

Securities and Exchange Commission of Pakistan

BEFORE THE APPELLATE BENCH

In the matter of

Appeal No. 76 of 2019

Musharraf Rasool Cyan

...Appellant

versus

Executive Director (Corporate Supervision Department),
Securities and Exchange Commission of Pakistan

...Respondent

Date of Hearing: 24/09/2020

Present:

For the Appellant:

- i. Barrister Kabir Hashmi, Counsel
- ii. Mr. Mujtaba Ghaus, Counsel
- iii. Mr. Suleman Tahir, Counsel

For the Respondent:

- i. Mr. Amir Saleem, Joint Director (Adjudication-1)
- ii. Mr. Sohaib Amin, Assistant Director (Adjudication-1)

ORDER

1. This Order is passed in the matter of Appeal No. 76 of 2019 filed under section 33 of the Securities and Exchange Commission of Pakistan Commission Act, 1997 against the order dated 30/08/19 (the Impugned Order) passed by Executive Director, Corporate Supervision Department (the Respondent).
2. The brief facts of the case are that Pakistan International Airlines Corporation Limited (the Company) failed to file the interim financial statements for the following period with the Securities and Exchange Commission of Pakistan (the Commission) within the stipulated time period pursuant to section 237 of the Companies Act, 2017 (the Companies Act).



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Quarter ended	Filing Due on
September 30, 2017	October 30, 2017

3. Then Chief Executive, Mr. Musharraf Rasool Cyan (the Appellant) and the Directors of the Company, *prima facie*, contravened the provisions of section 237(4) of the Companies Act by not filing the aforementioned quarterly accounts with the Commission within the stipulated time.
4. The Show Cause Notice dated 17/01/19 (the SCN) was served to the Appellant and Directors of the Company. The Appellant and the directors submitted their response to the SCN and hearing in the matter was held on 08/05/19. Mr. Syed Bulent Sohail of Hassan and Hassan (Advocates) appeared on behalf of the Appellant and Directors of the Company as their authorized representatives and made their submissions.
5. The Respondent dissatisfied with the response of the Appellant and the Directors held that pertinent provisions of the statute had been violated and the Appellant and the Directors are liable for penal action in terms of section 237 of the Companies Act for non-filing of interim financial statements for the quarters ended 30/09/17 with the Commission as stipulated under the law. In exercise of powers conferred under section 237(4) of the Companies Act, a penalty of Rs 50,000 was imposed on the Appellant by the Respondent and the remaining Directors were warned to ensure strict compliance of the law in future.
6. The Appellant preferred the appeal *inter alia* on the following grounds:
 - a) The SCN was not issued to the Appellant directly, but rather, was issued to the Appellant under the heading of Board of Directors (the Board). The penalty on the Appellant was thus imposed without serving a SCN on the Appellant individually and consequently, the Appellant was condemned unheard. While passing the Impugned Order, the Respondent did not take into account the actions taken by the Appellant to remedy the problem. Section 237(4) of the Companies Act requires that the Chief Executive Officer (the CEO) or Chief Financial Officer (the CFO) must have committed an action or omission which was the direct cause of the default. The Impugned Order does not produce any evidence



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that the CEO himself was the cause of the default. The SCN unevenly levelled charges against the Appellant and other Directors without taking into account that the Chief Financial Officer and the Chief Accountant should have been arrayed as party to the proceedings.

- b) In the letter of the Appellant to the Chairman of the Board dated 19/06/18 (the Letter to Chairman of the Board), the Appellant had clearly stated that he had fulfilled all his obligations when he joined the office to ensure that the financial workings of the Company are completed in compliance with the rules and conditions as laid down by the Commission. The Respondent has wrongfully singled out and penalized the Appellant ignoring the fact that the Appellant was the only person who made efforts to ensure that all requisite formalities are met and qualified people are hired for the quick issuance of financial statements to the Commission. The switchover to the ERP system was started in 2016 prior to the Appellant joining as CEO of the Company and the then CFO worked as the Project Director and reported to the Board Budget and Audit Committee directly. He could not complete the switchover and failed to prepare financial reports in time. As CEO the Appellant carried out due diligence and informed the Board of the lack of performance of CFO several times and finally prevailed in getting him removed to address the longstanding issues. The Appellant had fulfilled his duties as the CEO but still has been specifically and additionally penalized in the Impugned Order.
- c) It is clear that under section 188(3) of the Companies Act which pertains to terms of appointment of CEO, the CEO is equated as a director and shall enjoy all the rights and privileges of a Director, hence, any right and privilege extended to the Board by the Respondent should have also been extended to the Appellant in the present matter. Furthermore, section 188(3) of the Companies Act does not differentiate between a director and a CEO and such a distinction drawn by the Respondent in the Impugned Order, is *ultra vires* of the Companies Act. Furthermore, section 183(1) of the Companies Act provides that business of a company shall be managed by the Board and section 183(2)(g) of the Companies Act provides that, "*The board shall exercise the following powers on behalf of the company, and shall do so by means of a resolution passed at their meeting, namely to approve financial statements.*" Therefore, section 183(2)(g) of the Companies Act is extremely relevant for the purposes of the present matter which makes



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it the responsibility of the Board to approve financial statements. The Respondent's view that the "*the Chief Executive...has more responsibility to ensure timely compliance of the legal requirements*" is in violation of the Companies Act which does not place any such responsibility on the CEO. The Appellant could not have been penalized individually when the lapse had been committed by the entire Board.

- d) The Appellant only joined the Company on 15/09/17 and was asked to address the inability of the company to file its interim financial statements for the period ending on 30/09/17.

7. The Respondent rebutted the arguments of the Appellant *inter alia* on the following grounds:

- a) The name of the Appellant was included as Respondent to the SCN. Furthermore, CEO of a company is also deemed director of the company and responsible to manage the affairs of the company. In corporate governance, power is commensurate with the responsibility and the chief executive acts as captain of the corporate body. At the relevant time i.e. for the period ended 30/09/17, the Appellant was the CEO of the Company and responsible to ensure compliance with the provisions of section 237 of the Companies Act.
- b) The proceedings under section 237 of the Companies Act were initiated vide SCN and hearing opportunities on 30/01/19 and 08/05/19 were allowed to the Appellant and after hearing the Appellant and other Directors, the Impugned Order was passed under section 237 of the Companies Act.

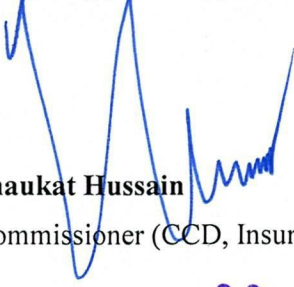
8. We have heard the parties i.e. the Appellant and the Respondent. We are of the view that the CEO as part of the Board, is responsible in terms of section 183(2)(g) of the Companies Act to file the quarterly financial statements. Furthermore, Section 237(4) of the Companies Act provides that if a company fails to file quarterly financial statements, "*...every director, including chief executive and chief financial officer of the company who has by his act or omission been the cause of such default shall be liable to a penalty of level 2 on the standard scale...*". In the instant case, the Appellant only joined the Company on 15/09/17 and could not have been responsible for failure to file timely accounts for the period ended 30/09/17 which was just 15 days after his joining. Furthermore, it is apparent from the Appellant's Letter to the Chairman of the Board that the Appellant seemed to ensure that the financial workings of the Company are completed in compliance with the rules and



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conditions as laid down by the Commission and made efforts to ensure that all requisite formalities are met despite the Company being in a difficult situation. Therefore, the Appellant cannot be held responsible for violation of section 237(4) of the Companies Act.

9. In view of the foregoing, we hereby convert the penalty imposed on the Appellant into a warning. Accordingly, the Appeal is disposed of with no order as to costs.


Shaukat Hussain
Commissioner (CCD, Insurance)



Farrukh H. Sabzwari
Commissioner (SCD-PRDD)

Announced on: **28 JAN 2021**