

Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. I

In the matter of

Appeal No. 46 of 2011

Ruhail Muhammad

M/s. Engro corporation (Formerly Engro chemical Limited) Appellant

Versus

Executive Director (SMD)

.... Respondent

ORDER

Date of Hearing

27/12/13

Present

Appellant

Mr. Ruhail Muhammad, Chief Accountant

For the Respondent

Mr. Muhammad Farooq (Joint Director, SMD)

Appellate Bench No. I

Appeal No. 46 of 2011

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1. This order is in appeal No. 46 of 2011 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the order dated 18/03/11 (the "Impugned Order") passed by the Respondent.
2. Brief facts of the case are that it was observed from the returns of beneficial ownership furnished by the Appellant under section 222 of the Companies Ordinance, 1984 (the "Ordinance") that he has made the following purchase and sale transactions, within a period of less than six months:-

Date	Nature of Transaction	No. of Shares	Rate per Share (Rs.)
08/05/2008	Sale	29,450	330.00
09/05/2008	Purchase	29,450	330.00
06/08/2008	Purchase	15,000	188.20

On account of the aforementioned transactions, the Appellant made gain of Rs. 2,127,000/- (Rupees two million one hundred twenty-seven thousand only), computed in the manner prescribed in rule 16 of the Companies (General Provisions and Forms) Rules, 1985 (the "Rules"). In the instant case, neither the matter of accrual of the aforesaid gain was reported by the Appellant in Part-D of the prescribed returns of beneficial ownership filed by him with this Commission for the aforementioned transactions, nor its tendering or recovery was reported to the Commission, as provided in section 224 of the Ordinance. The Appellant was, therefore, intimated vide letter dated 12/11/09 that the aforementioned liability accrued under section 224(1) of the Ordinance is apparently still outstanding and the same may now be discharged by tendering aforementioned amount of gain in favour of the Commission. The Appellant responded to the aforesaid matter on 18/11/09 and stated that section 222-224 of the Ordinance as well as Rule 16 of the Rules are designed to penalize trading gain (made within 6 months) but no such gain has been made by him. The plea of the Appellant was examined in the light of



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provisions of section 224 of the Ordinance and rule 16 of the Rules and was considered to be unsatisfactory.

3. Show Cause Notice dated 18/03/10 ("SCN") was issued to the Appellant to explain as to why action should not be taken against him under section 224(2) of the Ordinance and the personal hearing in the matter was fixed on 15/04/10. The Appellant was directed to tender Rupees 2,127,000/- (Rupees two million one hundred twenty-seven thousand only) as provided in Section 224(2) of the Ordinance.
4. The Appellant preferred the instant appeal against the Impugned Order. The Appellant's representative argued that:
 - a) the objective of section 224 of the Ordinance is to prevent the insiders from benefitting from the gains and it was held in the matter of *The Securities and Exchange Commission of Pakistan through Commissioner versus First Capital Securities Corporation Limited and another* in Civil Appeal No. 946/2005 cited at *PLD 2011 Supreme Court 778*, that "...the gains will remain under all circumstances the property of the company and SECP has no right or entitlement thereto..."; and
 - b) in the instant case, sale transaction dated 08/05/08 of 29,450 shares and the purchase transaction dated 09/05/08 of 29,450 shares were at the same rate per share. Furthermore, these transactions were entered into exclusively for tax benefit reasons. The purchase transaction dated 06/08/08 of 15,000 shares is held by the Appellant till date and no gain has been made with respect to the same. The Appellant, therefore, has not made any monetary gain from any of the above-mentioned transactions and section 224 of the Ordinance should not apply.

5. The department's representative argued that

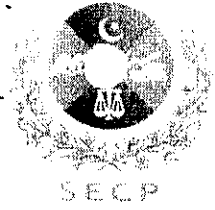


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- a) section 224 of the Ordinance lays two prerequisites for accrual of tenderable gain i.e. the listed securities involved in the transactions must be beneficially owned by the person and the transactions must be made within a period of less than six months. In the instant case, both conditions laid down in section 224 of the Ordinance for accrual of tenderable gain have been met. In light of Supreme Court Judgment of *The Securities and Exchange Commission of Pakistan through Commissioner versus First Capital Securities Corporation Limited and another in Civil Appeal No. 946/2005* cited at *PLD 2011 Supreme Court 778*, the gains should now vest in the Company; and
- b) the securities of the same class and of the same listed company are interchangeable/fungible. This concept has explicitly been expressed in Rule 16(1)(b) of the Rules, which states that, “...*the purchases and sales shall be matched as aforesaid so long as the securities involved in the purchase and sale are of the same class and of the same listed company and for this purpose the shares shall be deemed as fungibles...*” In the instant case, the Appellant has sold 29,450 shares on 08/05/08 at the rate of Rs. 330/- per share and later on made two purchase transactions, within the period of less than six months of the said sale at the rate ranging from Rs. 188,20 to Rs.330 per share. Since the transactions have been made in the same class of the shares as well within the period of less than six months, as such, the instant case falls within the ambit of section 224 of the Ordinance.
6. We have heard the parties. Section 224 of the Ordinance is reproduced for ease of reference:

224. Trading by director, officers and principal shareholders. - (1) Where any director, chief executive, managing agent, chief accountant, secretary or auditor of a listed company or any person who is directly or indirectly the beneficial owner of more than ten per cent of its listed equity securities makes any gain by the purchase and sale, or the sale and purchase, of any such security, within a

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period of less than six months, such director, chief executive, managing agent, chief accountant, secretary or auditor or person who is beneficial owner shall make a report and tender the amount of such gain to the company and simultaneously send an intimation to this effect to the registrar and the Commission:

Provided that nothing in this sub-section shall apply to a security acquired in good faith in satisfaction of debt previously contracted.

(2) Where a director, chief executive, managing agent, chief accountant, secretary, auditor or person who is beneficial owner as aforesaid fails or neglects to tender, or the company fails to recover, any such gain as is mentioned in sub-section (1) within a period of six months after its accrual, or within sixty days of a demand therefor, whichever is later, such gain shall vest in the [Commission] and unless such gain is deposited in the prescribed account, the Commission may direct recovery of the same as an arrear of land revenue.

(3) For the purposes of sections 220 to 224, the term "auditor of the company" shall, where such auditor is a firm, include all partners of such firm.

Explanation: (a) For the purposes of this section and section 222, beneficial ownership of securities of any person shall be deemed to include the securities beneficially owned, held or controlled by him or his spouse or by any of his dependent lineal ascendants or descendants not being himself or herself a person who is required to furnish a return under section 222, and

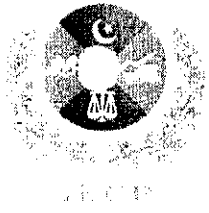
(i) in the case where such person is a partner in a firm, shall be deemed to include the securities beneficially held by such firm; and

(ii) in the case where such person is a shareholder in a private company, shall be deemed to include the securities beneficially held by such company:

Provided that for the purposes of sub-section (1) the gain which is required to be tendered to the company by such person shall be an amount bearing to the total amount of the gain made, as the case may be, by the firm or private company the same proportion as his relative interest bears to the total interest in such firm or private company.

(b) For the purposes of this Explanation, "control", in relation to securities means the power to exercise a controlling influence over the voting power attached thereto.

(4) Whoever knowingly and wilfully 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, noncompliance or default to a further fine which may extend to



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one thousand rupees for every day after the first during which such contravention, non-compliance or default continues.

Emphasis Added

- a) section 224 of the Ordinance applies to specified categories of persons, namely, a director, chief executive, managing agent, chief accountant, secretary, or auditor of a listed company or a person who is directly or indirectly, the beneficial owner of not less than 10% shares of its listed equitable securities. The section is applicable when there is sale or purchase of any shares of the company in question within a period of less than 6 months by the person making the gain and, in the event of such a sale or purchase taking place, the person making the gain is obligated to tender the amount of gain, if any, made by him to the company under intimation to the Registrar and the Commission. In the matter of *The Securities and Exchange Commission of Pakistan through Commissioner versus First Capital Securities Corporation Limited and another in Civil Appeal No. 946/2005 cited at PLD 2011 Supreme Court 778*, it was held that in the event the gains were not tendered to the Company within a period of six months or the fact of gain was not brought in the notice of the Company and the Commission, the gains at all times shall remain the property of the Company. It was held that , “...the entitlement of SECP to recover the amount in question from the company would be treated as being in the nature of an enforcement mechanism to ensure that the wrongful gains do not remain with the person who has violated the section but are transferred to or for the benefit of the Company...” In view of the above judgment, the gain, if any, shall not be tenderable to the Commission. It is pertinent to note, however, that the Commission has ample powers under section 224(4) of the Ordinance to take adverse action against any person found in contravention of section 224 of the Ordinance; and

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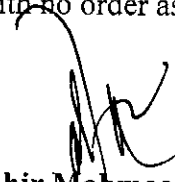


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- b) we have heard the arguments of the Appellant and the Respondent. The aforementioned para of the judgment has spelled out the purpose of section 224 of the Ordinance. The transactions were done in the ordinary course of business and nothing in the transactions suggest that the Appellant had entered into an unjust or inequitable transaction or has acted in a manner which is in violation of the Appellant's duties and obligations to the Issuer as stated in section 224(1) of the Ordinance. Moreover, in the instant case, no monetary gain was made by the Appellant.

In view of the foregoing, we set the Impugned order aside with no order as to cost.


(Zafar Abdullah)
Commissioner (SMD)


(Tahir Mahmood)
Chairman

Announced on: 03/10/14