

Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO.1

In the matter of

Appeal No. 6 of 2015

Nasim Beg

..... Appellant

Versus

(i) Director/HOD (MSRD)

Securities and Exchange Commission of Pakistan

(ii) Securities and Exchange Commission of Pakistan

..... Respondents

Date of Hearing

24/08/15

Present:

For the Appellant:

Mr. Emad-ul-Hasan, Advocate

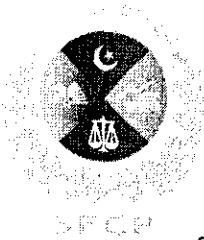
For the Respondent:

(i) Mr. Nasir Askar, Director (SMD)

(ii) Mr. Muhammad Farooq, Joint Director (SMD)

ORDER

1. This order shall dispose of appeal No. 6 of 2015 filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 against the order dated 31/12/14 (Impugned Order) passed by the Respondent.



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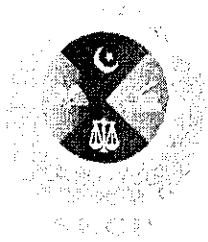
2. The facts of the matter are that Arif Habib Corporation Limited (Issuer Company) is a public listed company and the Appellant is a Director of the Issuer Company. The Appellant made the following sale and purchase transactions in ordinary shares of the Issuer Company within the period of less than six months:

Sr. No.	Date	Nature of transaction	No. of Shares	Rate per Share (Rs)
1	18/04/2008	Sale	33,300	184.29
2	23/06/2008	Purchase	344,000	145.34
3	18/09/2008	Purchase	9,900	94.11
4	29/09/2008	Purchase	125,000	74.09

On account of the aforesaid transactions, the Appellant in terms of Section 224(1) of the Ordinance read with Rule 16 of the Companies (General Provisions and Forms) Rules, 1985 (Rules) apparently made gain of Rs.3,669,660.

In the instant case, the Appellant did not show accrual of the aforesaid gain in Part-D of the prescribed returns of beneficial ownership filed with this Commission on Form 32 as at 26/06/2008. However, he sought clarification vide letter dated 25/07/2008 on the following issue:

"the section 224 covers gains on purchase and sale or sale and purchase, within six months. The expression "Sale and purchase" refers to the entering in sale transaction by short selling and thereafter making purchase. In my case absolutely no short sale is involved, as the sale of existing shares was made to avail the tax exemption. I never had the



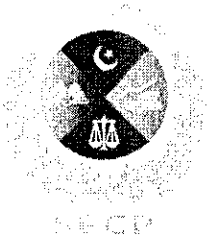
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intention to sell the shares, I therefore, request you kindly issue clarification that in such circumstances the provisions of section 224 are not attracted”.

In response, the Appellant was intimated vide letter dated 13/10/08 that provisions of the Section 224 of the Ordinance are applicable in the instant matter as his arguments regarding non-accrual of tenderable gain have no merit in the light of Section 224 of Ordinance and Rule 16 of the Rules. The Appellant reiterated vide letter dated 20/12/08 that no gain has been made on the relevant purchase, thus, the provisions of Section 224 are not applicable to the relevant purchase.

The Appellant was again informed vide letter dated 11/02/09 that the issue had been reviewed thoroughly in the light of the law and Rules on the subject matter and plea advanced by him for non-accrual of tenderable gain is not satisfactory. It was further intimated that he is required to discharge his liability in the manner provided in Section 224 of the Ordinance. The Appellant neither tendered the gain to the Issuer Company nor did the Issuer Company recover it, within the period stipulated in Section 224(2) of the Ordinance. Therefore, the matter of accrual of the above mentioned gain and its recovery manner provided in Section 224(2) of the Ordinance was brought to Appellant's notice vide letter dated 09/07/2009. The Appellant vide letter 10/08/2009 reiterated his earlier view point “that no gain has been made by him”.

3. Show cause notice dated 06/01/10 (SCN) was issued to the Appellant under section 224 of the Ordinance. The Appellant filed reply to the SCN and hearing in the matter was held. The Respondent directed the Appellant to tender Rs.1,297,035 to Issuer Company which was reduced from the amount

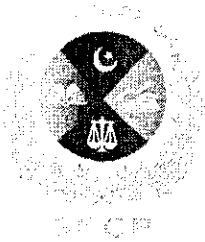


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of Rs.3,669,660 as it was recalculated pursuant to the decision of the Appellate Bench of the Commission in Appeal No. 49 of 2011 vide order dated 19/06/13, wherein, it was held that the amount of gain will be calculated by matching purchase and sale transactions in sequential manner rather than by applying lowest in highest out manner prescribed in Rule 16 of the Rules.

4. The Appellant has preferred the instant appeal against the Impugned Order on the following grounds:

- (i) The Respondent No.1 ignored the rulings held by the Honourable Supreme Court of Pakistan in the matter of Securities and Exchange Commission of Pakistan versus First Capital Securities Corporation Limited & another in Civil Appeal No. 946/2005 cited at PLD 2011 Supreme Court 778. It is clear, as per the judgment of the Supreme Court of Pakistan, that the objective of section 224 of the Ordinance is to curb insider trading but neither there was any 'inside information' affecting the prices of the shares nor any malafide in these transactions. It is submitted that the prices were generally falling at the time. Further, no gain of Rs.3,669,660 has been earned or realized by the Appellant on sale of 33,333 shares because the Appellant held shares for more than six months and sold on 18/04/08 in good faith to avoid imposition of capital gains tax on sale of shares which was expected to be imposed for the year 2009. Subsequently it was announced by the Federal Government that imposition of such tax was being exempted for another two years. Thereafter, the Appellant purchased a total of 478,900 shares between 23/06/08 to 29/09/08. The proviso to section 224(1) provides exemption for security acquired in good faith. Furthermore, there is no tenderable gain and all shares were subsequently sold at losses;

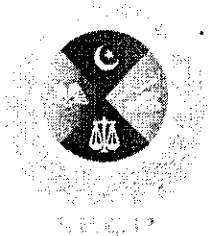


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- (ii) The Appellant notified about the sale and purchase transactions by filing the Returns with the Commission under section 222 and 224 of the Ordinance and acted in good faith, therefore, is entitled to retain the additional 8,924 shares in the light of the observations made by the Honourable Supreme Court. Furthermore, the Respondent erred in holding that *"...that this tacit assumption is not required to be proved that the person has acted on the basis of inside information."* The Respondent has also erred in observing in the Impugned Order that, *"...this section will mechanically apply, without regard to the purpose of the trades or actual use of material, non-public sensitive information."* It is submitted that there was no inside information at all at the time of the transaction. Reliance is placed on paragraph 20 of the judgment, wherein, it is clearly held that *"it should also be clarified that since the penal provision is stringent in nature it should also be applied in an appropriate manner. In applying such a provision, the Commission always bears in mind the importance of determining not merely a technical contravention but a substantial finding of guilt in relation to the person on whom the fine or penalty is being levied"*

5. The Respondent rebutted the arguments as follows:

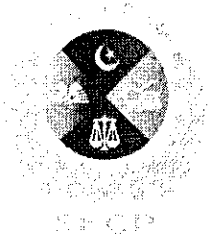
- (i) The Appellant has misconceived the contents of the above-mentioned Supreme Court judgment. In paragraph 15 of the judgment, the Honourable Apex Court has stated that, *"...it is clear that the section proceeds on the tacit assumption that the person in question is privy to inside information and taking advantage of the same, obtained a gain to which accordingly he 'was morally not entitled and thus was required to surrender it to the company. In other words; there is a presumption, which is tacit, to the effect that the person has done*



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something which is unjust or inequitable, or in violation of his duties and obligations to the company as a person falling within anyone of the prohibited categories, and thus should be compelled to surrender his gains to the company. Obviously, it would have been better if this presumption had been made explicit and not tacit but, accepting that the presumed legislative intent was the above, we can proceed further with our analysis..." As per the observation made by the Supreme Court of Pakistan, section 224 of the Ordinance is based on the presumption that persons mentioned in the said section are privy to inside information, therefore, the gain accrued on purchase and sale or sale and purchase, within the period of six months is required to be tendered to the Company and the Commission does not have entitlement thereto. Therefore, since it is not required to be proved that the person has acted on the basis of inside information, therefore, the said section will mechanically apply, without regard to the purpose of the trades or actual use of material, non-public price sensitive information. As in the instant case, if relevant purchase and sale or sale and purchase occur within the period of six months and yield gain, the beneficial owner/insider must tender the gain to the Company even in the absence of any wrongdoing. Further, the contention of the Respondent that 33,333 shares were sold in good faith after holding more than six months to avoid imposition of capital gain tax does not hold merit as the transactions made for tax purpose or any other purpose cannot be exempted from the purview of section 224 of the Ordinance; and

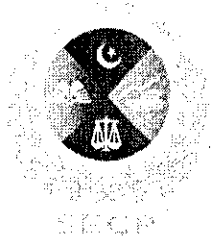
- (ii) The basic purpose of section 224 of the Ordinance is to protect the small shareholders against short-swing speculation by the beneficial owners/insiders who are likely to have advance information about the company. The Appellant has misconstrued the proviso to section



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224(1) of the Ordinance which states that “*nothing in this sub-section shall apply to a security acquired in good faith in satisfaction of debt previously contracted.*” The proviso of section 224(1) of the Ordinance provides the requirement of good faith relating to securities in satisfaction of debt previously contracted and does not apply to the facts of the instant case. Further, Paragraph 20 of the above-mentioned Supreme Court judgment refers to a situation where penal action is taken pursuant to section 224(4) of the Ordinance which is irrelevant to the instant case as tendering or recovery of tenderable gain is not penal action.

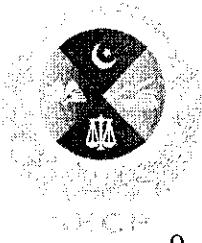
6. We have reviewed the arguments and perused the record provided to us by the parties i.e. the Appellant and the Respondent.
7. Reliance is placed on the Honourable Supreme Court Judgment of Securities and Exchange Commission of Pakistan versus First Capital Securities Corporation Limited & another in Civil Appeal No. 946/2005 cited at PLD 2011 Supreme Court 778, wherein, it was held that, “...the only two persons or entities entitled to retain the profits are either the person in question, assuming he has acted in good faith, or the company whose shares he has bought or sold within 6 months...” Further 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...” The Appellant has argued that section 224 of the Ordinance requires proof of malafide based on inside information before the relevant provisions of section 224 will apply to the facts of the instant case. Furthermore, if the beneficial owner acted bonafide then in such a scenario the beneficial owner can retain the gains



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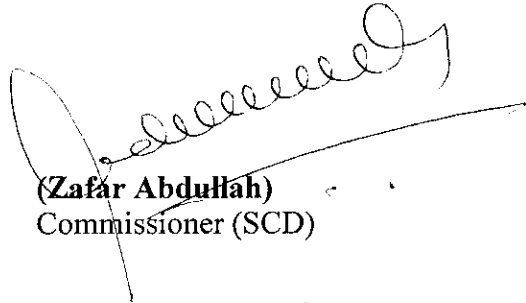
instead of surrendering them to the Company. The Appellant further, contended that there was no tenderable gain and shares were sold in good faith to avoid capital tax. The Respondent has rebutted the argument by stating that the section is applied on a presumption that the person was privy to inside information and, therefore, malafide is not required to be proved and the said section will automatically apply if the gains are not tendered to the Company within six months. Further, transactions made in good faith to avoid tax are not exempted from the provisions of section 224 of the Ordinance.

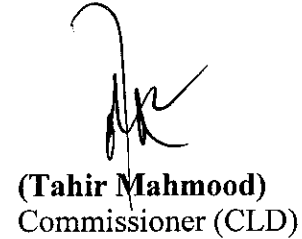
8. We are of the view that as per the observation in the Appellate Bench Order of Appeal No 14 of 2010, the question of whether the transactions are bona fide or not have to be decided on the threshold of the above-mentioned Supreme Court judgment. Section 224 of the Ordinance does not give exemption to transactions made for the purposes of tax and the proviso to section 224(1) of the Ordinance gives exemption to securities acquired in good faith in satisfaction of debt previously contracted. In the instant case, therefore, it is difficult to establish whether the transactions were bona fide or not. The aforementioned Supreme Court of Pakistan judgment above has spelled out the purpose of section 224 of the Ordinance which states that that the gains made shall at all times remain the property of the Company and SECP has no entitlement thereto. In the instant case, the transactions were done in the ordinary course of business, however, we concur with the Respondent that tenderable gains were made on the sale and purchase transactions in the ordinary shares of the Issuer Company within the period of less than six months, therefore, any gains made by the Appellant shall vest in the Issuer Company.



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9. In view of the above, the Impugned Order is upheld. The amount of tenderable gains of Rs.1,297,035 shall be transferred to the Issuer Company by the Appellant.
10. Parties to bear their cost.


(Zafar Abdullah)
Commissioner (SCD)


(Tahir Mahmood)
Commissioner (CLD)

Announced on: 21 SEP 2015