



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO.III

In the matter of

Appeals No.35 of 2013

1. Arif Hussain, Chief Executive

2. Nabila Arif, Director

3. Rubi Tufail, Director

4. Ali Raza, Director

5. Muhammad Tufail, Director

of Ali Raza Textile Mills Ltd

... Appellants

Versus

Director (Enforcement),

Securities and Exchange Commission of Pakistan

...Respondent

Date of hearing

05/09/13

ORDER

Present:

For the Appellant:

Mr. Rana Munir Hussain, Advocate Supreme Court

For the Respondent: (through video link)

Mr. Malik Asim Pervez, Deputy Director (Enforcement)

Mr. Shahid Javed, Deputy Director (Enforcement)

Mr. Haroon Abdullah, Deputy Director (Enforcement)



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1. This order is in appeal No. 35 of 2013 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the order dated 30/04/13 (the "Impugned Order") passed by the Respondent.
2. The brief facts of the case are that the Enforcement Department (the "department") of the Commission, while examining the annual audited accounts for the year ended 30/06/09 and 2011 (the "Accounts"), observed that Ali Raza Textile Mills Limited (the "Company") had failed to annex the notes to the accounts and Director's Report along with the Accounts filed with the Commission.
3. Show Cause Notice dated 14/02/13 ("SCN") was issued to the Chief Executive and directors of the Company advising them to submit a written explanation within 14 days from the date of SCN as to why penal action may not be taken against them under section 244(3) read with section 476 of the Companies Ordinance, 1984 (the "Ordinance"). The Appellants failed to respond to the SCN. Hearing in the matter was held. The Respondent, dissatisfied with the response of the Appellants, passed the Impugned Order and imposed a penalty of Rs.3,000 on the Chief Executive and each director with the total penalty aggregating to Rs.15,000. The Chief Executive was directed under the provisions of section 473 of the Ordinance to submit the fresh copy of Accounts along with notes to the accounts and Director's Report within 30 days of the Order.
4. The Appellants' counsel argued that:
 - a) the penalty proceedings are criminal in nature and the case has to be proved beyond reasonable doubt in such proceedings, which was not done in the



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instant case. In absence of mens rea and without proving that the act of the Appellants was willful, no penalty could have been imposed; and

- b) the non-fulfillment of the requirements of Accounting Financial Reporting Standards ("AFRS") for Medium Sized Companies ("MSEs") and Small Sized Companies ("SSEs") may be termed as irregularity but no illegality has been committed by the Appellants, as such, the penalty under section 244 of the Ordinance cannot be imposed.

5. The department's representative argued that:

- a) the Authorized representative of the Appellants failed to submit the notes to the accounts and the Director's Report in terms of section 244 of the Ordinance. Section 244 of the Ordinance states that in case of non-compliance, the company and directors of the company shall be held responsible. The penalty proceedings are civil in nature as only a fine was imposed. The Appellants failed to justify the non-submission of notes to the accounts and Director's Report and, as such, the default was committed knowingly and willfully; and
- b) the Appellants failed to comply with not only the AFRS but also the provisions of section 244 of the Ordinance by not annexing the notes to the Accounts and the Director's Report and, therefore, penalty was imposed for non-compliance of section 244 of the Ordinance.

6. We have heard the parties. Section 244 of the Ordinance is reproduced for ease of reference:

244. Penalty for improper issue, circulation or publication of balance-sheet or profit and loss account. - If any copy of a balance-sheet is issued, circulated or



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published without there being annexed or attached thereto, as the case may be, a copy each of (i) the profit and loss account or income and expenditure account, (ii) any accounts, reports, notes or statements referred therein, (iii) the auditor's report, and (iv) the directors report, the company, and every officer of the company who is knowingly and wilfully in default shall be punishable with fine which may extend to five thousand rupees.

Emphasis Added

- a) section 244 of the Ordinance is clear and unambiguous. The Appellants have not offered any reasonable explanation for not attaching the notes to the Accounts and the Directors' Report. We do not agree with the Appellant's counsel that *mens rea* has to be established in proceedings under section 244 read with section 476 of the Ordinance. *Mens rea* has been defined in Black Laws Dictionary as "*the state of mind that the prosecution, to secure conviction, must prove that a defendant had when committing a crime; criminal intent or recklessness.*" In the instant case the default has been committed under section 244 of the Ordinance, which is civil and not a criminal offence as such *mens rea* need not be established. We quote from the book of *Principle of Statutory Interpretation*, by Justice G.P. Singh (7th edition, Chapter 11, page 653 & 659, published by Wadhwa & Company Nagpur) that; ".....existence of a guilty intent is an essential ingredient of a crime at common law and the principle is expressed in the maxim- *Actus non facit reum nisi mens sit rea*" "penalty imposable under an Act for breach of civil obligation by an adjudicatory proceeding which is not criminal in nature does not attract the rule that *mens rea* is essential before a penalty could be imposed".

Moreover, the word "willful default" has been defined in Oxford Dictionary of Law, Fifth Edition as "*The failure of the person to do what he should do, either intentionally or through recklessness.*" The argument of the Appellants that the default was not "willful" holds no merit. The Appellants did not exercise due skill and care required of them as



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directors of the Company at the time of submission of the accounts. The default, therefore, would be considered as willful; and

- (b) the SCN was issued and the Impugned Order was passed for violation of section 244 of the Ordinance. As regards the requirements of the AFRS are concerned, the SRO 859(I)/2007, dated 21/08/07 has extended the scope of AFRS to MSEs and SSEs, however, this is not the issue at hand. The Appellants failed to comply with the statutory requirement of section 244 of the Ordinance i.e. annex the notes to the Accounts and attach the Director's Report and were rightly proceeded against by the Respondent.

In view of the above, we see no reason to interfere with the Impugned Order.

(Mohammad Asif Arif)
Commissioner (Insurance)

(Imtiaz Haider)
Commissioner (SCD)

Announced on: 03/10/13