



# Securities and Exchange Commission of Pakistan

## BEFORE APPELLATE BENCH NO. I

In the matter of

Appeal No. 72 of 2009

Sulaiman Ahmed Saeed Al Hoqani ..... Appellant

Versus

Executive Director (SMD) ..... Respondent

### ORDER

Date of Hearing 27/12/13

#### Present:

#### For the Appellant:

1. Mr. Iqbal L. Bawaney, Advocate Supreme Court
2. Mr. Abid Raza (Representative of Sulaiman Hoqani)
3. Mr. Tariq Qureshi, Advocate

#### For the Respondent

Mr. Muhammad Farooq (Joint Director, SMD)



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SECP

1. This order is in appeal No. 72 of 2009 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the order dated 17/11/09 (the "Impugned Order") passed by the Respondent.
2. The returns of beneficial ownership filed by Mr. Sulaiman Ahmed Saeed Al-Hoqani (the "Appellant") with the office of the Respondent from 01/10/07 to 13/05/08 showed that the Appellant had made the following purchase and sale transactions as a director of the World Call Telecom Limited ("Issuer Company") within the period of less than six months:

Serial No.	Date	Nature of Transaction	No. of Shares	Rate per Share (Rs.)
1	21/6/2006	Purchase	50,000	8.60
2	26/6/2006	Purchase	5,000,000	10.00
3	28/6/2006	Purchase	50,000	8.63
4	04/7/2006	Purchase	50,000	9.14
5	02/10/2006	Sale	975,000	12.01
6	06/10/2006	Sale	250,000	12.25
7	10/11/2006	Purchase	590,000	9.94
8	20/11/2006	Purchase	228,500	9.99
9	21/11/2006	Purchase	374,000	10.01
10	22/11/2006	Purchase	150,000	9.89
11	04/12/2006	Sale	413,500	10.74
12	05/12/2006	Sale	961,500	10.94
13	19/12/2006	Purchase	879,000	9.39
14	21/12/2006	Purchase	85,500	10.00
15	22/12/2006	Purchase	27,000	10.00
16	27/12/2006	Purchase	1,622,000	10.03
17	10/01/2007	Purchase	602,000	9.99
18	11/01/2007	Purchase	174,500	10.01
19	12/01/2007	Purchase	427,000	9.89
20	19/3/2007	Sale	900,000	11.40
21	18/5/2007	Sale	500,000	16.54
22	29/5/2007	Sale	500,000	18.03
23	04/6/2007	Sale	500,000	17.09
24	07/6/2007	Sale	250,000	16.94



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25	12/06/2007	Sale	250,000	17.45
26	14/6/2007	Sale	300,000	17.52
27	15/6/2007	Sale	200,000	16.95
28	28/6/2007	Sale	100,000	17.53
*29	18/07/2007	Sale	551,500	19.22
*30	18/07/2007	Sale	1,000,000	20.30
*31	23/07/2007	Sale	150,000	20.72
*32	07/4/2008	Sale	5,000,000	17.50
*33	08/4/2008	Sale	15,000,000	17.50
*34	10/4/2008	Sale	71,500,000	17.31
*35	02/5/2008	Sale	196,000,000	25.00

*\* Sale Transactions (from serial No. 29 to 35) have not been taken for calculation of under reference amount of tenderable gain, as no corresponding purchase transaction was available.*

The Appellant on account of the aforementioned transactions made gain of Rs. 24,621,355/- (Rupees twenty-four million six hundred twenty-one thousand three hundred and fifty-five only), computed in the manner prescribed in Rule 16 of the Companies (General Provisions and Forms) Rules, 1985 (the "Rules"). Section 224 of the Ordinance provides that where a director of listed equity securities makes any gain by purchase and sale, or the sale and purchase, of any such security within a period of less than six months, such person is required to make a report and tender the amount of such gain to the company and simultaneously send an intimation to that effect to the Registrar of Companies and the Commission. Section 224 further provides that where such person 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, the gain shall vest in the Commission.

3. Show cause notice dated 06/08/09 ("SCN") was issued to the Appellant under section 224(2) of the Ordinance, calling upon him to show cause as to why action for recovery of Rs. 24,621,355/- (Rupees twenty-four million six



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hundred twenty-one thousand three hundred and fifty-five only) may not be initiated against the Appellant. The Appellant filed reply to the SCN and despite several opportunities afforded to him to appear and present the case before the Respondent, failed to appear. The Respondent dissatisfied with the response of the Appellant given in the written communication, passed an ex-parte order and directed the Appellant to submit the tenderable gain of Rs. 24,621,355/- (Rupees twenty-four million six hundred twenty-one thousand three hundred and fifty-five only) in the favour of the Commission.

4. The Appellant dissatisfied with the Impugned Order has preferred the instant appeal. The Appellant's counsel argued that

a) reliance is placed on the judgment of 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 77*, wherein, it was held that, "...the gains will remain under all circumstances the property of the company and SECP has no right or entitlement thereto..."; and

b) reference was also made to the above-mentioned Supreme Court Judgment which provides that the gains should be surrendered to the Company if, "...the person in question was privy to inside information and, taking advantage of the same, obtained a gain to which accordingly he was morally not entitled and thus was required to surrender to the Company. In other words, there is a presumption, which is tacit, to the effect that the person has done something which is unjust or inequitable, or in violation of his duties and obligations to the company as a person failing within one of the prohibited categories, and thus should be compelled to surrender



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*his gains to the company...*” In the instant case, the transactions by the Appellant were bona fide and no monetary gains were made.

5. The department’s representative argued that

- 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 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 gain has been calculated in the manner prescribed in Rule 16 of the Rules, Rule 16(2) of the Rules exempts receipt of bonus shares from constituting of purchase transaction, therefore, the bonus shares have not been taken as purchase transactions for the purpose of calculation of tenderable gain. The Rule does not exempt, however, the sale from the application of provisions of section 224 of the Ordinance. More specifically 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 sale transactions made after receipt of bonus shares do not

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enjoy exemption from the application of 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 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*

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(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:

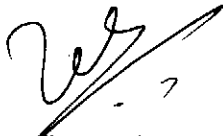
*Provided that for the purposes of sub-section (1) the gain which is required to be tendered to the company by such person shall be an amount bearing to the total amount of the gain made, as the case may be, by the firm or private company the same proportion as his relative interest bears to the total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

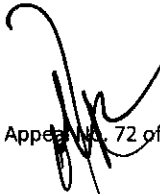
*(b) For the purposes of this Explanation, "control", in relation to securities means the power to exercise a controlling influence over the voting power attached thereto.*

*(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, 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

- 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 a listed company. 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 beneficial owner and, in the event of such a sale or purchase taking place, the beneficial owner is obligated to tender the amount of gain, if any, made by him to the company under intimation to the Registrar and the Securities and Exchange Commission 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*, 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

  
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the notice of the Company and the Commission, the gains at all times remained 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

- b) we have perused the arguments of the Appellants and the Respondents stated in para 4(b) and 5(b) respectively. The question of whether the transactions were bona fide or not have to be decided on the threshold of the Supreme Court judgment. In the instant case, the Appellant has made gains and it is difficult to establish whether or not the transactions were bonafide. Therefore, leaving the argument of the bona fide of the transactions aside, the aforementioned para of the Supreme Court judgment mentioned in paragraph 6(a) 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 the Commission has no entitlement thereto. We are of the view that 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.





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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