

# Securities and Exchange Commission of Pakistan

## BEFORE APPELLATE BENCH NO. I

In the matter of

Appeal No. 55 of 2009

Attock Oil Company Limited

...Appellant

Versus

Executive Director (SM) Securities and Exchange  
Commission of Pakistan, Islamabad

...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. 55 of 2009 filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 against the order (Impugned Order) dated 01/09/09 passed by the Respondent.



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2. The brief facts of the case are that Attock Oil Company (Appellant) purchased 500,000 shares of Attock Refinery Limited (Issuer Company) on 19/10/07 at the rate of Rs.248.12 per share and sold 60,000 shares on 11/04/08 at the rate of Rs.264.82 per share. The transactions were made within the period of less than six months. On account of the aforementioned transactions, the Respondent made gain of Rs.1,002,000 computed in the manner prescribed in Rule 16 of the Companies (General Provisions and Forms) Rules, 1985 (Rules). The Respondent was intimated vide letter dated 25/06/09 that since neither the matter of accrual of the aforesaid gain was reported by the Appellant in Part-D of the prescribed returns of beneficial ownership filed by it with the Commission for the aforementioned transactions, nor its tendering or recovery was reported to the Commission, as provided in section 224(2) of the Ordinance, the amount of the aforementioned gain now vests in the Commission. The Company secretary of the Respondent responded the matter vide letter dated 26/06/09.
3. Show Cause Notice dated 09/07/09 (SCN) was served on the Appellant under section 224(2) of the Ordinance and hearing on the matter was held on 23/07/09. Mr. Rahmat Ullah Bardaie, Company Secretary and Mr. Ahmed Hayat Lak, Manager Legal of the Appellant (Representatives) appeared on behalf of the Appellant and made their submissions.
4. The Respondent dissatisfied with the response of the Appellant held that the request of the representatives of the Appellant to withdraw the SCN was without any merit and Appellant was directed to tender Rs.1,002,000 to the Commission.
5. The Appellant has preferred the instant appeal against the Impugned Order. The Appellant's counsel argued that the Respondent failed to take into consideration the fact that sale of shares which are subject matter of the SCN and the Impugned Order dated 01/09/09 are beyond the scope of the section 224 of the Ordinance. Section 224



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of the Ordinance is only applicable in cases where shares which were purchased are sold. The Impugned Order contradicts with Rule 16 of the Rules as well as section 224 of the Ordinance and, therefore, cannot be sustained. The appeal is thus liable to be accepted on this ground alone.

6. The Respondent rebutted the arguments of the Appellant by stating that securities are fungible and the law and rules regulating the subject matter do not discriminate between previously held shares and newly purchased shares. In the instant case, the Appellant has purchased and sold the same class of shares of the same issuer company within the period of less than six months. The gains were calculated in accordance with Rule 16 of the Rules, however, 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 has provided 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, however, even if the gains are now calculated under the new formula as devised by the Appellate Bench in the aforesaid appeal, the result would be the same and it can safely be concluded that gains have been made by the Appellant tenderable to the Company.
7. We have heard the arguments and perused the evidence provided to us by the parties i.e. the Appellant and the Respondent.
8. 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



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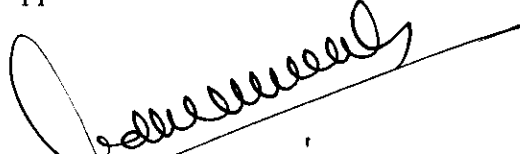
Securities and Exchange Commission of Pakistan through Commissioner versus First Capital Securities Corporation Limited and another in Civil Appeal No. 946/2005 cited at PLD 2011 Supreme Court 778, it was held that in the event the gains are not tendered to the Company within a period of six months or 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.

9. We place our reliance on the Order of the Appellate Bench dated 19/06/13 in Appeal No 49 of 2011, wherein, it was stated that, "... 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." Further, the Appellate Bench 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. In the instant case, we concur with the Respondent that the Appellant has purchased and sold the same class of shares of the same issuer company within the period of less than six months and even though the amount of gain was not calculated in accordance with the aforesaid judgment of the Appellate Bench, however, the result would be the same even if the amount of gain is calculated in accordance with the new formula.



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10. In view of the foregoing, we see no reason to interfere with the Impugned Order. The appeal is dismissed with no order as to costs.

  
(Zafar Abdullah)  
Commissioner (SCD)

  
(Tahir Mahmood)  
Commissioner (CLD)

Announced on: 07 OCT 2015