



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

BEFORE APPELLATE BENCH NO. I

In the matters of

Appeal No. 45, 46, 47, 48, 49 and 50 of 2014

ANS Capital (Pvt.) Limited

Mr. Aizaz Mansoor Sheikh

Mr. Nadeem Sheikh

Mrs. Hafsa Nadeem

Mr. Muhammad Rehman Sheikh

Mr. Atta Tanseer Sheikh

Directors of Kohat Cement

.....

Appellants

Versus

Director (SMD), Securities and Exchange Commission of Pakistan.....Respondent

Date of hearing

02-04-15

ORDER

Present:

For all the Appellants:

Mr. Rashid Sadiq of RS Corporate Advisory (Pvt.) Limited

For the Respondents:

Mr. Imran Inayat Butt, Director (SMD)

Mr. Muhammad Farooq, Joint Director (SMD)



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1. This order is in Appeal Nos. 45, 46, 47, 48, 49 and 50 of 2014 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 (the "SECP Act") against the orders dated 31-10-2014 (the "Impugned Orders") passed by the Respondent as similar question of law and fact is involved in these appeals.
2. The facts are that Appellant in appeal no. 45 is beneficial owner of more than ten percent equity security of Kohat Cement Company Limited (Issuer Company) and Appellants in appeal nos. 46-50 are directors of the Issuer Company. The Issuer Company is a public listed company. Being directors and beneficial owner of more than ten percent equity in the Issuer Company, the Appellants were required to file returns of beneficial ownership on Form 31 and Form 32 for change in their holding being beneficial ownership within the time stipulated by section 222 of Companies Ordinance, 1984 (Ordinance). However they failed to discharge the said statutory obligation and had not filed returns within the prescribed time hence committed default which attracts the penal consequences as laid in section 224(4) of the Ordinance.
3. Resultantly, the Appellants were served upon with separate show cause notices mentioning therein the beneficial ownership, time and duration of changes in beneficial ownership, time limitation provided by the relevant law for filing of returns in this respect and default of each Appellant. In consequence thereto, the Appellants have submitted their replies and the matters were fixed for personal hearing. Later, dissatisfied with the replies of Appellants, the Respondent has imposed fine of Rs. 25,000/- on Appellant in appeal no. 45 and a fine of Rs. 10,000/- each on Appellants in appeal nos. 46-50 for their default through Impugned Orders.
4. The Appellants have preferred the instant appeals against the Impugned Orders on the following grounds:
 - a. Respondent has failed to appreciate that section 224(4) specifically provides that whoever "knowingly and willfully" fails to comply with the requirement is liable to be fined. The default was not intentional hence was required to be ignored by



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the Respondent. Since the actions of the Appellants were not 'willful', therefore, it does not attract the penal provisions of section 224 of the Ordinance. Reliance was placed on case laws cited at PLD 2011 SC 778, PLD 1959 Karachi 32 and PLD 1985 Federal Shariat Court 126.

- b. In light of the fact that there had been full and complete disclosure of the Appellant's shareholding., it cannot reasonably be concluded that the delay in filing the Form 31/32 was done by the Company deliberately, consciously, permissively, with the specific intent to fail to do something the law requires to be done, without justifiable excuse or without taking any steps to comply with mandatory provisions of law.
- c. The Respondent has also conveniently managed to ignore the fact that the Form 31 & 32 were filed by the Appellant on its own and in compliance of the legal requirements of section 222 and no letter/notice was received from the Commission in this regard. In the covering letter with the Form 31/32 submitted to the Respondent, it was submitted by the Appellant that the delay was unintentional and not deliberate
- d. The penal provision, i.e. Section 224(4) of the Ordinance invoked by the Commission in the SCN and Impugned Order has recently been interpreted by the superior judiciary of Pakistan. It was clarified that since the penal provision is stringent in nature, therefore, the same should be applied in an appropriate manner. In applying such a provision, SECP should always bear 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. It is not sufficient merely on the basis of technical contravention to arbitrarily impose a fine of either in full amount or any other arbitrary chosen figure. (SECP v. First Capital Securities Corporation Limited, PLD 2011 SC 778). Further it was held in Crescent Bolts and Nuts Manufacturing Company v. Registrar, Joint Stock Companies, PLD 1959 Karachi 32 that in considering offences under Company Law in which knowledge and willfulness are necessary ingredients, it is necessary to distinguish between mere forgetfulness and inadvertence on the one hand and deliberate negligence on the other hand.



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- e. The Respondent, SCN and the Impugned Order do not take into account the fact that it has been held in various past decisions of the Commission that the default/contravention under Section 222 and 224 may not be willful if:
- No purchase or sale transactions in the market have been made (In Gharibwal Cement Limited, 19 March 2012; in Crescent Textile Mills Limited, 19 March 2012; in Azgard Nine Limited, 11 August 2011; in Safe Mix Concrete Products Limited, 30 June 2011; Agha Khan Fund for Economic Development S.A., 30 June 2011; in Bestway Cash and Carry Limited U.K.; 30 June 2011)
 - The returns in question have been filed promptly on receipt of letter from the Commission (in Crescent Textile Mills Limited, 22 February 2012; in Shadman Cotton Mills Limited, 11 August 2011; in matter of Agritech Limited, 11 August 2011; on Safe Mix Concrete Products Limited, 30 June 2011; in Descon Oxychem Limited, 30 June 2011; in Bestway Cement Limited; 30 June 2011; in Habib Bank Limited, 30 June 2011; in Agha Khan Fund for Economic Development S.A., 30 June 2011; in Bestway Cash and Carry Limited U.K., 30 June 2011);
 - Returns on Form 31/32 have been filed almost within the stipulated time period earlier;
 - Shares have been sold once but no subsequent sale/purchase transactions have been made (In Diamond Industries Limited, 31 October 2011)
 - Shares have been sold and purchased but the Commission has already accepted the explanation/justification for late filing of the return of beneficial ownership (in Javedan Cement Company Limited, 16 September 2011; in Fazal Cloth Mills Limited, 14 September 2011);

The Appellant has neither made any sale/purchase transactions since the acquisition of beneficial ownership. It is pertinent to mention that as per section 20(6)(c) of the Act, the Commission must achieve uniformity in how it performs its functions and exercises its powers. The Commission is hence obligated to maintain consistency in its decisions, the ratios of the orders of the commission quoted above show that the law has not been applied consistently and different treatment has been meted out in the Appellants' case as compared to the other cases quoted above, in spite of similar and indistinguishable sets and circumstances. The amounts to under, unjust and discriminatory treatment and contravenes the letter and spirit of the scheme envisaged under section 20(6)(c)



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of the Act. That the Respondent is a public functionary deriving authority from a statute, and therefore, is obligated to act justly, fairly, equitably, reasonably, without any element of discrimination and squarely within the parameters of law.

- f. The Appellant is a newly incorporated holding company set up by reputed sponsors. The Appellant is a law abiding citizen and, therefore, it always strives for compliance with the provisions of the Ordinance and other laws. In light of the preceding discussion, it cannot reasonably be concluded that the delay was willful and intentional, without justifiable excuse, so as to bring the Appellant within the ambit of section 222(1)(b) of the Ordinance. The Respondent has failed to determine that the filing of Form 31 was delayed “knowingly” and “willfully”.

5. The Respondent denied the grounds taken by the Appellants and stated that:

- a) The delay and default was intentional and willful. The intention of default can very well be established from the fact that the Commission has written a letter dated 06-01-2014 to three of the Appellants for filing of form 32 for changes in their beneficial ownership. Resultantly, all the Appellants have filed Forms 32 which too was delayed. It was the responsibility of Appellants to comply with the statutory requirements. In case of non-compliance the will-full default will be presumed against the defaulter unless proved otherwise. The Appellant has neither filed Form 31, the first disclosure of beneficial ownership nor Form 32 for thereafter changes in beneficial ownership, within the stipulated time limit which is non-compliance of the provisions of applicable law.
- b) That it is the act and the circumstances surrounding such act, which point towards the intention of a person committing an offence. Facts show that all the transactions were deliberate and intentional and the Appellants were well aware of the eventual results of its actions. The Appellants very well knew the consequences of such transactions and were, therefore, willful.



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- c) In-fact, the Commission asked vide letters dated 06/01/2014, to three directors of the Company namely Mr. Nadeem Atta, Mr. Aizaz Mansoor and Mr. Muhammad Atta Tanseer for filing of Form 32 for changes in their beneficial ownership, detected through BO-MSS Module. The Appellant along with above named directors of the Company also filed the under discussion Form 31 and Form 32. So the claim that there was no letter/notice received from the Commission in this regard is contrary to the facts of the case.
- d) Delay in filing of Form 31/Form 32 is not a technical but a procedural default.
- e) Decisions/orders passed earlier in this regard have been divided into two groups (i) orders passed in the year 2011 and (ii) orders passed in the year 2012

(i) Orders passed in the year 2011:

Powers of Section 224(4) of the Companies Ordinance, 1984 were delegated to Director (Securities Market Division) in 2009. Before exercising the said powers Notices for awareness of beneficial owners of listed companies dated 07/09/2009 and 21/09/2010 were published/ disseminated through newspapers and stock exchanges wherein beneficial owners were asked to file their overdue returns of beneficial ownership without facing legal proceedings. The purpose of this exercise was to provide an opportunity to directors/officers/beneficial owners of listed companies to comply with the regulatory requirement.

Thus, the Securities Market Division started proceedings/actions against the defaults/ contraventions of Section 222 of the Ordinance, in 2011. But, in the year 2011, SMD as a matter of policy, took lenient view and none of the beneficial owner was penalized. The basic purpose of aforesaid Notices published in 2009 and 2010 and lenient view took during the proceedings initiated in 2011 was to create awareness and motivate the beneficial owners for timely compliance of the provisions of Section 222 of the Ordinance. For this purposes, the orders were placed on Commission's website.

Hence, the below-mentioned orders referred by Counsel of Kohat Cement were passed in 2011 when SMD irrespective of intensity of default took lenient view and none of the defaulters was penalized, as a matter of policy.



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Date Order	Issuer/Beneficial Owner
11 August 2011	Azgard Nine Limited
30 June 2011	Safe Mix Concrete Products Limited
30 June 2011	agha Khan Fund for Economic Development S.A
30 June 2011	Bestway Cash and Carry
11 August 2011	Shadman Cotton Mills Limited
30 June 2011	Mix Concrete Products Limited
11 August 2011	Agritech Limited
30 June 2011	Descon Oxychem Limited
30 June 2011	Bestway Cement Limited
31 October 2011	Diamond Industries Limited
16 September 2011	Javedan Cement Company Limited
14 September 2011	Fazal Cloth Mills Limited

(ii) Orders passed in the year 2012

During the year 2012, SMD adopted slightly stringent policy and keeping in view nature of change in beneficial ownership, intensity of default etc. started imposing fine as provided in Section 224(4) of the Ordinance. The comments in the matter of orders (passed in the year 2012) pointed out by Counsel of the Appellants are as under:

Date Order	Issuer/beneficial Owner	Comments
19 March 2012	Gharibwal Cement Limited	On March 19, 2012 orders in respect of two beneficial owners were passed. In one case, where change in beneficial ownership was only due to acquisition of other than right shares warning was issued. While, fine Rs. 20,000 was imposed in other case, where change in beneficial ownership was due to acquisition of other than right shares coupled with another nature of change (sale).
19 March 2012	Crescent Textile Mills Limited,	The beneficial owner was warned because change in beneficial ownership was only due to receipt of bonus shares.
22 February	Crescent Textile Mills	No order under Section 224 was



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2012	Limited	passed against Crescent Textile on 22/02/2012
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Even in the present case lenient view was taken. The below mentioned beneficial owners of Kohat cement Limited along with the Appellants were also issued Show Cause Notices under Section 224 of the ordinance, but no penalty was imposed due to reasons mentioned against each:

Order Date	Beneficial Owner/Issuer	Comments
31/10/2014	Ibrahim Tanseer b/o Kohat Cement Limited	No penalty was imposed, as he retired on 28/06/2013 from the position of Director of the Issuer Company
31/10/2014	Ms. Shahnaz Aziz	No penalty was imposed because she has resigned on 17/02/2014 from the position of directorship of the Issuer

- f) Concerning the plea that the “default was not committed willfully” it is pointed out that the affairs of the Respondent are dealt by professional personnel who are supposed to be fully acquainted with the requirements of the Ordinance and to ensure timely compliance of regulatory and corporate requirements on behalf of the Respondent.
6. We have heard the learned counsel and parties/representatives of the parties with our utmost attention and perused the record very carefully with their assistance.
7. Before advertng to the point of difference between the parties, we would like to mention that the delay in filing of Form 31 and 32 as required by section 222 of the Ordinance within a stipulated time is not denied by the Appellants. However the main emphasis of the Appellants is on the point that this default/delay was not willful as mentioned in section and no sale/purchase transaction was made, therefore, it does not constitute an act which attracts penalty as provided in section 224 of the Ordinance.



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8. As mentioned above one the main point involved in these appeals is with respect to the application of phrase “knowingly and willfully” used in section 224(4) of the Ordinance.

For ease of reference, the relevant part of section 224 of the Ordinance is hereby being reproduced;

“Whoever knowingly and willfully contravenes or otherwise fails to comply with any provision of section 222, section 223 or section 224 shall be liable to a fine which may extend to thirty thousand rupees and in the case of a continuing contravention, non-compliance or default to a further fine which may extend to one thousand rupees for every day after the first during which such contravention, non-compliance or default continues.”

Emphasis added

9. It is important to mention that in the body of appeals, the Appellants have defined the term willful which means an act done with stubborn purpose, but not with malice, as done intentionally, knowingly and purposely as distinct from an act done carelessly, thoughtlessly, heedlessly or inadvertently. We have also perused the judgments provided in this context. The word “willful” can be used interchangeably with the word “intentional”. The intention of a person is a state of mind which is not visible and can only be gathered from the facts and circumstances surrounding that very act.
10. Learned counsel for the Appellants has relied on different judgments and tried to explain that phrase “willful” stands for an act which is done with malice and to achieve certain unlawful goals however no such unlawful or negative aims are available in the present case. We deem it appropriate to differentiate between the meanings of this word when used in different contexts. It has been laid down in judgment cited as 1990 CLC 1008 that “the term as used in different statutes and judicial precedents, means deliberate or intentional and not accidental”. In judgment cited as 1987 MLD 3039, Justice Saeed-uz-Zaman Siddiqui of Sindh High Court has observed while explaining the word willful “when somebody purposely fails to comply with (legal) provisions or intentionally avoids to comply with them, knowing full well that he is duty bound to do so” (Emphasis added)



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11. The above quoted precedent expressly mentions that a legal duty or liability is always required to be discharged by the person and if not complied, the presumption will be that it has done willfully. In fact, if we appreciate the judgment cited PLD 1985 Federal Shariat Court 126, produced before us by the learned counsel for Appellants; we are compelled to observe that this case deals the principles of criminal administration of justice and not applicable to peculiar circumstances of present matters. The other case law cited as PLD 2011 SC 778 is totally on distinguished facts where the question of tenderable gain has been discussed by Honourable Supreme Court of Pakistan.
12. It has also come into our notice during the hearing that upon non-compliance of Appellants, some of them were served with a notice to file the required Form 32 vide letter dated 06-01-2014 which definitely would have come into the knowledge of other Appellants as well however the Appellants have filed the required Forms on 04-03-2014 with an unexplained delay of about 40 days. Furthermore, the Appellants are well conversant with the regulatory and legal requirements and even otherwise, ignorance of law is no excuse.
13. In addition to the discussion above, we have also observed that section 224(4) of the Ordinance does not limit violation by any party to the extent of it being willful or intentional for imposing the penalty, rather it also includes a party who "otherwise fails to comply with" the provisions of sections 222, 223 and 224. This clearly provides that in case of non-compliance of any provision of law as provided therein, simple failure is ample ground to attract the penal provision.
14. The main argument which holds ground is that after acquisition of shares, no sale/purchase transaction was made by the Appellants. In view thereof, change in beneficial ownership of shares has not taken place.
15. The Bench has also observed that the Respondents have taken different actions for the same default in the past. This act tentamounts to discrimination. Law requires equal and fair treatment. Further Section 24A of the General Clauses act requires that fair trial be provided. The Commission should have a uniform approach in exercising powers and functions.



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16. In view of the above, we set aside the penalty imposed in the Impugned Order.

17. Parties to bear their cost.

(**Fida Hussain Samoo**)
Commissioner (Insurance)

(**Tahir Mehmood**)
Commissioner (CLD)

Announced on: **22 MAY 2015**