



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. I

In the matter of

Appeal No. 69 of 2017

TPL Properties (Pvt) Limited

Appellant

Versus

The Commissioner (SMD), SECP, Islamabad.

Respondent

Date of hearing:

14/09/17

Present:

For Appellant:

- i. Mr. Vaseeq Khalid, Advocate.
- ii. Mr. Danish Qazi, Group General Counsel.

For Respondent:

- i. Mr. Muhammad Farooq Bhatti, Additional Director (SMD)
- ii. Hafiz M. Wajid Wahidi- Deputy Director (SMD)
- iii. Mr. Asif Khan, Deputy Director (SMD)
- iv. Mr. Muhammad Hamza Ansar, ME (SSED)

ORDER

1. This Order shall dispose of Appeal No.69 of 2017, registered on 25/07/17 (the Appeal), under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 (the Act) against the Order dated 12/06/17 (the Impugned Order) passed by the Respondent under Section 40A of the Act whereby, a penalty of Rs. 3,000,000/- was imposed on the



Securities and Exchange Commission of Pakistan

TPL Properties (Pvt) Limited (the Appellant) for the violation of the Regulation 5 of the Book Building Regulations, 2015 (the Regulations).

2. Brief facts of the case are that the Appellant issued and circulated its prospectus with the approval of the Securities and Exchange Commission of Pakistan (the Commission) for raising capital through Book Building Process (the Process) under the Regulations. The Appellant offered 55.750 million shares of face value Rs. 10/- each at floor price of Rs. 12.50 per share. In order to check compliance with the requirements of the Regulations, the Commission conducted an investigation under the Securities Act, 2015 (the Securities Act). The Investigation *inter alia* revealed that an associated company of the Appellant, Asia Care Health and Life Insurance Co., Limited (the AHL) (currently named as TPL Direct Life Insurance Limited) subscribed 500,000 i.e. 0.90% shares of the Appellant under the process, whereas, an associated undertaking of the Appellant, the Staff Provident Fund (the Fund) of Trakker (Pvt.) Limited (currently named as TPL Holdings (Pvt.) Limited) subscribed 2,400,000 i.e. 4.31% shares of the Appellant under the Process. Thus, the AHL and the Fund in aggregate, subscribed 2,900,000 i.e. 5.21% shares of the Appellant under the process. The Appellant was required to disclose the name of its associated companies and associated undertakings in the prospectus, however, in violation of Regulation 5(8) of the Regulations, it failed to do so. In result thereof, the shares acquired by the AHL and the Fund has breached the threshold of the five percent shareholding, permitted under the Regulation 5(8) of the Regulations for the associated companies and associated undertakings.
3. Therefore, a Show Cause Notice dated 24/04/17 (the SCN) under Section 40A of the Act was served on the Appellant. The Appellant's chief executive officer vide letter dated May 15, 2017 filed written reply (the Reply) to SCN and denied the alleged violations. Hearing in the matter was held on May 26, 2017 wherein, the Appellant was



Securities and Exchange Commission of Pakistan

represented by Mr. Mikael Azmat Rahim (the Counsel). The Counsel reiterated the submissions of the Reply and stated that there had been no violation of the Regulation 5(8) of Regulations because the Fund is not an associated undertaking of the Appellant. The Respondent after considering the facts and submissions made by the Appellant, passed the Impugned Order. The Respondent had concluded in the Impugned Order that the AHL and the Fund were associated company/undertaking of the Appellant respectively, at the time of the Process due to common directorship, common shareholding, presence and control of Mr. Muhammad Ali Jameel in all entities.

4. The Appellant has challenged the Impugned Order and filed the Appeal before the Appellate Bench (the Bench). The Appellant has denied the “undertaking” status of the Fund and contended that the Fund is a trust, therefore, it cannot be under common management or control of or with any other entity, company because the trustee is required to act impartially and independently in the best interests of the beneficiaries and the beneficiaries, can exercise control over the trustee to act in a particular manner. The Fund, is controlled by its beneficiaries i.e. employees of Trakker (Private) Limited therefore, no question can possibly arise of the Fund being under common control with the Appellant. The Respondent has rebutted the assertions of the Appellant through written comments and stated that although the term “undertaking” has not been defined in the Ordinance, however, a conjunctive reading of the expression “companies or undertaking” used in definition of “associated companies and associated undertakings” under Section 2(2) (i) of the Ordinance, with the definition of Company under Section 2(7) of the Ordinance signifies that all other business forms except a company formed and registered under the Ordinance or an existing Company shall be treated as an undertaking. The Respondent has also placed reliance on “undertaking” definition, given in Competition Act, 2010 and Income Tax Ordinance 2001.



Securities and Exchange Commission of Pakistan

5. The Bench has heard the parties (Appellant and Respondent) and perused the record. The Appellant has been charged and penalized for the violation of the Regulation 5(8) the Regulation, therefore, we find it appropriate to reproduce here, the relevant provision of the Regulation 5 for reference;

*“5. Procedure for Issue or Offer of shares through Book Building: (8)The associated companies and associated undertakings of the Issuer or the Offerer **shall not in aggregate make bids for shares in excess of five per cent of the Book Building Portion** and in order to check this, the Issuer or the Offerer shall provide **names and Unique Identification Numbers of all its associated companies and associated undertakings as disclosed in the prospectus** to the Book Runner at least three working days before the commencement of the Bidding Period;” [**Emphasis Added**]*

6. The above quoted provision prescribes two necessary conditions for the Process i.e. disclosure of associated companies and associated undertakings names and aggregate limit of five percent shares of the Process for associated companies and associated undertakings. The point of contention in this case is that Appellant has denied the relationship of associated undertaking with the Fund whereas, the Respondent has connected the Fund with the Appellant as an associated undertaking on the basis of common directorship, common shareholding, presence and control of Mr. Muhammad Ali Jameel the Appellant (being CEO), the AHL (being director), and the Fund (being trustee).
7. The Bench is of the view that Respondent’s reliance on the definition of undertaking given in the Competition Act, 2010 and Income Tax Ordinance 2001, is irrelevant and erroneous, because both are special laws and every definition in said laws had been incorporated to meet the specific requirements, in consonance with the purpose of legislation, therefore, the definition of undertaking in said laws cannot be applied to other special law i.e. Ordinance. We appreciate the Respondent’s effort to interpret the Section 2(2) and Section 2(7) of the Ordinance, however, inclusion of a trust in the



Securities and Exchange Commission of Pakistan

definition of undertaking is beyond the scope of interpretation. The Ordinance has expressly defined the term “company” as “a company registered under the Ordinance or an existing company” whereas the term “undertaking” has not been defined in the Ordinance. Therefore, specifically mentioning of company definition implies that all other entities i.e. partnerships, sole and proprietorships etc. except a trust shall be considered as undertakings. A company, sole proprietorship and a partnership are different business vehicles, formed with the object to make profit for the owner, members or partners, whereas, a trust is always formed for the benefit and welfare of certain group of persons called “beneficiaries”, therefore, the Fund cannot be considered as undertaking of the Appellant in view of interpretation of Section 2(2) and Section 2(7) of the Ordinance.

8. The Fund is a trust and as per law, trust has no owner, partner or director, therefore, establishment of Appellant’s relation with the Fund, on the basis of common directorship, common shareholding, presence and control of Mr. Muhammad Ali Jameel is a glaring mistake of fact and law. A trustee has a fiduciary duty towards the trust and the beneficiaries and is required to act in the best interests of the beneficiaries. The Section 11 of the Trust Act, 1882 provides that: *“the trustee is bound to fulfil the purpose of the trust, and to obey the directions of the author of the trust given at the time of its creation, except as modified by the consent of all the beneficiaries being competent to contract”*. In view of the above, the Fund is controlled by its beneficiaries who are the employees of Trakker (Pvt.) Limited; therefore, no question can possibly arise of the Fund being under common control with the Appellant. Furthermore, any revenue or income generated by a trust can only be used for the purpose of trust and it would have no impact over the business or income of author of trust or a trustee. In present case Trakker (Pvt) Limited is the author of trust i.e. the Fund and Mr. Ali Jameel is one of the trustee of the Fund,



Securities and Exchange Commission of Pakistan

therefore, shares acquired by the Fund would not benefit the trustee or the author of the trust.

9. In view of the above discussion, we can safely say that the Fund was not an undertaking of the Appellant and it was not required to disclose the name of the Fund in the prospectus as its undertaking, therefore, we see no violation of the Regulation 5(8) of the Regulations. The issuance of the SCN was without any just cause and reason, therefore, we hereby, set aside the Impugned Order and allow this appeal, with no order as to cost.

(Fida Hussain Samoo)
Commissioner (Insurance)

(Tahir Mahmood)
Commissioner (CCD-CLD)

Announced on: **08 NOV 2017**