



# Securities and Exchange Commission of Pakistan

## BEFORE APPELLATE BENCH NO. IV

In the matter of

Appeal No. 25 of 2014

1. Mr. Faisal Malik Imran Hussain, Chief Executive/Director
  2. Mr. Aly Khan, Director;
  3. Mr. William Gordon Rogers, Director
  4. Mr. Shafi-ud-Din Ghani Khan, Director
  5. Mr. Mirza Ali Hassan Askari, Director
  - 6) Mr. Ihsan Ullah Ihsan, Director
- (all directors of Haleeb Foods Limited)

Versus

Director (Enforcement), SECP

...Respondent

Date of Hearing                      06/02/15

### ORDER

#### Present:

#### For the Appellant:

1. Ms. Shehzeen Abdullah, Advocate High Court

#### For the Respondent:

1. Mr. Amjad Iqbal Rao, Deputy Director (Enforcement)
2. Mr. Shahid Javed, Deputy Director (Enforcement)

1. This order is in appeal No. of 25 of 2014 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 ("SECP



## Securities and Exchange Commission of Pakistan

Act”) against the order (the “Impugned Order”) dated 17/06/13 passed by the Respondent.

2. The brief facts of the case are that Haleeb Foods Limited (the “Company”) is a public limited company limited by shares and incorporated under Companies Ordinance, 1994 (the “Ordinance”). The Company is a public limited company limited by shares and incorporated under the Ordinance. The paid up capital of the Company as at 30/06/12 stands at Rs. 278.615 million divided into 27.816 million ordinary shares of Rs. 10/- each. The Company is principally engaged in processing and sales of toned milk, milk powder, fruit juices, allied dairy and foods products. The Enforcement Department of the Commission, while examining the annual audited accounts for the year ended 30/06/12 of the Company observed that, total employee’s provident fund contribution booked during the year under review is Rs. 18.178 million whereas, the total liability shown in this regard under the head of “Trade and other Payables” is Rs. 51.376 million (2011:Rs. 48,479 million). Moreover, note 23.3 to the Accounts relating to “Due to Provident Fund” states that, “The board has finalized a repayment plan whereby year end payable balance to the fund will be repaid in fortnightly installments of Rs. 1.5 million commencing from 16/10/12 and ending on 28/02/14.” In reply to the inquiry of the Commission vide letter dated 22/05/13, M/s Ijaz Ahmed & Associates (“Legal Counsel”) vide letter dated 08/06/13 on behalf of the Appellants stated that their client is making payments to the provident fund in accordance with section 227 of the Ordinance. The reply was found unsatisfactory.
3. Show Cause Notice dated 09/10/13 (“SCN”) was issued to the Appellants under section 227 read with section 229 and section 476 of the Ordinance advising them to explain within 14 days from the date of the notice as to why a penal action may not be taken against them under section 229 of the Ordinance for contravention of



## Securities and Exchange Commission of Pakistan

section 227 of the Ordinance. Hearing on the matter was held on 07/03/14 and was attended by Mr. Faisal Imran Hussain Malik (Authorised Representative 1) on behalf of the following Appellants.

S.#	Name of the Directors
1.	Mr. Faisal Imran Hussain Malik, Chief Executive, Director
2.	Mr. Aly Khan, Director
3.	Mr. William Gordon Rogers, Director
4.	Mr. Shafi-Ud-Din Ghani Khan, Director
5.	Mirza Ali Hassan Askari, Director
6.	Mr. Ihsan Ullah Ihsan, Director
7.	Mian Aamer Mehmood (replaced Mrs.Nasreen Ilyas Chaudhry)

- In order to provide the opportunity for personal representation to the remaining four Appellants, another hearing was held on 30/04/14. The hearing was attended by Mr. Imtiaz Majeed-Advocate of Hameed Majeed Associates (Pvt.) Limited ("Authorised Representative 2"). The Authorised Representative 2 reiterated the same arguments as submitted earlier. While conceding the default, the Authorised Representative 2 requested to take a lenient view in this regard.
- The Respondent dissatisfied with the response of the Appellant held that the provisions of section 227 of the Ordinance have been violated in respect of utilization of provident fund amount by the Company for its operational purposes and the chief executive and directors are liable for the penalties as defined in section 229 of the Ordinance. Keeping in view the facts of the case, a maximum aggregate penalty of Rs. 50,000 was imposed on all the Appellants in the following manner:



## Securities and Exchange Commission of Pakistan

S. No.	Name	Designation	Amount Rupees
1.	Mr. Faisal Imran Hussan Malik	Chief Executive/Director	5,000
2.	Mr. Ilyas, M. Chaudhry	Director	5,000
3.	Mian Yasir Mehmood	Director	5,000
4.	Mr. Saqib Ali	Director	5,000
5.	Mr. Aly Khan	Director	5,000
6.	Mr. William Gordon Rogers	Director	5,000
7.	Mr. Shafi-Ud-Din Ghani Khan	Director	5,000
8.	Mirza Ali Hassan Askari	Director	5,000
9.	Mian Aamer Mehmood	Director	5,000
10.	Mr. Ihsan Ullah Ihsan	Director	5,000
	<b>Total Amount</b>		<b>50,000</b>

6. The Appellants have preferred the appeal against the Impugned Order. The Appellants' counsel argued that:

- a) the Company incurred huge losses from 2008 through 2012, with its equity turned to negative. Like, other affairs of the Company, the employee provident fund (the "EPF") was also adversely affected and its liability started accumulating for the above-said period. In 2010, the Appellants injected an equity investment of Rs. 428 million with a call option which resulted in change of management in July 2012 and thus the Appellants became the majority shareholders of the Company in 2012. Amongst the various measures the Appellants took to safeguard the interests of the Company was the EPF repayment plan finalized in the meetings of the Board of Directors of the Company (including the Appellants), whereby year end payable balance to the EPF would be repaid in fortnightly instalments of Rs. 1.5 million commencing from 16/10/12 through 28/02/14 (the "EPF Repayment Plan"). The Appellants, in strict compliance with the



## Securities and Exchange Commission of Pakistan

EPF Repayment Plan, started making monthly payments of Rs. 3 million towards outstanding EPF contributions along with regular payments of the current accrued balance. As a result of these regular payments, the amount outstanding towards the EPF reduced from Rs. 76.337 million to Rs. 27.133 million at the time when SCN was issued to the Appellants. These payments also included the profit thereon. The foregoing circumstances were brought to the attention of the Respondent by the Appellants vide their reply dated 10/03/14. The Respondent failed to take into consideration the fact that the Appellants had only taken charge of the Company in 2012 and had turned the Company around in a short span of time. The decision to give the EPF Repayment Plan priority over profitable investments reflects the importance that the Appellants give to the welfare of the Company's employees; and

- b) the spirit of section 227 of the Ordinance is that provident fund payments are held on trust for employees by the company; this was a priority for the Appellants upon taking charge of the Company in 2012 and to safeguard the interest of the Company employees. The Appellants had no role in the default in contributions towards EPF and, therefore, penalizing them is not within the spirit of section 227 of the Ordinance. Reliance is placed on the judgment of the Commission in the matter of *M/s Metropolitan Steel Corporation Limited* reported as 2006 CLD 454, wherein, it was observed by the Commission that it would be in the best interest of the employees and shareholders that the company continues to perform and earn profit, as the company was not in a position to pay the entire outstanding in one go without adversely affecting its performance and in view of the cash flow position. The undertaking shown by the company indicating its willingness to undo the irregularity and intent to abide by law was deemed sufficient to condone the delay/non-payment. Reliance is also placed in the matter of *United Brands Ltd* reported as 2008 CLD 731, *Arif Habib Limited* reported as 2007 CLD 1667 and *Pak Kuwait Takaful Company Ltd* reported as 2013 CLD 1710, wherein, the Commission had also condoned delay in payments to EPF.



## Securities and Exchange Commission of Pakistan

7. The department's representatives argued that:

- a) the stance of the Appellants that they took charge of the Company in the year 2012 and their decision to give EPF repayment plan and welfare of the employees priority over profitable investments is not tenable. The amount collected from the employees as contribution to the provident fund are in the nature of trust money in the hands of the Company and the same must be deposited in a scheduled bank or paid to the trustees within a stipulated time period. The Company on the pretext of vulnerable financial position cannot withhold or utilize such money; and
- b) the provisions of section 227 are very clear and the spirit of the provisions of section 227 is to secure the hard earned money of the employees. The objective of the Ordinance is to secure the amount collected from the employees of the Company as contribution to the provident fund/trust for the benefit of its employees.

8. We have heard the arguments. Section 227 of the Ordinance is reproduced for ease of reference:

**227. Employees' provident funds and securities.- (1) All moneys or securities deposited with a company by its employees in pursuance of their contracts of service with the company shall be kept or deposited by the company within fifteen days from the date of deposit in a special account to be opened by the company for the purpose in a scheduled bank or in the National Saving Schemes, and no portion thereof shall be utilized by the company except for the breach of the contract of service on the part of the employee as provided in the contract and after notice to the employee concerned.**

***(2) Where a provident fund has been constituted by a company for its employees or any class of its employees, all moneys contributed to such funds, whether by the company or by the employees, or received or accruing by way of interest, profit or otherwise from the date of contribution, receipt or accrual, as the case may be, shall either—***

***(a) be deposited—***

***(i) in a National Savings Scheme;***

***(ii) in a special account to be opened by the company for the purpose in a scheduled bank;***

***or***



## Securities and Exchange Commission of Pakistan

(iii) where the company itself is a scheduled bank, in a special account to be opened by the company for the purpose either in itself or in any other scheduled bank; or

(b) be invested in Government securities; or

1[(c) in bonds, redeemable capital, debt securities or instruments issued by Pakistan Water and Power Development Authority and in listed securities subject to the conditions as may be prescribed by the Commission].

(3) Where a trust has been created by a company with respect to any provident fund referred to in sub-section (2), the company shall be bound to collect the contributions of the employees concerned and pay such contributions as well as its own contributions, if any, to the trustees within fifteen days from the date of collection, and thereupon, the obligations laid on the company by that sub-section shall devolve on the trustees and shall be discharged by them instead of the company.

Emphasis Added

- a) the Appellants have argued that ever since they took over the management of the Company, the EPS contributions have been made to the employees and their welfare has been given precedence by the Company over any other profitable ventures. The Respondent has on the other hand argued that the Company on the pretext of vulnerable financial position cannot withhold or utilize such money and amount collected from the employees as contribution to the provident fund are in the nature of trust money in the hands of the Company. We are of the view that the Appellants have paid the contributions to the provident fund as well as paid profit on those contributions which shows the good intent of the Appellants to fully comply with the provisions of section 227 of the Ordinance. Moreover, no loss was caused to the employees of the Company as the fund was compensated through profit payment; and
- b) the Appellants have further argued that the spirit of section 227 of the Ordinance is that provident fund payments are held on trust for employees by the company which was priority for the Appellants. Reliance was placed on *Metropolitan Steel Corporation Limited* reported as 2006 CLD 454, wherein, delays in payments to the provident fund have been condoned given the fact the company had shown willingness to undo the wrong and had shown every intention to abide by the law. Reliance was also placed in the matter of *United Brands Ltd* reported as 2008 CLD 731, *Arif Habib Limited* reported as 2007 CLD 1667 and *Pak Kuwait Takaful Company Ltd* reported as 2013 CLD 1710, wherein, the Commission had also condoned delay in payments to EPF and not imposed penalty. The Respondent has argued





## Securities and Exchange Commission of Pakistan

that the spirit of the provisions of section 227 is to secure the hard earned money of the employees. We are of the view that given the fact the contributions to EPF have been made along with profit accrued, the Appellant has complied with the provisions of section 227 of the Ordinance and any delay in provident fund payments can be condoned in view of the afore-mentioned judgments.

In view of the foregoing, we set aside the Impugned order to the extent of penalty. We strictly warn the Appellants to fully comply with the requirements of section 227 of the Ordinance in future.

(Fida Hussain Samoo)  
Commissioner (Insurance)

(Zafar Abdullah)  
Commissioner (SMD)

Announced on: 17 FEB 2015