BEFORE APPELLATE BENCH IV

In the matter of

Appeal No. 24 of 2015

Service Provident Fund ...Appellant

Versus

Director/HOD (MSSID), Securities and Exchange Commission of Pakistan ...Respondent

AND

Appeal No. 25 of 2015

Mr. Jawwad Faisal
CFO, Service Industries Limited ...Appellant

Versus

Director/HOD (MSSID), Securities and Exchange Commission of Pakistan ...Respondent

Date of hearing: 14/05/15, 25/05/15

Present:

For Appellants:

i) Mr. Jawwad Faisal
ii) Mr. Muhammad Sohail Akhtar Chaudhry
iii) Mr. Rashid Sadiq

For Respondent:

i) Mr. Abid Hussain, Director (SSED-SMD)
ii) Mrs. Tayyaba Nisar, Deputy Director (SSED-SMD)

ORDER

1. This single order shall dispose of appeal No. 24 and 25 of 2015 filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 against the two separate orders dated 19/02/15 (the Impugned Orders) passed by the Respondent, as the similar question of law and fact is involved in these appeals.

2. The facts leading to this case are that the Appellant in appeal no.24 of 2015 (Appellant no.1) is a trust governed by a trust deed and the rules made thereunder. Beneficiaries of the trust are the members of /permanent employees/ directors of Service Industries Limited (the SIL).The SIL through its notice dated 20/08/14 informed the Karachi Stock Exchange (the KSE) and Lahore Stock Exchange (the LSE) that meeting of Board of Directors (BOD) of SIL will be held on 28/08/14 to consider the Half Yearly Accounts for the period ended June 30, 2014 (the Accounts). Thereafter, the SIL through its notice dated 28/08/14, announced the Accounts and declared Earning per Share (EPS) of Rs.39.57, as compared to the last year's EPS of Rs.29.29, which depicted an increase of 35%. The SIL also announced 100% interim cash dividend.

3. The perusal of trading data of the KSE for the period from 11/08/14 till 28/08/14 (the Period) depicted that the share price of SIL witnessed considerable increase. The share price opened at Rs.533.76 on 11/08/14 and closed at Rs.631.02 on 28/08/14. Further review exhibited that from 11/08/14 to 18/08/14 the Appellant no.1, bought 53,400 shares of SIL with average price of Rs.536.477 per share. The Respondent vide letters dated 30/09/14, 15/10/14, 27/10/14 and 11/11/14 sought the information from SIL regarding the BOD meeting of SIL held on 28/08/14, copy of the trust deed of the Appellant no.1, details regarding Investment Committee (the IC) of the Appellant no.1 and its meetings in which the decision of Investment in the shares of SIL was taken.

4. The review of various documents revealed that Board of Trustees of the Appellant no.1 consists of members of senior management as follows:

Sr. No.	Trustee of the Respondent	Position in SIL
1.	Mr. Ahmed Javed	Chairman
2.	Mr. Omar Saeed	Chief Executive Officer
3.	Mr. Arif Saeed	Director
4.	Mr. Hassan Javed	Director

5. A certified true copy of the board resolution passed by the trustees of the Appellant no.1, dated 26/06/13 resolved that the IC will independently make the investment decisions. As per the resolution following were the members of the IC:

Sr. No.	Investment Committee	Position in SIL
1.	Mr. Muhammad Ejaz, Chairman	Country Manager Marketing
2.	Mr. Muhammad Suhail Akhtar Chaudhry, Member	General Manager Domestic Sales

6. The record also revealed that investment orders on behalf of the Appellant no.1 were to be carried through the members of the IC. However in their absence, under the directions of the IC, any officer not below the level of Manager, as may be designated by the IC was authorized. As per the list attached to the resolution dated 26/06/13 following persons were authorized by the IC:

Sr. No.	Investment Committee Authorized Persons	Position in SIL
1.	Mr. Liaqat Ali	Manager Import
2.	Mr. Masoom Raza	Manager Sourcing
3.	Mr. Usman Liaqat	Manager Finance
4.	Mr. Rana Saeed Ahmed	Manager Marketing Services
5.	Mr. Jawwad Faisal	Chief Financial Officer
6.	Mr. Yasir Ali	Manager Treasury

7. The Respondent also sought information from the brokerage house IGI Finex Securities (Pvt) Limited vide letter dated 30/09/14 pertaining to trading account

maintained by the Appellant no.1, including complete Standardized Account Opening Form CDC-sub Account Form, Trading Statements, Financial Ledgers, copies of cheques and/or any other instrument used for receipts/payments and the telephonic recording for placement of orders. The information received by the brokerage house was analyzed and telephonic recording revealed that appellant in appeal no. 25 of 2015 (the Appellant no.2) was placing the orders on the behalf of the Appellant no.1. The copy of CNIC of the Appellant no.2 was also annexed with the AOF of the Appellant no.1.

8. In the above circumstance, a Show Cause Notice (the SCN) dated 03/12/14 was issued to the Appellant no 1 as to why action should not be taken against it under section 15E of the Securities and Exchange Ordinance, 1969 (the Ordinance) for trading on the basis of material non-public information pertaining to the Accounts of SIL which was disclosed to it by the Appellant no.2. The Respondent issued another SCN dated 03/12/14 to the Appellant no.2 as to why action should not be taken against him under Section 15E (3) of the Ordinance for passing on material non-public information pertaining to the Accounts to the Appellant no.1, which he possessed by virtue of his position as Chief Financial Officer (CFO) and based on which the Appellant no.1 traded in the shares of SIL just before the public dissemination. The Appellant no.1 and Appellant no.2 submitted written reply vide letter dated 01/01/14 and hearings were conducted on 21/01/15.

9. The Respondent being dissatisfied with the response of the Appellant no.1 and Appellant no.2 imposed a penalty of Rs.5,048,546 (Rupees Five Million Forty Eight Thousand Five Hundred and Forty Six only) on the Appellant no.1 through its trustees for contravention of the provision of sub-section (1) of the Section 15A by trading in the shares of SIL on the basis of inside information. Further, the Respondent, in exercise of powers under Section 15E (3) of the Ordinance, imposed a fine of Rs.500,000/- (Rupees Five Hundred Thousand

Only) on the Appellant no.2 for disclosing material inside information relating to Accounts.

10. The Appellant no.1 and the Appellant no.2, being aggrieved by the Impugned Orders, preferred an appeal before the Appellate Bench *inter alia* on the following grounds:

i) The Respondent has failed to understand that it is not a case of insider trading, because shares were not purchased for short swing profits. The purchased shares were meant for long term holding.

ii) The Respondent has failed to prove that the Appellant no.2 passed the inside information with regard to the Accounts of the SIL and the Appellant no.1 has acted upon the said information to purchase the shares of SIL, therefore Section 15 A (1) and 15 E (3) of the Ordinance cannot be invoked. Further the Appellant no.1 has not sold any share and, therefore, no benefit has been derived.

iii) The Respondent failed to deliberate on whether anticipated EPS information based on the previous year's EPS information was inside information. The Respondent also failed to prove that such 'inside information' was passed on to the Appellant no.1 by the Appellant no.2 for making investment in SIL shares.

iv) The Impugned Order is contrary to law as the Respondent failed to advert to the complete facts of the case and all legal propositions put forward. Further the Respondent has also failed to take into account the decisions of the Appellate Bench of the Commission and past decisions of the department on insider trading.

v) The Respondent failed to appreciate that financial performance is deemed inside information only when such confidential information is significantly different from public information, so as to have an effect on the price of listed securities. Consequently, an insider who

deals in listed securities on the basis of confidential information cannot be guilty of "insider trading" if the market could already anticipate such confidential information. This legal and commercial position is evident from the following:

a) The definition of "inside information" under Section 15B(1)(a) does not mean any confidential financial information but only such information that *"if it were made public, would be likely to have an effect on the prices of"* relevant listed securities. It is submitted that the any confidential information possessed by the Appellant no.2 was not "inside information" as it could not have affected the price of SIL's listed securities because the price-sensitive information was already available in public and, therefore, trading on the basis of such information by an insider cannot be considered "insider trading".

b) The Commission has issued a notification No. 1431 (1)/2012 dated 05/12/12 which specify that the listed company has to make an assessment of the likely impact of these events and circumstances on its share price and decide consciously whether the event or the set of circumstances constitute an inside information that needs to be disclosed. In the context of quarterly audited/unaudited financial statements, the relevant example from the aforementioned SRO is numbered (aa), i.e., *"Changes in expected earnings or losses"*. This example reflects the legal position that "expected earnings or losses" are not inside information but only "changes" in such expectations. Conversely, it may be stated that mere knowledge of the contents of the profit and loss account prior to their dissemination to the stock exchanges does not constitute an inside information unless there are unexpected

and/or substantial profits or losses that are at significant variation to the prediction of the market.

vi) The Respondent has not adopted right view and has tried to establish a spurious distinction between "anticipated information" and "information-in-hand", arguing that *"the probability of acting on the basis of certain information-in-hand is much higher than on the anticipated information, owing to fewer level risks for investment"*. Further the Respondent has specifically acknowledged in the Impugned Order that: *"The review of Research Reports provided by the Authorized Representative showed that the analysts' expectation regarding final results of the Company was in line with the actual results."* This admission alone is sufficient to establish that the trading in this case does not involve any "inside information".

vii) The Respondent has stated in the Impugned Order Appellant no.2 was *"aware of the probable declaration of Dividend to shareholders."* This is a deeply flawed, contrived and incoherent argument. Firstly, the Respondent has held that acting on anticipated/probable knowledge is not the same thing as acting on actual knowledge, but here the Respondent has taken a contrary view and equates probable knowledge with actual knowledge. The Respondent has conveniently ignored the inconsistency, incoherence and contradiction between the two-limbs of his own reasoning on which the Impugned Order is based. Further, the Appellant no.2 never submitted any working on for free distributable funds to be paid as dividends to the Board of Directors of SIL.

viii) The Respondent assumed in the Impugned Order that a blanket approval for investment is given by the IC and the decision of trading is done from time to time in consultation of IC. As matter of fact the IC had decided the specific value and period for making

investment and Appellant no.2 was only asked to place the orders with the broker.

ix) Appellant no.2 is neither a relevant authority nor had any vital role to play in the investment/trading decision and timings of the investment of the Appellant no.1 because it was the domain of the IC.

x) Appellant no.2 was just an authorized signatory of the Appellant no.1, however he was never significantly involved in the banking deals of the Appellant no.1.

xi) It is vehemently denied that the Appellant no.1 was aggressive in purchase of shares of SIL. The facts are contrary to the assumption of the Respondent, because much higher volumes were traded in past, although the Appellant no.1 never traded at that time.

xii) Appellant no.2 was never in liaison with the members of the IC for consultation of favorable dynamics of investment/trading in shares of SIL, therefore he cannot be held liable for any investment decision or post execution activities. He was simply acting on behalf of the IC for placement of orders. The Respondent has failed to establish that the Appellant no.1 was recipient of any material/non-public information/inside information pertaining to the Accounts of SIL from the Appellant no.2.

xiii) There was documentary evidence reflecting the instructions of IC for making investment during the period. The Respondent never asked for this information. Further, the Respondent failed to point out the manner of disclosure of inside information and the specific person to whom such disclosure was made.

11. The Respondent rebutted the ground of appeal in the following manner:

i) The contents of the para are based on misunderstanding of the law governing the offense of Insider Trading. Section 15A of the

Ordinance clearly prohibits Insider Trading irrespective of the fact that the subject trading was done for long term or short term.

ii) Appellant no.2 had access to all the Accounts of SIL because the development and consolidation of financial results of the SIL was the responsibility of the Appellant no.2. Therefore, it is an undeniable fact that the Appellant no.2, by virtue of his position, was in possession of this insider information and same was passed to the Appellant no.1.

iii) It is important to understand that previous EPS can only give an indication of improved future EPS but is not a conclusive figure for predicting the exact EPS.

iv) The Impugned Orders clearly stated the facts on the basis of which same were passed. The Impugned Orders were passed on sound grounds, in accordance with the law and lawful authority and procedure, as laid down in the Rules and Regulation. Further the Appellant no.1 and the Appellant no.2 referred various judgments passed in the past by the Honorable Appellant Bench. It is noteworthy that as per established principles of jurisprudence and precedents each and every case has to be decided at its own merits, therefore mandatory binding principle cannot be invoked, where merits of the case are different.

v) The arguments raised by the Appellant no 1 and the Appellant no.2 are conceptually wrong. As it is well known fact that information pertaining to the financial performance of a company is material price sensitive information irrespective of fact that it is in-line with the past or is entirely different.

a. Section 15B(1) of the Ordinance clearly defines Insider Trading and states that such information if made public would likely to have an effect on the share price of the company. The Appellant no.1 and the Appellant no.2 are

emphasizing on a wrong stance stating that information regarding the financial performance was already public. Further, the Appellant no.1 and the Appellant no.2 are completely negating the need of confidentiality and secrecy of such information before it is made public. The contention of the Appellant no.1 and the Appellant no.2 is also negated by the fact that the Appellant no.1 started purchasing the shares of SIL from 11/08/14 to 18/08/14. Further, the share price of SIL remained range-bound during the period between of Rs.598.71 to Rs.643.89, however, once the material information was made public on 28/08/14, the share price skyrocketed and increased by 21.3% in the next 5 trading sessions, including two consecutive upper locks. Therefore, in light of the aforementioned it is evident that the Accounts of the company constitute material inside information and the Appellant no.2 has this informational advantage over general public, which he utilized for trading on behalf of the Appellant no.1.

b. Appellant no.1 and the Appellant no.2 are trying to mislead the honorable Appellate Bench by the misrepresenting and misinterpreting the Commission Notification No. 1431(1)/2012 dated 05/12/12. The Commission has clearly mentioned a set of examples in this notification for which the disclosure obligation is mandatory. Nevertheless, this notification has never declared that the Accounts of a company represent inside information only if there is some change in expected earnings/loss. The said notification is dealing with the prescription of the manner and timing of public information, while it does not outline categories of insider trading. Moreover, the term "Inside Information" has

been clearing defined in Section 15B of the Ordinance and in light of that, the materiality of financial results of SIL are indisputably clear and in anticipation of improvement in earnings of the company which caused price fluctuation in the scrip.

vi) Appellant no.2 was an insider by virtue of his position being CFO of SIL. He had prior information regarding the Accounts of the SIL, well before its dissemination. It is also important to understand that an individual having direct access to the Accounts of the company is no way at par with the general public who would invest in any stock based on their analysis and market information. Further, all the research reports contain an explicit disclaimer that the recommendations mentioned in these reports should not be construed as, an offer to sell or a solicitation of an offer to buy any securities and these are developed on the basis on assumptions made through the record available to them. Therefore, the stance of the Appellant no.1 and the Appellant no.2 regarding the authenticity of these research reports is baseless.

vii) There were two segments of the Accounts which were announced on 28/08/14 i.e., firstly improved EPS of the SIL and secondly dividend declaration. The Appellant no.2 had information in hand regarding improved EPS of the company. He also admitted during the course of hearing that the SIL has implemented Oracle system and usually, the financial results are available with him after ten days of the close of the financial period. So practically, the draft Accounts of SIL for the period ending 30/06/14 were available with the Appellant no.2 by July 10, 2014.Further, Appellant no.2 would have the indication regarding the declaration of the dividend as he was aware of the surplus fund available with the SIL, on the basis of which dividend was declared.

viii) Appellant no.1 and the Appellant no.2 are negating their stance given at the time of hearing in the matter of the SCNs. It is important to note that the IC did not decide any specific date or period for making investment but just gave the approval deciding the scrip and amount.

ix) The detail of the members of the IC as obtained from SIL and the Fund indicated that IC consist of two members, one of them is Country Manager Marketing and other is General Manager Domestic Sales of SIL. The Appellant no.2 is the CFO of the SIL and has all the knowledge and expertise regarding subject of finance and accounts, which enable him to have better understanding of the financial performance and capital market's dynamics. The argument is also supported by the fact that the Appellant no.2 was solely liaising with the broker for order placement on behalf on the Appellant no.1and all the trading activity confirmation were being delivered to him.

x) The Appellant no.2 is one of the authorized persons to operate the bank account of the Appellant no.1.

xi) The trading pattern of the Appellant no.1 in the scrip of SIL shows that it accumulated only 19,600 share of SIL since the beginning of the year 2014; however, it accumulated 53,400 shares in just 5 trading sessions during the month of August 2014. This purchase by the Appellant contributed to more than 44% of the total volume of the scrip. Moreover, the meeting of IC, during which the decision for investment in the share of SIL was taken, was held on 28/06/14 but the trading was done just before the announcement of the Accounts.

xii) The contents of the para are strongly denied. As per the record the decision for trading was done by the Appellant no.2 from time to time in consultation of IC. The time and specifics of the trading were decided by the CFO as and when deemed fit. Simultaneously, he was

in liaison with the members of the IC for consultation of favorable dynamics of investment/ trading in the shares of SIL under the approval umbrella. Furthermore, he was responsible for order placement and post execution activities on the behalf of the Appellant no.1.

xiii) During the hearing Appellant no.2 admitted that there is no evidence/document reflecting that IC instructed him to make investments in SIL shares during the period under review. Further there is no need to elaborate the manner of the communication as it is evident that Appellant no.2, at the time of trading of shares by the Appellant no.1, was an insider and had prior information regarding the Accounts of SIL.

12. We have heard the parties and perused the record with the able assistance of the parties i.e. Appellant no.1, Appellant no.2 and Respondent.

13. The Appellant no.1 and the Appellant no.2 stance regarding nullity of the provisions of the Ordinance incorporated or amended through Finance Acts by the Honorable Supreme Court cannot be acceded. As matter of fact provisions of the Ordinance, incorporated through the Finance Acts have never been adjudicated by any court of competent jurisdiction. The reference precedents *Sindh High Court Bar Association v. Federation of Pakistan* (PLD 2009 SC 879, 1112-3), *Mir Muhammad Idris v. Federation of Pakistan* (PLD 2011 SC 213), and *Muhammad Ashraf Tiwana and others v. Pakistan and others* (2013 SCMR 1159) are with reference to other laws enacted or amended through the Finance Acts.

14. The facts reveal that IC of the Appellant no.1 decided on 28/06/14 to invest up to Rs.40 million in SIL shares, therefore it would be impossible for the Appellant no.2 to disclose inside information regarding the Accounts of SIL

because the Respondent has stated in the Impugned Order and written comments that practically, the draft Accounts of SIL for the period ending 30/06/14 would have been available with the CFO by July 10, 2014. Therefore it is evident from the record that IC took an independent decision of investment into the shares of SIL and at that time the Appellant no.2 had no detail of the Accounts. It is also important to note that the IC vide emails dated 08/08/14, 13/08/14 and 15/08/14 asked the Appellant no.2 to buy the shares of SIL and thereafter he bought 53,400 shares of SIL between the period 11/08/14 to 18/08/14. The transactions were carried out much prior to the announcement of the Accounts of SIL and their dissemination to the KSE and the LSE on 28/08/14, therefore we may say that it was the independent decision of the IC to invest into the shares of SIL and the Appellant no.2 was mandated to execute the transactions by keeping in view the limitations elaborated in aforementioned email.

15. The stance of the Appellant no. 1 and the Appellant no.2 with respect to market indicators and financial reports which were depicting the SIL strong performance, consistent dividend record, growth forecast mentioned in directors;' report, predictions by independent analysts etc. prior to announcement of the Accounts ended 30/06/14 cannot be ignored. Therefore we believe that investment decision by the IC and placement of share purchase orders by the Appellant no.1 were not based on any inside information rather these were based on the indicators prevailing in the market about the financial health of the SIL.

16. Further it is an admitted fact that the Appellant no.1 and the Appellant no.2 never denied that the Appellant no.2 was assigned to place the orders to purchase the shares of SIL on IC instructions. As per record Appellant no.2 was authorized by the IC along with five other officers of SIL to place investment orders on behalf of the IC. Therefore, in our view the Respondent presumed that

the Appellant no.2 being CFO of SIL was aware of the Accounts for the period ended 30/06/14, prior to their announcement and he disclosed inside information regarding the Accounts of SIL to the IC. The decision to purchase the SIL shares was taken by the IC much before the announcement of the Accounts i.e. on 28/06/14 while accounts were approved and announced on 28/08/14. As per the email record and telephone record, the Appellant no.2 placed the investment orders as authorized by the IC. In the above circumstance and facts we consider that the Respondent proceeded against the Appellant no.1 and the Appellant no.2 on presumptions, therefore we have no doubt to say that conclusions could not be drawn on assumptions or presumptions rather should be based on conclusive evidence or on unbroken corroborated circumstantial evidence.

17. After careful examination of the grounds of appeal and rebuttal submissions, we are of the view that there is no direct evidence against the Appellant no.2, that he possessed the inside information and same was passed on to Appellant no.1, therefore the Respondent has failed to establish two basic ingredients of insider trading. The Respondent has tried to penalize them on the basis of broken circumstantial evidence, which is not tenable. As per established jurisprudence when any case is rested entirely on circumstantial evidence then, each piece of evidence collected must provide all links making out one straight chain and if any link of the chain is missing, it would create serious doubt and the benefit of the same go to accused/defaulter. In the present case, there is no nexus of one link i.e. "inside information" with the other i.e. "disclosure prior to announcement", therefore it did not make the complete chain of circumstantial evidence, necessary to penalize the Appellant no 1 and the Appellant no.2.

18. Beside the foregoing analysis, reasoning and conclusion, that the Impugned Order lacks direct or circumstantial evidence of insider trading, the transactions carried out by the senior management of SIL, particularly the Appellant no.2 on behalf of the Appellant no.1 creates suspicion. Therefore we find it appropriate

that the Respondent should probe into the matter whether appointment of senior management of SIL as Trustees of the Appellant no. 1, members of IC and authorization of senior management of SIL by the IC to carryout investment transaction was in accordance with the Code of Corporate Governance and all other ancillary laws to ensure arm's length transactions.

19. In view of the above, we believe that the Impugned Orders were not passed keeping in view the principle of legal reasoning necessary to establish the alleged guilt and violation on the part of Appellant no.1 and the Appellant no.2. However, the involvement of senior management in the affairs of the trust as mentioned above creates suspicion. In view of the foregoing, we set aside the Impugned Order. The matter is hereby remanded to the Respondent department.

20. Parties to bear their own cost.

(Fida Hussain Samoo)
Commissioner (Insurance)

(Zafar Abdullah)
Commissioner (SCD)

Announced on: 13 OCT 2015