



Securities and Exchange Commission of Pakistan

BEFORE THE APPELLATE BENCH

In the matter of

Appeal No. 51 of 2024

Pakistan Poverty Alleviation Fund

...Appellant

Versus

1. Executive Director, LRD, SECP, Islamabad.
2. Poverty Alleviation and Social Safety Division

...Respondents

Dates of hearing:

September 19, 2024 and
September 27, 2024

Present:

For the Appellant:

1. Mr. Feisal Hussain Naqvi, Advocate
2. Mr. Mohammad Qasim Qureshi, Advocate
3. Mr. Zain Ali, Advocate
4. Mr. Salman Ahmad, Company Secretary

For the Respondents:

1. Mr. Mubasher Saeed Saddozai, Executive Director, Licensing and Registration Division, SECP
2. Ms. Samreen Zehra, Management Support, Corporate Registry Department, SECP
3. Mr. Shahzad Nawaz Cheema, Joint Secretary, Poverty Alleviation and Social Safety Division, Government of Pakistan

ORDER

1. This Order shall dispose of Appeal No. 51 of 2024 filed by Pakistan Poverty Alleviation Fund (the Appellant) against the Order dated May 29, 2024 (the Impugned Order) passed by the Executive Director Licensing and Registration Division, SECP (Respondent No.1) in compliance with the Appellate Bench's

ML.



Securities and Exchange Commission of Pakistan

Order dated January 22, 2024 whereby the matter was referred to Respondent No.1 with a direction to pass a speaking order after affording an opportunity of hearing to all parties.

2. The brief facts of the case are that the Appellant is a licensed not-for-profit association incorporated on February 6, 1997 under Section 42 of the repealed Companies Ordinance, 1984. The Appellant filed an application dated September 7, 2021 (the Application) to seek prior approval for the appointment of Mr. Muzaffar Uddin as Chief Executive Officer (CEO) under clause (xvi) of regulation 7 of the Associations with Charitable and Not for Profit Objects Regulations, 2018 (the Charitable Regulations). The Application was turned down by then Director, SECP vide letter dated September 8, 2021 (the Refusal Letter) on the basis of an opinion dated September 1, 2021 rendered by the Ministry of Law and Justice wherein the legal status of the Appellant was declared as a Public Sector Company (PSC). The Appellant was directed vide the Refusal Letter to follow the Public Sector Companies (Corporate Governance) Rules, 2013 (the Rules) and Public Sector Companies (Appointment of Chief Executive) Guidelines, 2015 for the appointment of the CEO. Being aggrieved, the Appellant filed a Writ Petition No. 3928 of 2021 (the WP) before the Honorable Islamabad High Court against the Refusal Letter. The WP was dismissed by the Honorable Islamabad High Court vide order dated December 9, 2022 wherein it was *inter alia* held that remedy of appeal under Section 33 of the SECP Act, 1997 (the SECP Act) is available. Subsequently, the Appellant filed an appeal dated January 9, 2023 under Section 33 of the SECP Act before the Appellate Bench. The registration of the said appeal was declined by the Appellate Bench Registry vide letter dated January 17, 2023. The Appellant filed a Writ Petition No. 322 of 2023 (the WP2) whereby letter dated January 17, 2023 was challenged before the Islamabad High Court. During the pendency of the WP2, the Appellate Bench fixed the matter for hearing as an objection case for June 22, 2023 and September 20, 2023, however, the matter was adjourned due to the non-availability of the Appellant's Counsel. In the interest of justice, the matter was again fixed for December 6, 2023, the Appellant's Counsel appeared and argued the case and subsequently, the Appellate Bench passed an order dated January 22, 2024 wherein the matter was referred to Respondent No.1 to pass a speaking order as per law. The Respondent after hearing the parties passed the Impugned Order and declared that the Appellant is a PSC.



Securities and Exchange Commission of Pakistan

3. The Appellant has challenged the Impugned Order before the Appellate Bench (the Bench). Hearing in the matter was held on September 19, 2024 wherein the Appellant and the Respondent raised certain preliminary objections. The Appellant objected to the veracity of the proceedings before the Respondent on the ground that the Appellant and Poverty Alleviation and Social Safety Division (the Administrative Ministry/Division) were heard separately, therefore, the Appellant has no knowledge about the information and documents shared by the Administrative Ministry/Division with the Respondent during the hearing dated May 21, 2024, and which of the information and documents had been considered by Respondent No.1 while passing the Impugned Order. Respondent No.1 objected that the Appeal be dismissed due to non-joinder of the necessary party i.e. the Administrative Ministry/Division.
4. The Bench heard both parties, and to address the respective objections, Respondent No.1 was directed to provide a complete set of information and documents to the Appellant, which were submitted by the Administrative Ministry/Division during the hearing dated May 21, 2024 so that the Appellant could have full knowledge of the facts and records related to this matter. On the other hand, to address Respondent No.1's objection, the Bench asked the Appellant whether it has any objection if the Administrative Ministry/Division is made a respondent in the Appeal to which the Appellant agreed. Therefore, the Bench directed the Appellate Bench Registry to issue a hearing notice to the Administrative Ministry/Division as a necessary party/respondent for the next date of hearing. Thereafter, the Appellate Bench Registry provided the requisite documents and information to all parties. The final hearing in the matter was held on September 27, 2024, and at the outset, the Bench asked the Appellant and the Respondents (Respondent No.1 and Respondent No.2) whether they had received the requisite documents/information and comments. The Appellant and Respondents confirmed that all required documents and information had been received, therefore, their preliminary objections had been addressed adequately. As the objections of all parties were addressed, the Bench proceeded with the case.
5. The Appellant has challenged the Impugned Order *inter alia* on the grounds that the Impugned Order is an extension and repetition of the stance taken by the Ministry of Law and Justice vide letter dated September 1, 2021 whereby the Appellant was considered as a PSC. The Appellant stated that the Securities and Exchange Commission of Pakistan (the Commission) is not subordinate to the Ministry of Law and Justice, therefore, before proceeding against the Appellant it should have independently determined whether or not the Appellant is a PSC.



Securities and Exchange Commission of Pakistan

6. The Appellant contended that Respondent No. 1 has passed the Impugned Order by inferring 'control' by the Federal Government over the Appellant's affairs. In doing so, Respondent No.1 has misinterpreted the Memorandum of Association (MOA) and Articles of Association (AOA) of the Appellant. The Appellant stated that Respondent No.1 has relied on the term 'Government' used at various points within the MOA and AOA to infer control by the Federal Government and on that basis, label the Appellant as a PSC. The Appellant stated that Respondent No.1 has overlooked that the term 'Government' used in the MOA and AOA is specific and limited to certain purposes, such as obtaining government approval for foreign loans and collaboration with international bodies. The Appellant stated that it is crucial to recognize that as per Regulation 7(xxii) of the Charitable Regulations such approvals are required for all companies formed under Section 42 of the Companies Act, 2017 (the Act), therefore, no additional control is conferred upon the government through the Appellant's MOA and AOA. The Appellant further stated that Respondent No.1 has overlooked the fact that the Federal Government does not hold majority position or control whether direct or indirect in the Appellant's general body or Board of Directors, therefore, the Appellant's legal status should have been assessed on its actual control structure rather than the mere inference of government involvement in certain specific matters. The Appellant argued that Respondent No.1 has also failed to analyze the distinctions between positive and negative control - positive control is proactive authority, allowing an entity to direct management decisions, influence strategic policies, and appoint key personnel, whereas, negative control merely restricts specific actions without guiding on day-to-day operations or giving strategic direction.
7. The Appellant stated that Respondent No.1 has failed to understand the fundamental purpose as well as the establishment process of the Appellant. The Appellant argued that it is crucial to recognize that while the Federal Government initiated the process to establish the Appellant, it was never the intention that the Appellant will function as a 'government-owned' or 'government-controlled entity'. This assertion is overwhelmingly supported by the contents of the 1997 Summary presented by the Deputy Chairman, the Planning Commission of Pakistan Dr. Hafiz A. Pasha to the Prime Minister of Pakistan to establish the Appellant (the Summary).



Securities and Exchange Commission of Pakistan

8. The Appellant stated that the Impugned Order failed to give due significance to section 3(3) of the SECP Act which states that the Commission is administratively, financially and functionally independent from the Federal Government. The Appellant argued that given the foregoing, it was incumbent upon Respondent No.1 to apply his independent mind to the question of whether or not the Appellant is a PSC under the confines of the applicable laws. The Appellant stated that, on the contrary, this question remained neglected and unanswered in the Impugned Order because it was entirely based on the opinion rendered by the Ministry of Law and Justice. The Appellant stated that Respondent No.1 failed to take into account that the question as to whether the Appellant is a PSC was first referred to the Commission by the Administrative Ministry/Division through a letter dated March 5, 2021 to which the Commission responded through a letter dated March 29, 2021 stating that the Appellant is not a PSC. The Appellant stated that after the above stance, the Commission could not resiled from it without giving appropriate independent reasons. The Appellant has taken the plea that the change in the Commission's stance coincided with the then Government's attempt to influence the appointment of the Appellant's CEO. The Appellant stated that the Impugned Order does not adequately address or provide credible and independent reasons for departing from the Commission's initial stance that the Appellant does not meet the necessary criteria for classification as a PSC.
9. The Appellant stated that the Impugned Order is against the law which defines "public sector company" under section 2(54) of the Act and Rule 2(g) of the Rules. The Appellant further stated that government representatives are in minority and, therefore, cannot play any influential or leading role in the Appellant's operations. The Appellant also argued that the Administrative Ministry/Division has a limited administrative role which excludes administrative or management control/oversight. The Appellant has contended that the management and administration of the Appellant has been functioning independently for the last twenty-seven (27) years and there has been no interference from the Government or any statutory body. The Appellant further stated that even the MOA or the AOA do not allude to the fact that the Appellant is owned by the government or whether it is a PSC. The Appellant stated that the initial eight (8) members who incorporated the Appellant acted in their personal capacity and they were not ex-officio members from their ministries/divisions. The Appellant stated that it is evident that most of them continue as members of the Appellant after their transfers and even after retirement.



Securities and Exchange Commission of Pakistan

10. The Appellant has taken the plea that Respondent No.1 failed to note that the only reason given by the Ministry of Law and Justice in its letter dated September 1, 2021 for declaring the Appellant to be a PSC is that it is listed in the Rules of Business, 1973 (the Rules of Business). The Appellant stated that the Rules of Business do not state that the Appellant shall be under the "administrative control" of the Administrative Ministry/Division, rather, Item 31 AA, Entry 11 (ii), Schedule 2 of Rules of Business only provides that the administrative matters of the Appellant fall under the Administrative Ministry/Division. There is no mention of the phrase "administrative control." Furthermore, this entry only exists because the MOA and AOA of the Appellant specifically provide that the Administrative Ministry/Division shall have certain defined obligations, such as the obligation to appoint three directors and eight members of the general body. The Appellant argued that Entry 11 does not place the Appellant under the administrative control of the Administrative Ministry/Division. The Appellant stated that this point is indeed clarified by the immediately preceding Entry 11 which refers to the Administration of entities like BISP and Pakistan Bait-ul-Mal. The Appellant stated that it may be argued that the Appellant should be considered a PSC because the Administrative Ministry/Division can influence (or restrict) its funding, however, it is settled law that the provision of funds does not change the nature of an entity. In this regard, the Appellant has relied upon case law titled *Printing Corporation of Pakistan v. Province of Sindh*, PLD 1990 SC 452; 459 as well as on case law titled *Ghani Gases Limited v. Federation of Pakistan*, PLD 2016 Lahore 207,214 in which the Court held that "subscription of part of capital by the Government has never been considered to establish control of the Government over the affairs of a company/corporation." The Appellant stated that Respondent No.1 failed to comprehend that in the cited cases, the Court rejected the argument that the Federal Government subscribed bulk of the capital, therefore, it controlled the affairs of the entity. The Appellant stated that Respondent No.1 has erred by including the provision of funds as an additional criterion for determining whether or not the Appellant is a PSC, which is a nullity in the eyes of the law.
11. The Appellant stated the Respondent No.1 has erroneously relied on case law, which does not support the conclusions drawn in the Impugned Order. The reliance on the case *Ramana v. IA. Authority of India*, AIR 1979 SC 1628, cited in paragraph 14 of the Impugned Order is ill-founded as the case pertains to whether an entity can be sued in constitutional jurisdiction. Therefore, this case is neither relevant nor applicable to the specific circumstances of the Appellant's case.

ML



Securities and Exchange Commission of Pakistan

12. The Appellant stated that Respondent No.1's reliance on *Fateh Khan v. Sharaaf Khan*, PLD 1984 Lahore 106, cited in paragraph 25 of the Impugned Order is misplaced. The Appellant's Counsel argued that this case strengthens the Appellant's position, as it sets out that the test for determining control by the Federal Government over an entity is whether the Federal Government can take over the affairs of the entity if it so desires. The Counsel of the Appellant also stated that the Federal Government cannot take over the affairs of the Appellant, because it lacks sufficient control over the Appellant to classify it as a PSC. The Appellant's Counsel further argued that the Federal Government also lacks the authority to appoint the CEO of the Appellant or raise objections to appointments made by the Appellant.
13. The Appellant stated that Respondent No.1 has erred in his assertion that as the MOA and AOA require the BOD to treat the Appellant's income as public monies, therefore, such income automatically becomes part of the Federal Consolidated Fund or the Public Account under section 9 of the Public Finance Management Act, 2019. The Appellant stated that the Board's obligation to treat the Appellant's income as public money serves a different purpose. The Appellant stated that it signifies that this income is held in trust for the benefit of the general public, an obligation consistent with the treatment of section 42 companies as outlined in Regulation 7(xix) of the Charitable Regulations.
14. The Appellant stated that the mere channeling of funds to the Appellant by the Federal Government does not make it a PSC, referring to other rural support programmes including NRSP and the Akhuwat Foundation which also receive similar government funding but operate independently without undue influence on their governance despite having government representatives on their Boards. The Appellant stated that the erroneous nature of the Impugned Order is evident from the direction contained therein that the Appellant should challenge its MOA and AOA. The Appellant's Counsel argued that the MOA and AOA do not reflect that the Appellant is a PSC and without prejudice, the Commission or Respondent No.1 has no authority or power to direct the Appellant to challenge its own MOA and AOA.
15. Respondent No.1 stated that the Commission is administratively, financially, and functionally independent and denied the assertion made by the Appellant that the Impugned Order has been passed based on the opinion of the Ministry of Law and Justice and influence of the government. Respondent No.1 argued that the Impugned Order is a self-speaking order and the case was examined independently



Securities and Exchange Commission of Pakistan

from all possible angles to determine that the Appellant is a PSC within the meaning of Section 2(54) of the Act.

16. Respondent No.1 stated that mere non-existence of majority directors and members on the Board and in the general body of the Appellant does not substantiate that the it not a PSC. Respondent No. 1 argued that the test to determine that a company is a public sector company or not is not dependent entirely on whether the Government or any agency of the Government or a statutory body holds not less than fifty-one percent of the voting securities or voting power in a company, or the Government or any agency of the Government or a statutory body has otherwise power to elect, nominate or appoint the majority of its directors. Respondent No.1 stated that each case needs to be examined for the fact that whether the Government or any agency of the Government has control (direct or indirect) over a company which needs to be seen beyond the threshold provided in Article 6 of AOA whereby it is provided that the majority representation of the general body and Board is with the private sector. Respondent No.1 argued that the same AOA contains provisions that reflect that the Appellant is managed in a way to establish control of the Government.
17. Respondent No.1 stated that it appears from the bare perusal of the Summary that the Appellant was formed to provide support to institutions having good governance, track record and strong accountability and to provide micro-credit for income-generating activities and loans for infrastructure and grants depending on the poverty level of communities. Respondent No.1 stated that the Appellant was formed specifically to secure the World Bank Loan and the Federal Government assumed the role of an enabling facilitator and the execution of the project was entrusted to the Appellant having majority private sector representation and management. Respondent No.1 stated that the Summary clearly states that the income/monies of the company shall be considered 'Public Funds' as a sacred trust, therefore the Appellant is a PSC. Respondent No.1 stated that the Appellant has misconstrued that due to the functions entrusted to the Appellant's Board, it is independent of the Government. Respondent No.1 stated that the Appellant can only secure loans/grants and acquire properties, endowments and other funds with the approval of the Administrative Ministry/Division and such funds shall be considered as public money (article 3) and it is not required to explicitly state in the MOA or AOA, that the company is a PSC. Respondent No.1 stated that the condition contained under Regulation 7(xix) of the Charitable

ML



Securities and Exchange Commission of Pakistan

Regulations is a general condition applicable to all not-for-profit companies. The Public Finance Management Act, 2019 clearly provides that "public moneys" mean the moneys forming part of the Federal Consolidated Fund and the Public Account of the Federation. The definition provided in the said Act is clear and unambiguous and relevant guidance was taken from the said definition provided in the relevant law. Respondent No.1 also denied the Appellant's assertion that subscribers of MOA and AOA were not ex-officio rather they acted in their personal capacity. Respondent No.1 clarified that the subscriber members of the Appellant were Government employees or nominees as is evident from the subscriber page of the MOA and AOA filed at the time of incorporation.

18. Respondent No.1 stated that the Appellant had misread and misinterpreted the content of the Impugned Order because it is a self-speaking order that was passed after examining all facts, documents, and records placed on file by the parties were examined thoroughly before passing of the Impugned Order. Respondent No.1 further stated that the Appellant has relied on the content of the letter dated March 29, 2021 issued by an officer of the Commission to establish that it is not a PSC, however, the said letter was written to the Administrative Ministry/Division in response to specific queries and the said letter cannot be termed as a declaration to the extent of the legal status of the Appellant. Respondent No.1 further stated that the said letter was an independent opinion and contained a disclaimer as well, therefore, said opinion was not conclusive. Respondent No.1 stated that the following disclaimer is self-explanatory in this regard;

"Disclaimer: This clarification has been provided on the basis of information provided by you. The Commission gives no assurance and assume no liability for any error or omission of the information/clarification given hereinabove and no one can use the information for any claim, demand or cause of action. If you are in doubt in dealing with any specific condition, it is suggested to seek legal advice, before proceeding further in the matter."

19. Respondent No.1 stated that the Rules of Business allocate the business of Government amongst Ministers by assignment to the Divisions, therefore, the administration of the Appellant has been placed under the control of the Government through the relevant Ministry/Division. Respondent No.1 argued that

ML



Securities and Exchange Commission of Pakistan

'Funds' provided by the Government is not the only criterion to declare an entity as a PSC, as it is one of the many factors that substantiate the argument that the Appellant is a PSC. Respondent No.1 stated that the Appellant's reliance on *Printing Corporation and Ghani Gases* case laws is misplaced. Respondent No.1 stated that in the *Printing Corporation of Pakistan* case, the Hon'ble Supreme Court of Pakistan while considering the provisions of the Articles of Association of the *Printing Corporation of Pakistan* and its capital structure, held that although the government has majority shares, however, decisions and management of the corporation are with the Board, hence the government has no control. Respondent No.1 stated that Indian case law duly supports the assertion made by the answering respondent. Respondent No.1 stated that reliance on India's Supreme Court's case law is not ill-founded and the same is applicable in the instant matter. The referred case was filed before the Supreme Court of India, against the International Airport Authority of India. The Court ruled that the International Airport Authority of India is an instrumentality or agency of the government, therefore, equality before law under Article 12 of the Constitution should be ensured while awarding contract.

20. Respondent No.1 stated that the *Ratio Decidendi* set by the Lahore High Court in the *Fateh Khan* case is applicable in the instant matter. The relevant para of the said case has been reproduced in para 25 of the Impugned Order. In this particular case, the Court was of the view that the term "controlling share or interest" means that the Government, either through the percentage of its financial stake or holding or through power conferred by or spelt out from the Articles of Association or partnership deed or other document or documents regulating that statutory or other body, has the ability, if it should so desire, to establish or take control over its affairs and working. Respondent No.1 stated that similarly, in the instant matter, the Government not only influences the policy decisions of the Appellant but also initiated its creation which dissolution is also in the hands of the Administrative Ministry/Division.

21. Respondent No.1 denied the Appellant's assertion with regard to NRSP and Akhuwat Foundation and stated that these entities are not at par with the Appellant, therefore, are not applicable in this case because the Appellant has been established and funded by the Federal Government. Furthermore, Respondent No.1 also denied the assertion of the Appellant that in the Impugned Order direction has been passed to amend the MOA and AOA. The Appellant clarified that it has been mentioned in the Impugned Order that

ML.



Securities and Exchange Commission of Pakistan

the articles or clauses contained in the AOA and MOA infer that the Appellant is a PSC and the said articles/clauses have never been challenged or objected to by the Appellant.

22. Respondent No. 2 reiterated their stance and stated that the Appellant was established by the Federal Government and huge funding has been provided by the government since its inception, therefore, Respondent No.1 has rightly declared the Appellant as a PSC and Respondent No. 2 subscribes to the arguments of Respondent No.1.
23. The Appellate Bench has heard the parties and perused the record. The Bench is of the view that the Appellant's claim that the Impugned Order is a reflection and repetition of a letter dated September 1, 2021 issued by the Ministry of Law and Justice whereby it was stated that the Appellant is a PSC, is a misconceived notion and against the facts of this case. The Bench is of the view that the Appellant's argument that Respondent No.1 has not acted independently while passing the Impugned Order is a baseless allegation. As a matter of fact and record, the Impugned Order is based on the mandate and scope of the Administrative Ministry/Division duly incorporated in MOA and AOA of the Appellant, therefore, we reject the Appellant's assertion that Respondent No.1 has not applied his independent judgment while proceeding with the matter. The Bench has noted that while adjudicating the Appeal filed against the Refusal Letter, the Bench has referred the matter to the Respondent for fresh proceedings and in this regard, a direction was issued to hear all parties so that a speaking order may be passed. Respondent No.1 has proceeded accordingly and after hearing the parties passed the Impugned Order with un rebutted evidence and reasons, therefore, the Bench is not inclined to accept the Appellant's plea that the Respondent failed to act legally, independently and fairly.
24. The Bench is of the view that at the time of incorporation of the Appellant neither the Rules nor Section 2(54) of the Act existed, which could have an impact on the Summary or constitutive documents of the Appellant i.e. MOA and AOA to incorporate specific reference that the Appellant is a PSC. Therefore, this case has to be dealt by keeping in view the regulatory and statutory legal framework available at the time of incorporation of the Appellant. It is an admitted fact, that the Federal Government has established the Appellant to achieve the objective of poverty alleviation through a specialized corporate entity i.e. a company established under Section 42 of the Companies Ordinance, 1984. In this regard, the Federal


ML.



Securities and Exchange Commission of Pakistan

Government has placed certain controls and restrictions in the MOA and AOA of the Appellant to ensure compliance with the desired objectives of poverty alleviation. In view thereof, the Bench believes that the conditions and restrictions in the Appellant's MOA and AOA provide sufficient and reasonable provisions to determine that the Appellant falls under the current regulatory PSC regime governed under the Act and the Rules. The Bench has reviewed the definition of PSC provided under Section 2(54) of the Act, which prescribes different thresholds to determine whether a company is a PSC or not. The definition has broadly four elements which emphasize that a company, whether public or private, qualifies as a PSC if it; (1) is directly or indirectly controlled, (2) beneficially owned or (3) not less than fifty-one percent of the voting securities or voting power of which are held by the Government or any agency of the Government or a statutory body, or (4) the Government or any agency of the Government or a statutory body, has otherwise power to elect, nominate or appoint majority of its directors. The Bench notes that as the Appellant is not a shareholding company, therefore, the Administrative Ministry/Division's claim that the Appellant is a PSC cannot be determined based on majority shareholding or appointment of majority directors or beneficial ownership. In our view, the only criterion remaining to determine the status of the Appellant is whether it is directly or indirectly controlled by the Administrative Ministry /Division or not. In this regard, one has to consider the Appellant's MOA and AOA, which provide explicit provisions whereby it is established that the Administrative Ministry/Division has indirect control over the execution of the Appellant's operations because the Appellant can neither secure funds, grants or loans without the approval of Administrative Ministry/Division nor is it competent and empowered to dispose of its assets in case of winding-up, as the power is vested with the Administrative Ministry/Division.

25. The Bench has noted that the Appellant was incorporated by the Federal Government through then Deputy Chairman, Planning Commission and seven other officials of the Federal Government in their official capacities and the initial registered office address of the Appellant was "Economic Affairs Division, Block C, Room Number 305, Pakistan Secretariat, Islamabad". In our view, undoubtedly, the Appellant is a PSC because its initial subscribers were government officials, the first registered office of the Appellant was the address of the administrative ministry, provision of endowment funds, equity investment and further funding was also provided by the Federal government, therefore, one could not claim that the Appellant is not a PSC. The details of government funding (as provided by the Appellant as annexure "D" vide letter dated September 25, 2024) since the inception of the Appellant are as follows;

 ML.



Securities and Exchange Commission of Pakistan

FY	Endowment Fund	Loans from Government of Pakistan		
		Receipts	Repayment	Balance
1998-99	100,000,000	-	-	-
1999-00	100,000,000	133,624,767	-	133,624,767
2000-01	300,000,000	259,716,844	-	393,341,611
2001-02	-	660,665,683	-	1,054,007,294
2002-03	-	902,219,098	-	1,956,226,392
2003-04	-	778,421,358	-	2,734,647,750
2004-05	150,000,000	3,747,825,554	-	6,482,473,304
2005-06	350,000,000	4,031,085,238	-	10,513,558,542
2006-07	-	374,550,857	-	10,888,109,399
2007-08	-	101,020,189	109,617,378	10,879,512,210
2008-09	-	370,588,422	109,617,378	11,140,483,254
2009-10	-	1,325,023,502	109,617,378	12,355,889,378
2010-11	-	1,797,446,000	109,617,378	14,043,718,000
2011-12	-	2,067,806,000	288,613,641	15,822,910,359
2012-13	-	263,536,000	467,609,904	15,618,836,455
2013-14	-	451,018,000	615,506,908	15,454,347,547
2014-15	-	226,434,333	653,733,908	15,027,047,972
2015-16	-	68,471,000	791,181,418	14,304,337,554
2016-17	-	-	856,306,341	13,448,031,213
2017-18	-	-	1,100,513,460	12,347,517,753
2018-19	-	-	1,279,595,656	11,067,922,097
2019-20	-	-	1,279,595,656	9,788,326,441
2020-21	-	-	1,279,595,656	8,508,730,785
2021-22	-	-	1,279,543,041	7,229,187,744
2022-23	-	-	1,125,464,462	6,103,723,282
2023-24	-	-	1,190,620,649	4,913,102,633
Aug-24	-	-	358,078,459	4,555,024,174
2024-25	-	-	-	-
2025-26	-	-	-	-
2026-27	-	-	-	-
	1,000,000,000	17,559,452,845	13,004,428,671	

26. As per the above funding details, as of today, the Government of Pakistan has provided Rs. 1,000,000,000/- (One Billion rupees) as endowment fund whereas Rs. 4,555,024,174/- is the balance of loans provided to the Appellant as of August, 2024. The Bench has perused a copy of the Summary and other documents of projects detailed and summaries annexed with the Appeal on pages 123 to 136 which



Securities and Exchange Commission of Pakistan

indicate that incorporation of the Appellant was the initiative of the Government of Pakistan through the Planning Commission of Pakistan and the objective of its creation was to provide financial and technical assistance to non-government organizations to implement poverty alleviation and community-based development programs. The Bench has also perused the Office Memorandum of the Ministry of Finance and Economic Affairs dated January 15, 1998 wherein in paragraph "C" it is specifically mentioned that the Appellant is "a Government of Pakistan sponsored Private not for profit company established in February 1997". The Bench has noted that the Appellant's annual report for the year 2020 reflects that the Appellant's funding comprises 54% Government Loans, 13% Government Funds through the budget, and 13% Donor Funds received through the Government of Pakistan. The Bench has noticed that the Federal Government's contributions towards the generation of the Appellant's funds constitute 80% of the total funds available to the Appellant. The Bench is of the view that the Appellant cannot execute its projects unless the Federal Government facilitates its operations through the different modes of funding, therefore, the Appellant's existence and operations entirely depend on the will and wishes of the Federal Government, which fact establishes that the Appellant is a PSC. The Bench has also perused clause III (12) of the Appellant's MOA which provides that the company can only establish and maintain contact and collaborate with other organizations, institutions, bodies and societies in Pakistan and abroad, subject to prior approval from the Administrative Ministry/Division. Given the above referred MOA clause, the Appellant, without the consent and approval of the Administrative Ministry/Division, cannot obtain even a single rupee of funding from national and international sources to run its affairs. This in itself suffices for the Bench to consider that the Appellant is a PSC. The Bench has further noted that conditions of the Administrative Ministry/Division approval while securing funds for national and international institutions are also mentioned in Article 62 (x) and (xi) of the Appellant's AOA. At this juncture, the Bench also desires to address the Appellant's argument that the condition of prior approval of authorities before soliciting funds is a part of incorporation/ licensing requirements of every company licensed and registered under Section 42 of the Act. The Bench is of the view that Regulation 7(xxii) of the Charitable Regulations is in the context to determine the legitimacy of the funds and ensure that such funds are not obtained from any illegal activity or such funds are not acquired to sponsor any anti-state activity and under this provision companies have to satisfy the relevant authorities including State bank of Pakistan, Ministry of Interior etc. Furthermore, such funds are solicited by other not-for-profit companies through their own resources, however, this is not the case for the Appellant because funds are solicited, arranged and guaranteed by the Government or Administrative Ministry/Division. Moreover, the object of

ML



Securities and Exchange Commission of Pakistan

conditions and restrictions mentioned in the MOA and AOA of the Appellant are entirely different because by incorporating such provisions, the Administrative Ministry/Division has ensured 'ultimate control' to execute the intending objects through the Appellant. The Bench has perused the record which revealed that since its incorporation, the Appellant remained under the administrative control of the Finance Division of the Federal Government and the status remained intact since the year 2019. Thereafter, in the year 2019 the administrative control of the Appellant was assigned to the Administrative Ministry/Division and, in this regard, relevant amendment was made to the Rules of Business.

27. The Bench has also noted a very relevant fact that as per clause IX (c) of MOA, in case of winding-up of the Appellant, the Administrative Ministry/Division is empowered to decide the fate of its assets. In the context of the Appellant's argument that it is not a PSC because it has the majority of twenty-two private members out of thirty members and nine private sector directors out of twelve directors (eight directors and one CEO) is not valid due to clauses IX (c) and III (12) of MOA. The Bench is of the view that MOA is the supreme constitutive document of any company, therefore, the impact of its clauses cannot be ignored while determining the status of the Appellant.
28. The Bench has also noted from the record that the Appellant cannot amend its MOA and AOA without the prior permission of the Administrative Ministry/Division. In this regard, the Bench has perused the letter dated August 21, 2014 written by the Finance Division (then the relevant federal ministry) to the Commission that no amendment in MOA and AOA of the Appellant be accepted without its concurrence. The Bench has also perused another letter dated February 7, 2019 whereby the Finance Division, advised the Appellant to amend its AOA and replace the word Government with the word Administrative Ministry/Division. In response, then CEO of the Appellant informed the Finance Division, vide letter dated March 18, 2019 that amendments in AOA are subject to BOD, SECP, the General body and the Finance Division's approval. The above-referred letters suggest that 'ultimate control' of the Administrative Ministry/Division has not only been recognized but the Appellant also admitted the fact that amendments in AOA are subject to the approval of the relevant ministry. It is also important to note here that the Appellant never challenged the 'ultimate control' of the relevant ministry by amending its AOA and MOA, which establishes that the Appellant is a PSC and its functions and mandate are subject



Securities and Exchange Commission of Pakistan

to the conditions and restrictions imposed under the MOA and AOA laid down by the Administrative Ministry/Division.

29. The Bench is of the view the Federal Government established the Appellant and provided the initial funding to run its affairs, however, to ensure the execution of intended objectives it was decided to engage relevant persons from the private sector having the required qualifications and experience necessary to efficiently manage the operations of the Appellant. Therefore, in our view, the Appellant is restricted to go beyond the administrative control of the Administrative Ministry/Division because it was the exclusive initiative of the Federal Government to create a company for the furtherance of its objective i.e. poverty alleviation. In view thereof, the Bench finds no reason to declare that the Appellant is not a PSC. The Bench also finds it appropriate to mention here that being autonomous, the Appellant cannot assume that it is not a PSC when the objectives are set through the Summary and MOA.

30. The Bench has perused the letter dated March 29, 2021 issued by the Commission in repose to a query of the Administrative Ministry/Division whether the Appellant is PSC or not. The Bench is of the view that the said letter was a response to the specific queries raised by the Administrative Ministry/Division vide letter dated March 5, 2021, therefore, the response attempted to simply answer the queries. The Bench is of the view that in the letter dated March 29, 2021, the Commission has categorically placed a "Disclaimer" and it was merely a correspondence, therefore, one may not argue that correspondence can override the matter duly adjudicated by Respondent No.1 after considering all the information, record and after hearing the respective parties. The letter dated March 29, 2021 was written in the context of queries of the Administrative Ministry/Division, therefore, the response was not a reflection of a holistic analysis, which has since been performed, requiring a deeper appreciation of facts and records. Therefore, the Bench is not inclined to accept the Appellant's assertion that allegedly the Commission has taken a contrary stance by passing the Impugned Order. In view thereof, the Bench also rejects the Appellant's assertion that the Impugned Order has been passed under the 'influence' of the Ministry of Law and Justice because the Impugned Order is based on the clauses of MOA and articles AOA which establish the ultimate control of the Administrative Ministry/Division over the execution of the Appellant's operations and even its existence.



Securities and Exchange Commission of Pakistan

31. The Bench is of the view that by virtue of the role and mandate assigned to the Administrative Ministry/Division, it is fully competent to exert its control on the Appellant, therefore, under Section 2(54) of the Act and Rule 2(g) of the Rules, the Appellant is a PSC. The Bench is of the view that neither Respondent No.1 nor Respondent No.2 has denied the fact that the Administrative Ministry/Division has minority representation in the Appellant's general body and the Board. As a matter of fact, Respondent No.1 and Respondent No.2 claimed that due to different clauses of the MOA and AOA, and because of the initial and subsequent funding by the government to run the affairs of the Appellant, the Administrative Ministry/Division has 'ultimate control', therefore, the Appellant is a PSC. Additionally, while proceeding with this Appeal, the Bench cannot overlook the factual and legal position on ground that for the last twenty-seven years- there has been no objection by the government or any statutory body. The Bench believes that by referring statutory body, the Appellant has impliedly referred to the Commission. If this is the case then we must observe that inaction if any? on the part of the Commission may not dilute the Administrative Ministry/Division's right to claim or re-claim the ultimate control of an entity established through ex-officio government members and the required funds were provided from the Consolidated Fund of the Federal Government. Furthermore, the Appellant's contention that the promoters or subscribers of MOA and AOA acted in their personal capacity is factually incorrect because it has been mentioned in paragraphs 5 and 7 of the Summary that these persons shall be government nominees. The Bench also finds it necessary to mention here that there is no bar on ex-officio members becoming private members of the Appellant upon their retirement.
32. The Bench is of the view that the Impugned Order has not been passed on a single ground that the name of the Appellant is mentioned in the Rules of Business. As a matter of fact, this could be called a relevant fact but the Impugned Order does not rely on this fact only, therefore, for us, the Appellant's arguments with regard to the entry of Rules of Business is not fatal to the merits and conclusion drawn by Respondent No.1. However, we find it appropriate to clarify the objection raised by the Appellant regarding the Rules of Business. The Appellant has taken the plea that the Administrative Ministry/Division has a limited role to deal with a few administrative matters of the Appellant, however, it cannot be construed as "administrative control" and to establish this contention it has been stated that where the government has administrative control of an entity, it is expressly provided under the Rules of Business and in this regard example of BISP and Pakistan Bait-ul-Mal has been cited. In the Bench's



Securities and Exchange Commission of Pakistan

view, this argument is flawed because BISP and Pakistan Bait ul Mal are the creation of a statute, whereas, the Appellant has been created in consequence of a Summary and subsequently a specialized corporate entity was created under the company law.

33. Furthermore, the case laws cited and relied upon (*Printing Corporation of Pakistan and Ghani Gases Limited*) by the Appellant are not relevant to this case because in both cases companies/corporations have shareholding and the AOA expressly empowers the respective Boards to control the affairs. Whereas, in the Appellant's case there is no concept of shareholding rather it has been incorporated on the basis of sponsorship, membership and its day-to-day affairs which are controlled by its Board, however, 'ultimate control', with respect to provisions of funds and right to deal with the assets of the Appellant upon dissolution, are vested with the Administrative Ministry/Division.
34. The Bench is of the view that factors elaborated through the Indian Supreme Court judgment titled *Ramana v. I.A. Authority of India (AIR 1979 SC 1628)* are quite relevant to understand whether the Appellant is PSC or not. It is an admitted fact that the Appellant since its inception is receiving funds from the Federal Government and a substantial part of its funding is either by the Federal Government or from other international donors routed through the Federal Government. Furthermore, the objectives, mandate and policy guidelines of the Appellant were defined through the Summary and MOA and AOA. The Bench believes that in its usual course of business, the Appellant is independent to carry out its function within four corners of its objectives set through the Summary and MOA. In our view, the functions assigned to the Appellant are closely related to the functions usually performed by the government, for instance, better living standards, alleviation of poverty, better health and education facilities and well-being of underprivileged communities living within a state. In view thereof, the Bench believes that the cumulative impact of the aforementioned characteristics makes it clear the Appellant is a PSC. Therefore, the Bench endorses the analogy drawn by Respondent No.1 from the aforementioned Indian case law.
35. The Appellant has also relied upon a case law titled *Fateh Khan V. Sharaaf Khan, PLD 1984 Lahore 106 (110-11)* to establish that the government/administrative ministry has no 'effective control' on the Appellant. It has been argued that 'effective control' does not mean that the government can regulate the



Securities and Exchange Commission of Pakistan

activities of the company and there is a requirement for a company to get permission from the government. It has been stated that 'control' means actual control or the ability to control. The Appellant's representative argued that the government/administrative ministry neither has actual control nor the ability to control the affairs of the Appellant, therefore, it cannot be treated as a PSC. On the other hand, Respondent No.1 also relied upon the same case law to establish that if the government has no controlling shares in the Appellant, even then, by virtue of the AOA/MOA, the Government/Administrative Ministry/Division can establish or take over the control of the affairs of the Appellant. In the Bench's view inference drawn by Respondent No.1 is relevant to this case because the MOA and AOA of the Appellant provide 'ultimate control' to the Government/Administrative Ministry/Division. Therefore, we believe that the Appellant is a PSC because the execution of its business operation depends on funding approved by the Government/Administrative Ministry/Division. Therefore, if the government so desires, it can stop approval of funding for the Appellant which, will lead to the Appellant not being able to carry out its functions and eventually go into winding up. And in such a case, the Government/Administrative Ministry/Division will be the only stakeholder to claim the assets of the Appellant.

36. The Bench has considered the respective arguments of the Appellant and Respondents regarding the treatment of the Appellant's income whether or not it is a part of the Federal Consolidated Fund and falls under the Public Account. The Bench is of the view that it is not a contested or disputed fact that funds are either provided by the government of Pakistan through its resources or arranges loan /funds with the help of different international/multilateral donor agencies. The Bench believes that endowment funds are provided by the Government for the life -cycle of the Appellant, whereas, other loans are provided for a certain period, which are payable as per the agreed terms and conditions between the Government of Pakistan and donor agencies. The Bench has noted that the Appellant has no liability to pay back loans/funds acquired through international/multilateral donors, therefore, the entire liability lies upon the Government of Pakistan. The Bench has perused note 4.14 of the annual financial statements of the Appellant for year ended June 30, 2023 which explicitly states that "*the government of Pakistan has executed various agreements with multiple donors for the execution of poverty alleviation projects. Amounts are received from the Government of Pakistan, on account of these donor's projects.....*". In the same note it has been further stated that "*The Company has no obligation (contractual or constructive) in respect of the funds received from the donors and transferred to partner organizations*



Securities and Exchange Commission of Pakistan

under the above-mentioned donor agreements.....” In view thereof, it is quite clear that repayment of donors’ loans/funds is the obligation of the Government of Pakistan, therefore, irrespective of whether the Appellant returns the loans/funds or not, under the agreement the Government is responsible. The perusal of Subsidiary Financing Agreements had further made it clear that ultimately Federal Government is responsible to payback nations and international loan/funding availed by the Appellant. Therefore, we have no doubt that the Government of Pakistan is playing the role of guarantor of loans/funds so provided to the Appellant.

37. The Bench rejects the Appellant’s contention that the NRSP and Akhuwat Foundation are not a PSC despite the fact that both entities are receiving funding from the government and government representatives are also on their Boards, therefore, the same principle should be applied to the Appellant. The Bench is of the view that there is a core difference between the Appellant and NRSP/Akhuwat Foundation because the former was established by the Federal Government and its MOA and AOA had certain clauses that empowered the Administrative Ministry/Division to exercise its control which could have a significant impact on the operations of the Appellant. Whereas, the MOAs and AOAs of NRSP/Akhuwat Foundation do not provide clauses to empower the Federal Government to exercise its control. We believe that the Appellant’s case is not at par with the case of NRSP/Akhuwat Foundation.
38. The Bench also rejects the Appellant’s allegation that Respondent No.1 has passed a direction in the Impugned Order to amend the MOA and AOA. The Bench has noted that Respondent No.1 has only stated in the Impugned Order that due to the rights and powers vested with the Administrative Ministry/Division, the Appellant is a PSC, and in case the Appellant has any objection then it should have amended its MOA and AOA which has not been done to date. However, it is important to reiterate here that the Appellant is not empowered to amend its MOA or AOA except with the express permission of the Administrative Ministry/Division.
39. The Bench has also perused the case law relied upon by the Appellant by referring to the case titled *Sindh Rural Support Organization V. FOP (2018 SCMR 407)*. The cited case law is not relevant to the facts of this case and *ratio decidendi* of the cited case is entirely different from what the Appellant and its representatives argued before the Bench. The Appellant’s contention is incorrect that in the cited case law

ML.



Securities and Exchange Commission of Pakistan

the Supreme Court has held that Sindh Rural Support Organization (SRSO) is not under the control of the Government of Sindh. The Bench has noted that this aspect has not been even discussed in the cited judgment. Primarily, the judgment is about the Auditor General of Pakistan's (AGP) authority to conduct an audit of SRSO because it has received funds from the Consolidated Fund. It has been held in the cited case law that SRSO falls under the category of "authority or body established by the Federation or a Province which is substantially financed by loans and grants from the Consolidated Fund" therefore, it is subject to audit by AGP. It is also important to note here that the petition filed by SRSO against the AGP audit was dismissed by the Supreme Court.

40. The Bench has also perused another case cited by the Appellant which is titled *Anoosha Shaigan V. Lahore University of Management Sciences through Chancellor and others, cited as PLD 2007 Lahore 568*. In the cited case law *ratio decidendi* is that if the government has neither executive nor financial control of an entity then it cannot be treated as a person under Article 199 of the Constitution of Pakistan, 1973, therefore, Writ jurisdiction cannot be invoked against the said entity. The cited case law has discussed "absolute control" however, the case in hand is not about "absolute control" rather it is about the 'ultimate control' of the Government/Administrative Ministry/Division by virtue of clauses of the MOA and AOA of the Appellant which explicitly state that the Appellant cannot accept loans, grants and other funding except with the permission and approval of the Government/Administrative Ministry/Division. Furthermore, in case of winding-up of the Appellant, the Government/Administrative Ministry/Division is empowered to decide the fate of the Appellant's assets. In view thereof, the cited case law is not relevant to the merits of this Appeal.
41. Without prejudice to the merits of this case and discussion made hereinabove regarding the Appellant's status as a PSC, the Bench finds it appropriate to mention here that a special law i.e. the State-Owned Enterprises (Governance and Operations) Act, 2023 (the SOE Act) has been recently enacted. The Bench has perused Section 3 (1) of the SOE Act and noted that Section 3(1), state that SOE Act is applicable to all public sector companies as defined under Section 2(52) of the Act and Schedule-I specifically mentioned that the SEO Act is applicable to all companies established under Section 42 of the Act. The Bench is of the view that as per the requirements of Section 2(d)(i) of the SOE Act, the government has direct and indirect control on the "policy decisions" of the Appellant. In view thereof,



Securities and Exchange Commission of Pakistan

Administrative Ministry/Division/Government's direct control on the policy decisions of the Appellant is established by the contents of the Summary through which the Federal Government has decided to establish the Appellant, whereas, indirect control is established on the basis of restriction contained in MOA and AOA regarding soliciting funds with the help of government and entitlement of government on the assets of the Appellant upon winding up. The Bench wants to reiterate that decision in this Appeal has not been influenced by the aforementioned provisions of the SOE Act and purpose of this discussion is to highlight that all public sector companies are required to implement the provisions of the SOE Act.

42. In view of the above analysis and discussion, it has been established that the Appellant is a PSC, therefore, the appointment of its chief executive officer should be in accordance with the applicable statutory framework governing the PSC regime companies in Pakistan. In view thereof, the Bench finds no reason to interfere with the merits of the Impugned Order. In the circumstances, while maintaining the Impugned Order we hereby dismiss this Appeal, without any order as to cost.

(Mujtaba Ahmed Lodhi)

Commissioner

(Akif Saeed)

Chairman/Commissioner

Announced on: 21 OCT 2024