



SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN

Adjudication Department- I

Adjudication Division

Before

Shahzad Afzal Khan, Director/ Head of Department

In the matter of

Engro Fertilizer Limited

Number and date of show cause notice: CSD/ARN/428/2017-306 dated September 01, 2022

Date of hearings: January 23, 2023

Hearing attended by: Mr. Fahad Dar, G.M. Legal; and
Mr. Imran Ahmed, Chief Financial Officer

Under Section 184 of the Companies Act, 2017 read with Section 479 thereof

This order shall dispose of the proceedings initiated through the Show Cause Notice (the "SCN") dated September 01, 2022 issued under Section 184 of the Companies Act, 2017 (the "Act") read with Section 476 thereof against Engro Fertilizer Limited (the "Company/ Respondent").

2. Brief facts of the case are that news circulated in the social media revealed that the private jet owned by the Company was used for political purposes. The Securities and Exchange Commission of Pakistan (the "Commission"), vide letter dated April 18, 2022, sought explanation about the aforesaid matter and the Company vide its letter dated April 22, 2022 contended that the aircraft was handed over to Princely Jet (Private) Limited (the "Princely") under the operating and maintenance agreement for the purpose of chartering the same to third parties when the aircraft is not in the Company's use and claimed that Princely has violated the terms of agreement by chartering the subject aircraft for use of political purposes without its prior permission.

3. The Commission vide letter dated April 28, 2022 advised the Company to submit the explanation given by Princely for violating the terms of agreement. The Company vide letter dated May 06, 2022 forwarded the reply of Princely which transpires that Princely admitted that the aircraft was chartered without prior permission of the Company and apologized the Company for the said transgression. Princely, however, contended that the aircraft was chartered on a routine charter request that did not have name of the passengers on board and while requesting the Company to condone the lapse, confirmed its availability to explain the oversight to the Commission and undertook to settle penalty, if any, imposed by the Commission.





SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

Adjudication Department - I Adjudication Division

Continuation Sheet - 1 -

4. Keeping in view the aforesaid, the SCN was issued to the Company seeking justification as to why penalty may not be imposed on it for contravening section 184 of the Act. In response of the SCN, the Company vide letter dated September 13, 2022 stated as under (relevant extracts):

"1. In this regard, we would like to refer to:

- a. Our response letter dated April 22, 2022 (Letter I), in response to the Commission's letter dated April 18, 2022; and
- b. our letter to the SECP dated May 06, 2022 (Letter II), in response to the Commission's letter dated April 28, 2022;

2. At the outset we would like to impress upon the Commission that Engro Fertilizers Limited ("EFERT" or "Company") has maintained an exemplary compliance record in the past and continues to take its responsibilities and duties to its shareholders and its regulators very seriously. The Company has been selected by the Pakistan Stock Exchange (the "PSX") as part of the top twenty-five companies in Pakistan in the last 5 years, securing 5th position in the top twenty-five companies awards in 2021, 6th position in top twenty-five companies award in 2019; 17th position in the top twenty-five companies awards in 2018; and 10th position in the top twenty-five companies award in 2017.

3. As explained in our Letter I, EFERT owns two aircrafts, both of which are operated and maintained by Princely Jets (Pvt.) Limited under the O&M agreements dated June 24, 2020 and February 24, 2022 (the "Agreements"). Under the terms of these Agreements, inter alia, Princely is allowed to charter aircrafts to third parties, when these aircrafts are not in the Company's use, provided Princely seeks EFERT's prior written approval. Furthermore, as Princely explained in their letter to EFERT dated April 25, 2022 ("Princely's Letter"), the purpose of these charters are to generate revenue and defray the cost to EFERT as is common practice in the private jet industry. Hence, the third party charters are commercial transactions in the ordinary course of business and commonplace in this line of business (emphasis supplied).

4. We would like to emphasize that as a contractual arrangement, the Company has an arrangement under the Agreements with Princely to seek the Company's prior permission before chartering out the aircrafts to ensure that: (a) the Company does not need the aircrafts for its own use at the time of the third-party charter, and (b) to allow the Company to have prior knowledge of the passengers, which is prudent business practice. As we have mentioned in our Letters, Princely failed to seek our permission in the instant case as Princely clarified in Princely's Letter, explaining that the booking was made through a local travel company, who did not forward the names of the Passengers at the time of booking, leading to the procedural booking error at their end.

5. We respectfully submit that while Princely breached a contractual term of their Agreement with EFERT in not seeking EFERT's prior approval for the charter, throughout the Company



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

Adjudication Department - I Adjudication Division

Continuation Sheet - 2 -

has remained in compliance of Section 184 of the 2017 Act, since chartering of the aircraft by Princely to a political party/ person was done for a fare, as a commercial transaction in the ordinary course of business. In this regard, in accordance with the terms of the Agreements, EFERT received a credit note of almost PKR 2.5 Million from Princely for the charter-party transaction.

6. *We further submit that Section 184 of the 2017 Act prohibits companies from making political contributions, either in the form of funds or in the form of (free) use/ utilization of company property and assets by political parties/persons. In this particular instance, a commercial transaction was entered into by Princely (albeit without our knowledge) in the ordinary course of business for which Princely charges the passengers a fare for chartering the aircraft, which funds were then used to defray the costs to the Company in accordance with the terms of the Agreements. Hence the respective charter-party Transaction was purely a business transaction and by no means a political contribution, and therefore, akin to a political person buying a ticket and travelling on a commercial airliner (such as PIA, Air Blue etc.).*
7. *Accordingly, because EFERT neither contributed funds nor assets towards any political party or person and the Transaction was a commercial transaction in the normal course of business, we respectfully submit that there has been no violation of Section 184 of the 2017 Act. Given that the Company has not violated the provisions under Section 184 of the 2017 Act, we entreat the Commission to kindly not impose any penalty, as it would be unjustified and unfair to EFERT and mar our untainted compliance record.*
8. *We assure the Commission that we will be extra vigilant going forward and impose and enforce strict conditions on Princely re the charter-party arrangements vis-à-vis our aircrafts with Princely, which Princely has promised. Hence, we would beseech the Commission for its understanding and to kindly accept our explanation and close this matter at the SECP's end satisfactorily, hence maintaining the Company's compliance record.*

We thank the Commission and look forward to a favorable response in relation to the matter."

5. In order to provide opportunity of personal representation, hearing in the matter was fixed for December 12, 2022 that was adjourned on the request of the Respondent. Subsequently hearing was fixed on January 23, 2023 wherein Mr. Imran Ahmed, Chief Financial Officer and Mr. Fahad Dar, G.M. Legal appeared before me on behalf of the Respondent as its Authorized Representatives (the "Representatives") and stated that:

- i) response to SCN dated September 13, 2022 is reiterated;
- ii) we have two airplanes and have entered into an O&M agreement with Princely Jets whereby Princely Jets charter those planes after seeking written approval of EFERT;
- iii) in the instant case Princely Jets did not take approval and it has also admitted its contravention of the agreement;
- iv) EFERT was not aware of the party to whom the jet was chartered;



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

Adjudication Department - I Adjudication Division

Continuation Sheet - 3 -

- v) The plane was chartered on fare basis and due amount was charged and received making it a commercial transaction;
- vi) It was a similar transaction as other commercial airlines like PIA, Air Blue, etc. that are used by political persons/ groups for traveling;
- vii) Similarly hotels like Marriott also book their premises for events organized by political parties and charge rent and in case of cement companies, will sale of cement bags to political persons is considered utilization of assets for political purposes;
- viii) Intent of the laws appears that the assets should not be allowed to used for election campaigns by the political persons/ parties;
- ix) Memorandum of Association of EFERT also allows it to purchase aircrafts and to rent them for revenue purposes;
- x) Even the instant charter was not a free utilization of its asset but on fare basis and hence a normal course of business;
- xi) EFERT never had any such intention to use or let its assets used for political purposes; and
- xii) ensured to increase controls over Princely for strict compliance of law in future.

6. The relevant provisions of section 184 of the Act provides that:

"184. Prohibition regarding making of political contributions.- (1) Notwithstanding anything contained in this Act, a company shall not contribute any amount or allow utilization of its assets----

- (a) to any political party; or
- (b) for any political purpose to any individual or body.

(2) If a company contravenes the provisions of sub-section (1), then----

- a. the company shall be liable to a penalty of level 2 on the standard scale."

7. In light of the aforesaid legal provisions, I have gone through the facts of the case, the written submissions, the record duly placed and considered the arguments made during the hearing, and state that:

- To unravel section 184 of the Act, it starts from the provisions of non obstante clause which clearly indicates the intent of the law makers that section 184 shall prevail despite anything to the contrary in the provision contained in the Act. Section 184(1) of the Act categorically directs all the companies to desist from contributing any amount or allowing of its assets to any political party or for any political purpose to any individual or body. Neither section 184 nor other provisions of the Act forbids the companies from entering into any commercial transaction or agreement with thirty parties. While entering into such commercial transaction or agreement, every company has to ensure that there shall not be any provision in the agreement which is in contradiction with the provisions of the Act or any other law for the time being enforce.





SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

Adjudication Department - I Adjudication Division

Continuation Sheet - 4 -

Further, even if there are provisions in the agreement which are in compliance with the law *vis a vis* the Act, the company has to ensure that the third party shall not violate the provisions of the Act or any law administered by the Commission pursuant to the agreement entered into by such company and the third party. If the third party contravenes any provisions of the Act or the rules and regulations made thereunder, it is the company or its directors as the case may be who shall be held liable before the Commission for any act or omission made by such third party.

- In the instant matter, it is an admitted fact that the ownership of the aircraft belongs to the Company which may be treated as an asset of the Company. It is also confirmed that the Company is legally allowed to enter into commercial agreement with any third party. Having said that the Company rightly entered into O&M agreement with Princely, however, it was the Company who had to ensure that Princely shall abide by the provisions the Agreement. The requirements of Section 184 of the Act are explicit which prohibit the companies for contribution of any amount or allow utilization of their assets to any political party and for any political purposes to any individual or body without providing any exemption thereunder. Hence, the assertion of the Respondent is not cogent and tenable. Moreover, I would like to point out that violation of O&M agreement with Princely does not absolve the Company from its responsibility relating to utilization of its assets. The Company is indebted to put in place adequate controls mechanism to enable it to remain aware and vigilant of the utilization of its assets i.e. airplanes by Princely; so that the Company comply with the provisions of Section 184 of the Act in letter and spirit.
- The law does not bifurcate prohibition relating to contribution of amount and utilization of assets on the basis of allowing free utilization or charging fee for the same, hence the contention of the company that the fare was charged and plane was not chartered for free does not hold merit;
- The stance of the Company that the purchasing and chartering of aircrafts is allowed under its Memorandum of Association (MOA), therefore, chartering of its aircraft to a political person is similar to the business of any (i) commercial airliner like PIA or Air Blue etc., (ii) cement companies and (iii) hotels like Marriot who allows political persons to (i) travel by purchasing their tickets, (ii) purchase cements bags manufactured by them and (iii) hold meetings or events by reserving their premises, respectively and charge accordingly, is not acceptable. In this regard, it is noted that the commercial airlines, cements companies and hotels are offering these services in accordance with their principle line of business however as per the MOA, the principle activity of the Company is manufacturing, purchasing and marketing of fertilizers, seeds and pesticides. Hence contribution of any amount or allowing utilization of its assets to any political party and for any political purposes to any individual or body





SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

Adjudication Department - I
Adjudication Division

Continuation Sheet - 5 -

is in contravention with the provisions of Section 184 of the Act and stance of the Respondent does not hold merit.

8. In view of the foregoing, I am of the considered view that the Respondent has contravened Section 184 of the Act and has also admitted said contravention, therefore, is liable for penalty under Section 184 (2) (a) of the Act read with Section 479 thereof. I have duly considered that the Company has assured to be extra vigilant going forward and impose and enforce strict conditions on Princely regarding charter party arrangements. In view of the foregoing, without prejudice to legal action(s) which may be taken under section 184(2)(b), I, in exercise of power in terms of section 184 (2)(a) of the Act, hereby conclude the proceedings initiated through the SCN by imposing a penalty of Rs. 500,000/- (Rupees five hundred thousand only) on the Respondent.

9. The Respondent is hereby, directed to deposit the aforesaid penalty in the designated bank account maintained in the name of the Commission with MCB Bank Limited within thirty (30) days from the date of this Order and furnish a receipted bank challan to the Commission forthwith. In case of failure to deposit the penalty, the proceedings under Section 485 of the Act will be initiated for recovery of the penalty.

10. Nothing in this Order may be deemed to prejudice the operation of any provision of the Act providing for imposition of penalties in respect of any default, omission, violation of the Act.

(Shahzad Afzal Khan)
Director/ HOD
Adjudication Department-I

Announced:

Dated: April 07, 2023
Islamabad