



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. II

In the matter of

Appeal No. 45 of 2016

Hazrat Wali Khattak

(Ex-Non-Executive Director)

Appellant

Versus

Commissioner (Specialized Companies Division), SECP.

Respondent

Date of hearing:

09/03/17

Present:

For Appellant:

Appellant in person.

For Respondent:

1. Saima Ahrar, Joint Director (SCD)
2. Muhammad Jahangir, Joint Director (SCD)

ORDER

1. This Order shall dispose of Appeal No. 45 of 2016 filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 (the Act) against the Order dated 14/06/16 (the Impugned Order) passed by the Respondent under section 158 read with section 476 of Companies Ordinance 1984 (the Ordinance).
2. Brief facts of the case are that Saudi Pak Leasing Company Limited (the Company) failed to convene its Annual General Meeting (the AGM) for the year ended 30/06/15 on 31/10/15 as required under subsection (1) of section 158 of the Ordinance. The Company was initially granted one month extension to conduct the AGM by 30/11/15 however, the Company failed to conduct the AGM within this period and requested for another

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extension which was granted with direction under section 170 of the Ordinance to convene the delayed AGM latest by 31/12/15. Despite the extended timeline, the Company still failed to hold the AGM. Therefore, a Show Cause Notice (the SCN) dated 16/03/16 was issued to Mr. Hazrat Wali Khattak (the Appellant) and other directors.

3. The Appellant replied to the SCN on 04/04/16 and hearing before the Respondent was held on 11/04/16. The Respondent, being dissatisfied with the response of the Appellant, passed the Impugned Order whereby a fine was imposed on the Appellant and other directors in the following manner;

S.No.	Name of Respondents	Amount(Rs.)
1.	Mr. Niaz Ahmad Khan	50,000
2.	Ms. Parveen A Malik	50,000
3.	Mr. Arsalan Iftikbar Khan	50,000
4.	Mr. HazratWali Rs.	50,000
5.	Mr. Muhammad Tariq Masud(CEO)	100,000
Total		300,000/-

4. The Appellant preferred this Appeal against the Impugned Order before the Appellate Bench (the Bench) on the following grounds;
- The Respondent has ignored the submissions of the Appellant.
 - The Appellant being a nominee director was not involved in the management of the Company. Therefore, the case of the Appellant does not fall within the ambit of "knowingly and willfully a party to the default". The Impugned Order has been passed without determination of willful default of the Appellant.
 - The Respondent has ignored the facts and record because the AGM for the year 2014 of the Company was held on 26/12/14 whereas the AGM for 2015 was held on 22/03/16, hence AGM was held within fifteen months from the date of preceding meeting. Therefore, directors including the Appellant have complied with the requirements of Section 158 of the Ordinance.
 - That the SCN is bad in law as the Respondent failed to issue SCN to the Company despite the clear provisions of law that in case of default in complying with the

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provisions of Section 158, the company and every officer of the company who is knowingly and willfully a party to the default shall be liable for penal action.

5. The Respondent has rebutted the grounds of appeal in the following manner;

- i. The Impugned Order has been passed after due consideration of written and verbal submissions of the appellant and it is based on lawful and cogent grounds.
- ii. The law does not distinguish the roles of executive and non-executive directors. The paragraph 6.47 of the Manual of Code of Corporate Governance states that there is no distinction between executive and non-executive directors as far as their legal responsibilities are concerned. Furthermore, the directors of a listed company while filing their consents to act as directors, inter alia, give an undertaking that they are aware of their duties under the Ordinance. It is mandatory for the directors of a listed company to have knowledge of the requirements of applicable laws including holding AGM. The Appellant being a member of the Board was responsible to ensure compliance of timelines given by the Ordinance to hold the AGM, however, he failed to discharge his duties in a required manner. The directors have fiduciary duties towards the Company and its shareholders therefore, they are liable to a higher level of accountability, which requires them to be vigilant to perform their duties.
- iii. The Section 158 sets out definite time limits to be followed whereby a company is required to hold its AGM once at least in every calendar year within a period of four months following the close of its financial year, and not more than fifteen months after the holding of its last preceding AGM.
- iv. A Company is an artificial person and those who manage its affairs are under a legal as well as fiduciary obligation, to run the affairs of the Company in accordance with law. The Appellant and other directors therefore, cannot be absolved from the default and its consequences.

6. We have heard the parties (Appellant and Respondent) and perused the record of the Appeal. We have also gone through the written arguments of the Appellant submitted

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vide a letter dated 13/03/17. The Appellant's argument that the being a non-executive director is not responsible for the delayed AGM, cannot be acceded to. The law does not distinguish the responsibilities of directors whether they are executive or non-executive. Furthermore, it is mandatory for the directors of a listed company to have knowledge of applicable laws because every director of a listed company while filing the consent to act as a director, inter alia, gives an undertaking that s/he is aware of the duties required under the Ordinance. In our view the role of a non-executive director is more critical than an executive director because s/he sits on the Board of Directors (the BOD) to ensure compliance, good governance and transparency of the affairs of the Company, for the protection of the shareholders/members. Although, a non-executive director has no active role in day-to-day affairs of the company, however, s/he can object or resist to any non-compliance by the management during the BOD meetings, through dissenting notes or in accordance with clause eight of the Code of Corporate Governance, 2012. Therefore, we may say that the Appellant, in the capacity of a non-executive director, was required to be more vigilant and conscious about his/her responsibilities.

7. The Counsel's argument that the Respondent has failed to establish willful default of Section 158 of the Ordinance, cannot be accepted because it is an evasive statement. The Counsel has failed to corroborate this argument from the facts of the case. As a matter of fact, two extensions were granted to the Company, however, it failed to convene the AGM by 31/12/15. The AGM of the Company was held on 22/03/16, after lapse of the extended time. This fact is enough to indicate that the Company/BOD were aware about the mandatory requirement of Section 158, and to avoid non-compliance, had sought and availed two extensions.
8. The next plank of the arguments advanced by the Appellant was that the management of the Company failed to prepare true accounts, therefore, all non-executive directors refused to approve the same, until removal of the qualifications/ observations of the Auditor with respect to the Company accounts. The Appellant stated that being a non-executive director of the Company, he has performed his duties in the required manner



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and did not approve the untrue accounts, which could have been detrimental to the interest of the Company and shareholders. Adverting to the question of delay in holding of the AGM, the Appellant argued that the circumstances were beyond his control and the management had failed to prepare accurate accounts within the stipulated time.

9. The Bench believes that the role of a non-executive director is akin to a whistle-blower and the Appellant has attempted to demonstrate the required conduct. On the other hand, preparation of accounts is the responsibility of the management and ultimately the management is accountable before the shareholders during the AGM, therefore, the AGM should not be delayed in any case. If the accounts are qualified and the non-executive directors have rendered their dissenting note, then the shareholders could be the best judge to fix the persons responsible for such qualifications.
10. In view of the above discussion, there is no doubt that default of Section default 158 of the Ordinance has been established against the Appellant and other directors however, by considering the facts of the case and subsequent compliance, we are inclined to take a lenient view in the case. Therefore, we hereby convert the penalty of fine imposed on the Appellant into a warning and direct the Appellant to ensure strict compliance of the relevant provisions of law in future.
11. The appeal is disposed of accordingly and parties are directed to bear their own cost.

(**Fida Hussain Samoo**)

Commissioner (Insurance)

(**Tahir Mahmood**)

Commissioner (C&CD-CLD)

Announced on: **03 MAY 2017**

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