



BEFORE APPELLATE BENCH NO. III

In the matter of  
Appeal No. 21 of 2005

Diamond Industries Limited

..... Appellant

Versus

Executive Director (CLD)  
Securities and Exchange Commission of Pakistan

..... Respondent

ORDER

Date of hearing

22-12-11

Present:

For the Appellant:

Khurram Saeed, Advocate

For the Respondent Department:

Tariq Ahmad, Deputy Director  
Tauqeer Sipra, Junior Executive



## SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

**SECP**

1. This order shall dispose of appeal No. 21 of 2005 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the order dated 25/05/05 (the "Impugned Order") passed by the Respondent.
2. The facts of the case are that on examination of accounts of Diamond Industries Limited (the "Appellant") for the year ended 30/06/04, it transpired that an amount of Rs 35.231 million had been advanced by the Appellant to its associated company namely Diamond Polymers (Pvt.) Limited. The Appellant, on being inquired on the transaction, stated that the transaction was not an investment in terms of section 208 of the Companies Ordinance, 1984 (the "Ordinance") instead it was normal trade credit, therefore, the requirement of passing of a special resolution did not apply in the instant case. On further examination of the record it was evident that there was transfer of fund without interest from the Appellant to its associated company and it was not a normal trade credit as there was no common business between the two concerns.
3. Show cause notice dated 04/03/05 (the "SCN") was issued to the Chief Executive Officer (the "CEO") and directors of the Appellant. In reply to the SCN, the Appellant's representative contended that in fact a special resolution was passed on 26/11/96, authorizing the CEO to invest in the shares/ loans up to Rs 50 million in its associated company. The Respondent, dissatisfied with the response of the CEO, passed the Impugned Order and imposed a penalty of Rs 250,000/- on the CEO and gave the direction to recover the outstanding return from



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the associated company based on calculation made by a Chartered Accountant with a satisfactory QCR.

4. The Appellant preferred the instant appeal against the Impugned Order. The Appellant's counsel appeared and argued that the investment was made in terms of special resolution dated 26/11/96. The special resolution once passed remains valid till winding up of the Company, as such, the observation that the resolution is an old one is invalid. Further, the Respondent's contention that the Appellant failed to comply with the requirements of the SRO 865(I)/2000 dated 06/12/00 is without basis as the said SRO was passed in the year 2000, whereas, the special resolution of the shareholders of the Appellant was passed in the year 1996. The aforementioned SRO is not applicable in the instant case; therefore, the Impugned Order may be set aside.
5. The department representatives argued that the Appellant had taken different stance before issuance of the SCN, as at that time the Appellant contended that the investment was normal trade credit. It was only after the issuance of the SCN that the Appellant placed reliance on a special resolution which was passed in the year 1996. It is the Appellant's responsibility to stay compliant with the Ordinance and any amendments made therein. The Appellant should have ensured that a fresh special resolution was passed after coming into force of the SRO No 865(I)/2000 dated 06/12/00.
6. We have heard the parties. The objection of the Appellant that the Respondent as Executive Director (CL) was not empowered to impose fine under section 208 of the Ordinance in terms of SRO No 712(3)/2003 dated 18/07/03 has been examined. The Appellant has



relied on an irrelevant SRO, as the Respondent was empowered to impose fine under section 208 of the Ordinance in terms of SRO 162/2004 dated 17-03-04, as such, the contention of the Appellant is baseless. Section 208 sub-section (1), (2) and (3) of the Ordinance, as were in force at the time of issuance of the SCN, are reproduced for ease of reference:

**208. Investments in associated companies and undertakings.-** (1) *A company shall not make any investment in any of its associated companies or associated undertakings except under the authority of a special resolution which shall indicate the nature, period and amount of investment and terms and conditions attached thereto:*

*Provided that the return on investment in the form of loan shall not be less than the borrowing cost of investing company.*

**Explanation.-** *The expression 'investment' shall include loans, advances, equity, by whatever name called, or any amount which is not in the nature of normal trade credit.*

(2) *No change in the nature of an investment or the terms and conditions attached thereto shall be made except under the authority of a special resolution.*



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*(3) If default is made in complying with the requirements of this section, every director of a company who is knowingly and wilfully in default shall be liable to fine which may extend to one million rupees and in addition, the directors shall jointly and severally reimburse to the company any loss sustained by the company in consequence of an investment which was made without complying with the requirements of this section.*

The different stance taken by the Appellant before the issuance of SCN and after the SCN shows that at the time of making investment in the associated company, the Appellant was unaware of special resolution already passed in the year 1996, as such, it ought to have passed fresh resolution in compliance with section 208 of the Ordinance read with SRO No 865(I)/2000 dated 06/12/00. We have perused the special resolution passed by the Appellant in the year 1996 to see whether it complied with the requirements of section 208 of the Ordinance. The requirement of section 208 of the Ordinance are very specific as it requires the Company to *indicate the nature, period and amount of investment and terms and conditions attached thereto*. If it is assumed that the requirements of SRO No 865(I)/2000 dated 06/12/00 were not applicable on the transaction, even then the special resolution passed in the year 1996 was deficient and insufficient as it failed to disclose the mandatory requirements of section 208 of the Ordinance. The Company Secretary during the hearing before the Respondent had admitted that the advances were interest free, as such, the Appellant even did not comply with the deficient special resolution.



**SECP**

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The Appellant's counsel undertook to provide the evidence of compliance with the direction under section 473 of the Ordinance within 7 days of hearing. No such communication has been made to the Appellate Bench till date. In absence of any evidence of compliance with section 473 of the Ordinance, the Respondent department is called upon to ensure that the direction in the Impugned Order is complied.

In view of the above, we uphold the Impugned Order. The appeal is dismissed with no order as to costs.

(Mohammed Asif Arif)  
Commissioner (Insurance)

(Imtiaz Haider)  
Commissioner (SMD)

Announced on: 14-02-12