



# Securities and Exchange Commission of Pakistan

## BEFORE APPELLATE BENCH NO. I

In the matter of

Appeal No. 36 of 2012

Nishat Mills Limited

...Appellant

Versus

Director/HOD (MSCID)

Securities and Exchange Commission of Pakistan

...Respondent

## ORDER

Date of hearing

01/01/15

### Present:

For the Appellant:

Mr. Rashid Sadiq

Department representatives:

Mr. Muhammad Farooq, Joint Director

Mr. Nazim Ali, Assistant Director



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1. This order shall dispose of appeal No. 36 of 2012 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 ("SECP Act") against the order (the "Impugned Order") dated 25/06/12 passed by the Respondent.
2. The brief facts of the case are that Pakgen Power Limited ("Issuer Company") is a public listed company and Nishat Mills Ltd ("Appellant") being a beneficial owner of more than ten percent of its ordinary shares was required to file return of beneficial ownership on Form 31, within the period stipulated under section 222 of the Companies Ordinance, 1984 (the "Ordinance"). However, it failed to discharge the said obligation which attracts penal provisions contained in section 224(4) of the Ordinance.
3. Show cause notice dated 10/05/12 ("SCN") was issued to the Appellant under section 224(4) of the Ordinance and Mr. Rashid Sadiq, Chief Executive Officer, RS Corporate Advisory (Pvt.) Ltd ("Appellant's Representative") vide letter dated 21/05/12 filed written reply to the SCN on behalf of the Appellant. Hearing in the matter was held on 24/05/12 wherein written and verbal submissions were made by the Appellant's Representative. The Respondent, dissatisfied with the response of the Appellant, held that the Appellant was aware of its liability of filing of return of beneficial ownership, but it failed to comply with the legal provision within the stipulated time. The Appellant had contravened the provisions of section 222 of the Ordinance, however, the Appellant had not entered into any purchase and sale transaction in the shares of the Issuer Company, since the Company is listed at Stock Exchange. The Respondent took a lenient view and in exercise of the powers conferred under section 224(4) of the Ordinance, a fine of Rs 20,000 was imposed and no fine for continuous default was imposed on the Appellant.



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4. The Appellant has preferred the instant appeal against the Impugned Order. The Appellant's Representative argued that:

- a) the imposition of penalty under section 222 of the Ordinance is subject to determination that the default was made "willfully" and "knowingly". In the instant case, it cannot be reasonably concluded that the delay was willful and intentional so as to bring the Appellant within the ambit of Section 222(2) (b) of the Ordinance. The Respondent has failed to determine that the filing of Form 31 was delayed "knowingly" and "willfully"; and
- b) 102,524,728 ordinary shares of Pakgen Power Limited (Issuer Company) were held the Appellant before its listing. The Issuer Company was listed on 21/07/11. In accordance with section 222 (2) (b) of the Ordinance the Appellant was required to file return within 30 days of listing which was inadvertently not filed in time. However the same was filed on February 27, 2012 i.e. with a delay of 192 days. Further, it is important to note that the Appellant neither made any sale/purchase transactions since the listing of the Issuer Company nor did the Appellant file the Form 31 upon receipt of a letter from the Commission, it did so on its own in accordance with the requirements of section 222 of the Ordinance. It was further argued that the delay in filing of the return has not caused any harm to anyone and no loss has been suffered nor any benefit has been derived by the Appellant, therefore, the Impugned Order and the penalty imposed may be set aside.

5. The department representatives argued that:

- a) concerning the knowledge of the Appellant regarding requirements of the provisions of section 222 of the Ordinance, it was argued that the Appellant is a listed company since 1961. The services of professional personnel are



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available to the Appellant 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 Appellant. Despite having services of professional personnel, the Appellant failed to discharge its liability entailed under section 222 (2) (b) of the Ordinance. It was further argued that ignorance of law is no excuse;

- b) in the instant case the fine was imposed as the Appellant is a principal shareholder/beneficial owner of the Issuer Company and the default was committed despite having knowledge of the provisions of section 222 (2) (b) of the Ordinance. The Respondent has already taken a lenient view by imposing a fine of Rs. 20,000 only and no further fine was imposed for the continuing default of 192 days.

6. We have heard the parties. Section 222 (2) (b) of the Ordinance is reproduced for ease of reference:

***222. Submission of statements of beneficial owners of listed securities. –***

*(1) ....*

*(2) The period within which the said return is to be submitted to the registrar and the Commission shall be —*

*(a) .....*

*(b) in any other case, including a case where the company is listed on the stock exchange after the commencement of this Ordinance or after the person has occupied the position or office specified in sub-section (1) or has acquired interest as beneficial owner of securities as aforesaid, within thirty days of occupying the office in the company or acquisition of interest as beneficial owner requiring submission of the return aforesaid or listing of the company on the stock exchange, as the case may be;*

*(c) .....*

*(d) .....*



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Section 224 (4) of the Ordinance is also reproduced for ease of reference:

**224. Trading by director, officers and principal shareholders. - (1) ....**

(2) .....

(3) ...

(4) *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, 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.*

- a) Section 222 (2) (b) of the Ordinance clear and unambiguous and we would place reliance on case titled *City Equitable Fire Insurance Co Ltd Re, 1925 Ch 407*, referred to in *2005 CLD 333*:

*“that a default, in case of breach of duty, will be considered ‘wilful’ even if it arises out of being recklessly careless, even though there may not be knowledge or intent.”*

Moreover, the word “willful default” has been defined in Oxford Dictionary of Law Fifth Edition as *“The failure of the person to do what he should do, either intentionally or through recklessness.”* The argument of the Appellant’s Representative that the default was not “willful” does not hold merit as even if it was not intentional, the directors of the Appellant did not exercise the due skill and care required of them as directors of the Company. The default, therefore, would be considered as willful;



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- b) pursuant to the provisions of section 222 (2) (b) of the Ordinance, the Appellant was required to file return of beneficial ownership on Form 31, within 30 days of the listing of the Issuer Company on the stock exchange, but the Appellant failed to discharge its legal liability within the stipulated time limit. The said return was filed with the Commission on 27/02/12 with a delay of 192 days. Whether profit or loss was made or not is immaterial and not an ingredient to default section 222 (2)(b) of the Ordinance. The Respondent has already taken a lenient view by imposing a fine of Rs. 20,000 only instead of the maximum penalty of Rs. 30,000. Furthermore, no further fine for the default which continued for 192 days was imposed by the Respondent.

In view of the above, we do not find any grounds to interfere with the Impugned Order. The appeal is dismissed with no order as to cost.

**Tahir Mahmood**  
Commissioner (CLD)

**Fida Hussain Samoo**  
Commissioner (Insurance)

Announced on: 14/1/15