



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO.I

In the matter of

Appeal No. 47 of 2011

Attock Refinery Limited

..... Appellant

Versus

Executive Director (SMD)

Securities and Exchange Commission of Pakistan

..... Respondent

Date of Hearing

16/09/15

Present:

For the Appellant:

- (i) Mr. Ali Sibtain Fazli, Advocate Supreme Court
- (ii) Mr. Abad-ur Rahman, Advocate High Court
- (iii) Mr. Zafar Iqbal, Senior Executive Finance, Attock Oil Company Ltd

For the Respondent:

- (i) Mr. Nasir Askar, Director (SMD)
- (ii) Mr. Muhammad Farooq, Joint Director (SMD)

ORDER

1. This order is in appeal No. 47 of 2011 filed under section 33 of the Securities and Exchange Commission of Pakistan, 1997 against the order dated 18/03/11 (Impugned Order) passed by the Respondent.

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2. Brief facts of the case are that Attock Refinery Limited (Appellant) made the following sale and purchase transactions as a more than ten percent shareholder of Attock Petroleum Limited (Issuer Company) within the period of less than six months:

Sr. No.	Date	Nature of Transaction	No. of Shares	Rate (Rs.)
1	28/05/2008	Sale	500,000	431.88
2	29/05/2008	Purchase	500,000	432.88
3	29/05/2008	Sale	2,500,000	422.88
4	30/05/2008	Purchase	2,500,000	423.37
5	30/05/2008	Sale	3,000,000	420.88
6	02/06/2008	Purchase	3,000,000	421.37
7	02/06/2008	Sale	2,500,000	424.88
8	03/06/2008	Purchase	2,500,000	425.37
9	03/06/2008	Sale	1,917,680	437.88
10	04/06/2008	Purchase	1,917,680	438.38
11	29/07/2008	Purchase	30,800	312.09
12	31/07/2008	Purchase	8,800	311.24
13	06/08/2008	Purchase	6,900	261.82
14	07/08/2008	Purchase	1,000	259.98
15	11/08/2008	Purchase	12,000	296.78
16	13/08/2008	Purchase	900	292.21
17	25/08/2008	Purchase	6,000	296.93
18	26/08/2008	Purchase	16,000	282.10

3. On account of the aforementioned transactions, the Appellant made gain of Rs.52,203,874 (Rupees fifty-two million two hundred three thousand and eight hundred seventy-four only), computed in the manner prescribed in Rule 16 of the Companies (General Provisions and Forms) Rules, 1985 (Rules).
4. Section 224 of the Companies Ordinance, 1984 (Ordinance) provides that, "Where any director, chief executive, managing agent, chief accountant, secretary or auditor of a listed company or any person who is directly indirectly the beneficial owner of more than ten percent shareholder of listed equity securities makes any gain by purchase and sale, or the sale and purchase, of any such



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security within a period of less than six months, such director, chief executive, managing agent, chief accountant, secretary or auditor or person who is beneficial owner shall make a report and tender the amount of such gain to the company and simultaneously send an intimation to this effect to the Registrar of Companies and the Commission.” The said section further provides that where such person fails or neglects to tender or the company fails to recover, any such gain within a period of six months after its accrual, or within sixty days of a demand thereof, whichever is later, such gain shall vest in the Commission and unless such gain is deposited in the prescribed account, the Commission may direct recovery of the same as an arrear of land revenue.

5. The aforesaid amount of gain was neither reported nor tendered by the Appellant to the company nor was its recovery divulged to the Commission as prescribed under Section 224 of the Ordinance.
6. Show cause notice (SCN) dated 18/03/10, was issued to the Appellant to explain as to why action for recovery of the aforementioned gain of Rs.52,203,874 (Rupees fifty-two million two hundred three thousand and eight hundred seventy-four only) may not be taken against it under section 224(2) of the Ordinance. The Appellant’s counsel Mr. Ali Sibtain Fazli, Advocate Supreme Court responded to the SCN vide letter dated 16/04/10 and hearings in the matter were held on 21/04/10 and 08/12/10. The Respondent, dissatisfied with the response of the Appellant, passed the Impugned Order dated 18/03/11 and directed the Appellant to tender Rs.52,203,874 to the Commission as provided in section 224(2) of the Ordinance.
7. The Appellant preferred the instant appeal against the Impugned Order. The Appellant’s counsel argued that:
 - a) The Respondent failed to take into consideration that the aforesaid sales and purchase transactions resulted in loss to the Appellant as the sale prices were



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lower than price at which these shares were re-purchased subsequently. As far as the transactions listed at serial nos. 11 to 18 above is concerned, they are only purchase transactions and there are no corresponding sale transactions and thus the same do not fall within the meaning of section 224 of the Ordinance. It is an essential pre-condition for application of section 224 that there should be either a purchase and sale or sale and purchase transaction. Purchase of shares without any further sale would not be covered by section 224 of the Ordinance. As far as the reference to Rule 16 of the Rules are concerned, it may be pointed out that the bare reading of section 224 shows that the said provisions of section are an independent code and are not made subject to any Rule or Regulation prescribed by anybody whether it would be Federal Government or the Commission. The meaning of section 224 of the Ordinance cannot be controlled by a subordinate legislation. The additional condition laid down by said rule is thus totally unsustainable. However, even rule 16 does not support the order as there are also 'purchase and sale' or 'sale and purchase' is a precondition which is absent in the case. The Impugned Order is thus illegal and liable to be set aside;

- b) The Respondent failed to consider the true import and purpose of section 224 which had only been enacted in order to avoid/discourage insider trading. A public limited company even if it is a holder of shares in another public limited company would not be a person within the meaning of section 224. The word person appearing in section 224 of the Ordinance refers to a natural person only and not to a juristic person such as a company in the instant case. Section 224 of the Ordinance, therefore, is not applicable to the case in hand. Furthermore, as the Appellant is a listed company the beneficial ownership of all its assets vests in the shareholders which is the general public and tendering of any gains made by it to the Commission would amount to depriving the public of their lawful gains. This further establishes that the person mentioned in section 224 of the Ordinance will be a natural person as it is clearly specified that even his spouse or his dependent,



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lineal descendant or descendant are included within the meaning of person under the said section; and

- c) Section 224 of the Ordinance is not applicable in the case of the Company as the sale and purchase transactions were conducted after public announcement of Company's intention to sale and repurchase the shares of Attock Petroleum Limited. Shareholders' approval was obtained for the sale and repurchase of shares in the Extra-Ordinary General Meeting (EOGM) of the Company held in May 2008 and a statement under section 160(1)(b) of the Ordinance was attached to the Notice of EOGM which specifically spelled out the purpose of these transactions. After seeking the approval of the shareholders in the EOGM held in May 2008, the Company conducted these transactions during the period 28/05/08 to 04/06/08 and these transactions were also duly reported by the Karachi Stock Exchange in their daily reports for this period. The provisions of section 224 primarily relate to insider trading and are not applicable in the case of the Company.

8. The Respondent rebutted the arguments as follows:

- a) The instant appeal is based on the assumption that the shares of the same class are not identical, therefore, for the applicability of section 224 of the Ordinance, the security purchases and sold or sold and purchased must be the same. The Appellant has, therefore, divided the under reference transactions into two groups i.e. transactions listed at serial nos. 11 to 18 (made from 29/07/08 to 26/08/08) mentioned above. The phrases "equity securities" signifies that a beneficial owner may own simultaneously more than one class of shares, while the word "such security" symbolizes security of same class. Furthermore, the word "any" appears before the words "such security". Thus, it is emphasized that the law uses the word 'any' instead of the word 'particular'. Therefore, the tenderable gain will arise through purchase and sale or sale and purchase of "any security of same



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class” instead of “particular security of same class by a beneficial owner of a listed company. The primary law itself indicates that securities of same class of a same listed company are interchangeable/fungible. Furthermore, section 224 of the Ordinance stipulates that the gain must be tendered either to the issuer company or to the Commission as an enforcement mechanism but does not provide the methodology for calculation of amount of gain. The standardized method for calculation of amount of tenderable gain had previously been provided in Rule 16 of the Rules and the amount of gains of the Appellant was calculated in accordance with the said Rule. Subsequently, the Appellate Bench of the Commission in Appeal No. 49 of 2011 filed by Mrs. Nasreen Humayun Shaikh, a beneficial owner of Azgard Nine Limited vide Order dated 19/06/13, held that Rule 16 of the Rules is no longer within the four corners of section 224 of the Ordinance and that amount of gain is to be calculated by matching the purchase and sale transactions in sequential manner rather than by applying lowest in highest out manner prescribed in Rule 16 of the Rules. In the instant case, therefore, it can safely be concluded that no gain can be said to have been made if the gains are now calculated in accordance with the aforesaid Appellate Bench judgment;

- b) It is a well-settled principle of the law that the term ‘person’ includes both natural and juridical persons. Moreover, the word ‘person’ has been defined in the Securities and Exchange Ordinance, 1969 (SE Ordinance) from where the provisions under reference were transferred to this Ordinance, which inter alia include “a company any every other artificial juridical person”. Therefore, the companies are juridical persons and listed companies also fall within the definition of person used in section 222 and 224 of the Ordinance; and
- c) The Appellant’s assertion that the sale and repurchase of shares was made with the approval of shareholders in Extraordinary General Meeting holds no merit. The resolution authorizing the investing company to make investment only in its associated company does not have an overriding effect on other provisions of the

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Ordinance. Section 224 of the Ordinance does not contain any requirement of evidence of use of inside information and relates to transactions made by specified persons within the period of less than six months, without mentioning insider trading and purpose of the transactions.

9. We have heard the arguments and perused the evidence provided to us by the parties i.e. the Appellant and the Respondent.
10. Section 224 of the Ordinance is applicable when there is sale or purchase of any shares of the company in question within a period of less than 6 months by the person making the gain. In the event of such a sale or purchase taking place, the person making the gain is obligated to tender the amount of gain, if any, made by him to the company under intimation to the Registrar and the Commission. In the matter of The Securities and Exchange Commission of Pakistan through Commissioner versus First Capital Securities Corporation Limited and another in Civil Appeal No. 946/2005 cited at PLD 2011 Supreme Court 778, it was held that in the event the gains are not tendered to the Company within a period of six months or the fact of the gain was not brought in the notice of the Company and the Commission, the gains at all times shall remain the property of the Company. It was held that , "...the entitlement of SECP to recover the amount in question from the company would be treated as being in the nature of an enforcement mechanism to ensure that the wrongful gains do not remain with the person who has violated the section but are transferred to or for the benefit of the Company..." In view of the above judgment, the gain, if any, shall not be tenderable to the Commission. It is pertinent to note, however, that the Commission has ample powers under section 224(4) of the Ordinance to take punitive action against any person found in contravention of section 224 of the Ordinance.



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11. In the instant case, the Appellant has argued that the Appellant made losses with respect to the sales and purchase transactions as their sale prices were lower than price at which these shares were re-purchased, therefore, no gains were made by the Appellant which are tenderable to the Company. The Respondent has accepted that no gain arises when calculation is made matching the purchase and sale transactions in sequential manner as per Order of the Appellate Bench of the Commission dated 19/06/13 in Appeal No. 49 of 2011, which states

“... rule 16 of the Rules has not been framed within the four corners of section 224 of the Ordinance...The Bench further stated that “the rule 16 of the Rules is inconsistent with the statute and contradicts the express provisions of the statute from where it derives its authority. The Appellant cannot be burdened to submit a gain, which never accrued to her in the first place.”

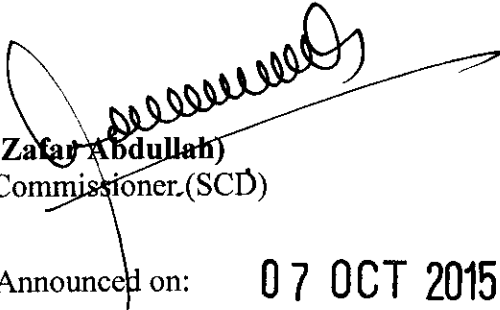
The Appellate Bench of the Commission in the said appeal stated that amount of gain is to be calculated by matching the purchase and sale transactions in sequential manner rather than by applying lowest in highest out manner prescribed in Rule 16 of the Rules.


12. Further, it was argued that the word “person” defined in section 224 of the Ordinance does not include a company. We concur with the Respondent, as the spirit and meaning of section 224 of the Ordinance suggests that word ‘person’ includes both a natural person as well as a juristic person i.e. company in the instant case. Further, the argument of the Appellant that the sale and repurchase transactions were made after taking approval from EOGM has no merit. The provisions of section 224 of the Ordinance have to be complied with and compliance with other provisions of the Ordinance has no bearing on section 224 of the Ordinance.



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13. In view of the fact that no gain arises when calculation is made by matching the purchase and sale transactions in sequential manner, we set aside the Impugned Order with no order as to costs.


(Zafar Abdullah)
Commissioner.(SCD)


(Tahir Mahmood)
Commissioner (CLD)

Announced on: 07 OCT 2015