



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. I

In the matter of

Appeal No. 14 of 2010

Hashoo Holdings (Pvt.) Limited Appellant

Versus

Executive Director (SMD)
Securities and Exchange Commission of Pakistan Respondent

ORDER

Date of Hearing 27/12/13

Present

For the Appellant:

Mr. Furkan Ali (Advocate High Court)

For the Respondent: (through video conference)

Mr. Muhammad Farooq (Joint Director, SMD)



Securities and Exchange Commission of Pakistan

1. This order is in appeal No. 14 of 2010 filed under section 33 of the Securities and Exchange Commission of Pakistan (the “Commission”) Act, 1997 against the order dated 09/02/10 (the “Impugned Order”) passed by the Respondent.
2. Hashoo Holdings (Pvt.) Ltd (the “Appellant”) made purchase and sale transactions of shares of Pakistan Services Limited (the “Issuer Company”) as holder of more than ten percent shares of the Issuer Company. The transactions were made within the period of less than six months.

Sr. No.	Nature of Transaction	Date of Transaction	No. of Shares	Rate per Share (Rs.)
1	Purchase	25.08.2003	800,000	110.00
2	Purchase	16.09.2003	1,377,200	42.628
3	Sale	26.12.2003	1,377,200	42.628
4	Sale	19.01.2004	2,400,000	129.40

On account of the aforementioned transactions, the Appellant made gain of Rs. 135,019,644 computed in the manner prescribed in rule 16 of the Companies (General Provisions and Forms) Rules, 1985 (the “Rules”). The Appellant failed to make a report and tender the amount of such gain to the Issuer Company and failed to send an intimation to that effect to the Registrar of Companies and the Commission as required under section 224 of the Companies Ordinance, 1984 (the “Ordinance”). Section 224 of the Ordinance further provides that where a person who is beneficial owner fails or neglects to tender or the company fails to recover, any such gain within a period of six months after its accrual, or within sixty days of a demand thereof, 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. The aforementioned matter was first raised by the Commission vide letter dated 20/10/04 and the



Securities and Exchange Commission of Pakistan

Appellant was directed to explain the reasons on the basis of which the gain had not been tendered to the Issuer Company. The Appellant through their legal counsel submitted their response vide letter dated 08/11/04 and 09/12/04. The Respondent vide their letter dated 27/12/05 requested the Appellant's legal counsel for further documents in support of their plea. The Appellant's legal counsel vide their letter dated 09/01/06 disputed the Respondent's findings and the Respondent in response to their letter dated 09/05/06 requested for further documents. The Appellant's counsel submitted their response vide their letter dated 24/05/06 and the Respondent found the response of the Appellant unsatisfactory.

3. Show Cause Notice dated 17/07/09 ("SCN") under section 224(2) of the Ordinance was issued to the Appellant and hearing in the matter was held on 30/07/09. The Respondent, dissatisfied with the response of the Appellant, passed the Impugned Order and directed the Appellant to deposit the amount of gain of Rs. 135,019,644 with the Commission.
4. The Appellant preferred appeal against the Impugned Order. The Appellant's counsel argued that:
 - a) it was held by the Supreme Court of Pakistan 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..." In the instant case, the Impugned Order has become a nullity in light of the aforementioned judgment as the gains are no longer tenderable to the Commission; and

Appellate Bench No.1

Appeal No. 14 of 2010



Securities and Exchange Commission of Pakistan

- b) the transaction of purchase of 800,000 shares of the Issuer Company from Associated Builders (Private) Limited (“ABL”) was merely a transfer of shares from one group company to another. There was no effective transfer of ownership and thus no ‘purchase’ of the kind envisaged by section 224 of the Ordinance. The sale of 2,400,000 shares from the Appellant to ABL was a strategic move to reposition shares within the same group of companies. Furthermore, the 800,000 shares purchased on 25/08/03 were never part of the 2,400,000 shares allegedly sold on 19/01/04. The transactions, therefore, did not attract the provisions of section 224 of the Ordinance, as such, the Appellant is entitled to keep the gains.

The transaction of purchase of 1,377,200 shares of the Issuer Company from the Commonwealth Development Corporation (“CDC”) were made in good faith in satisfaction of a debt previously contracted under the Loan and Share subscription agreement and Project Funds and Share Retention Agreement dated 23/09/93 and were purchased from CDC as part of a buy back liability which had been negotiated between CDC and Mr. Sadruddin Hashwani. The transaction, in the light of the proviso given in section 224(1) of the Ordinance is exempted from the provisions of section 224 of the Ordinance.

The transaction of sale of 1,377,200 shares of Issuer Company to Bagh-e-Korangi (Private) Limited (“BKL”) was in fact repositioning of shares from one group company to another. There was no effective transfer of ownership and thus no ‘sale’ of the kind envisaged by section 224 of the Ordinance.

5. The department’s representative argued that:



Securities and Exchange Commission of Pakistan

- 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 the 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 vest in the Issuer Company and the amount calculated in accordance with rule 16 of the Rules should be paid to the Issuer Company; and
- b) the transactions were not made in good faith and attract the provisions of section 224 of the Ordinance. As regards the transaction of 800,000 shares purchased on 25/08/03, it is stated that securities are fungible and due to the fungibility of the securities, section 224 of the Ordinance and Rule 16 of the Rules do not allow any distinction between the securities newly purchased and previously held. In the instant case 800,000 shares purchased on 25/08/03 and 2,400,000 sold on 19/01/04 are of the same class; are of the same listed company and both the purchase and sale transactions fall within the period of six months, as such, the transactions fall under section 224 of the Ordinance.

Secondly, it is not acceptable that the purchase of 1,377,200 shares of the Issuer Company from CDC, by Hashoo Holdings, was a purchase made in good faith in satisfaction of a previously contracted debt, because the debt was owed to CDC by the Issuer Company and not by the Appellant. The Appellants had not pointed out any provision of the CDC documents which



Securities and Exchange Commission of Pakistan

obliged any of party of the Agreements to re-purchase the shares other than section 4.2 of the Project Funds and Share Retention Agreement which did not come into effect during the term of the Agreement. Sadruddin Hashwani Group always maintained its holding at 55% or above in the Issuer Company as confirmed by representative of the Appellant in its letter dated 24/05/06.

As regards the sale of 1,377,200 shares of Issuer Company to BKL, it is unacceptable that the beneficial ownership of the shares remained the same throughout and the transactions were merely a repositioning of shares within the Sadruddin Hashwani Group which did not have an impact on the beneficial ownership of shares. It is pertinent to note that if there was no change in beneficial ownership of the shares in question, then there was no need to effect transactions, making and receiving of payment by the parties to the transactions and even involvement of broker for completion of cycle of the transactions. Moreover, there is no proviso under section 224 of the Ordinance which provides for exemption of inter-group transactions from the applicability of the said section. The plea, therefore, that the transactions made with group-companies do not attract provisions of section 224 of the Ordinance is without merit.

6. We have heard the parties. Section 224 of the Ordinance is reproduced for ease of reference:

Section 224 of the Companies Ordinance, 1984

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 period of less than six months, such director, chief



Securities and Exchange Commission of Pakistan

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.

Appellate Bench No 1

Appeal No. 14 of 2010

Page 7 of 9



Securities and Exchange Commission of Pakistan

(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 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. 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. Further, in terms of section 224(2) of the Ordinance, such gains if not tendered to the Company within a period of six months after the accrual, shall vest in 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 are not tendered to the Company within a period of six months or the fact of the 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

Appellate Bench No.1

Appeal No. 14 of 2010

Page 8 of 9

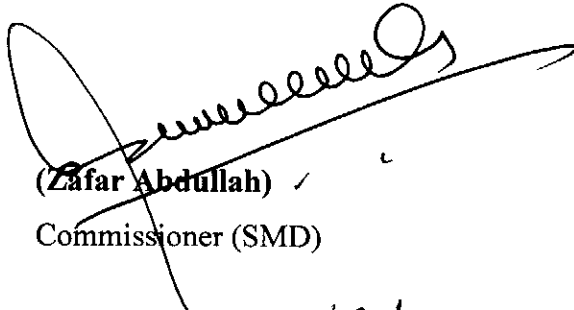


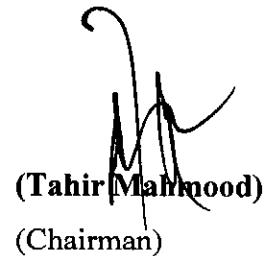
Securities and Exchange Commission of Pakistan

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 punitive action against any person found in contravention of section 224 of the Ordinance; and

- b) we have perused the arguments of the Appellant and the Respondent stated in para 4(b) and 5(b) respectively. The question of whether the transactions are bona fide or not have to be decided on the threshold provided in the judgment. However, in the instant case it is difficult to establish whether the transactions were bona fide or not. The aforementioned para of the judgment mentioned in paragraph 6(a) above has spelled out the purpose of section 224 of the Ordinance which states that that the gains made shall at all times remain the property of the Company and SECP has no entitlement thereto. In the instant case, the transactions were done in the ordinary course of business; however, any gains made by the Appellant shall vest in the Issuer Company.

In view of the above, the Impugned Order is set aside. The gains shall be transferred to the Issuer Company.


(Zafar Abdullah)
Commissioner (SMD)


(Tahir Mahmood)
(Chairman)

Announced on: 01/12/14