



SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN  
Securities Department  
Securities Market Division

NIC Building Jinnah Avenue, Blue Area, Islamabad

Before The Executive Director (Securities Department)

In the matter of Recovery of Tenderable Gain  
Under Section 224(2) of the Companies Ordinance, 1984  
From Mrs. Nasreen Humayun Shaikh, More than 10% Shareholder of  
Azgard Nine limited

**Date of Hearing :** 13/01/2011

**Present at hearing :**

Representing the Respondent: Mr. Syed M. Raza,  
Muneer and Associates, Advocates, Legal  
Consultants

Assisting the Executive Director (SD) :

- (i) Mr. Imran Inayat Butt Director (SD)  
(ii) Mr. Muhammad Farooq Joint Director (SD)  
(iii) Mr. Nazim Ali Assistant Director (SD)

**Order**

This order will dispose of the proceedings initiated under Section 224(2) of the Companies Ordinance, 1984 (the "**Ordinance**") by the Securities and Exchange Commission of Pakistan (the "**Commission**") through Show Cause Notice No. S.M.(B.O)C.O.222/4(4662)07 (the "**Notice**") dated 21/12/2010, against Mrs. Nasreen Humayun Shaikh, (the "**Respondent**"), a more than 10% Shareholder of Azgard Nine limited (the "**Issuer Company**").

2. Brief facts of the case are that:-

- a) It was observed from the returns of beneficial ownership furnished by the Respondent under Section 222 of the Ordinance that she has made the following purchase and sale transactions, in the shares of the Issuer Company, within a period of less than six months:-

NIC Building, Jinnah Avenue, Blue Area, Islamabad, Pakistan PABX: 0092-51-9207091-94,  
FAX: 0092-051-9218595

Table-I

Sr. No.	Date of Transaction	Nature of Transaction	Rate per Share (Rs.)	No. of Shares
1	16-Jun-2009	Purchase	23.78	750,000
2	23-Jun-2009	Purchase	21.65	1,500,000
3	06-Jul-2009	Sale	22.00	9,591,629
4	03-Sep-2009	Sale	27.08	250,000
5	04-Sep-2009	Sale	28.20	250,000
6	07-Sep-2009	Sale	28.91	200,000
7	09-Sep-2009	Sale	27.91	1,500,000
8	10-Sep-2009	Sale	27.84	454,337
9	11-Sep-2009	Sale	27.44	45,683
10	21-Oct-2009	Sale	25.00	500,000
11	22-Oct-2009	Sale	23.76	1,000,000
12	26-Oct-2009	Sale	24.52	600,000
13	27-Oct-2009	Sale	25.07	45,000
14	29-Oct-2009	Sale	23.95	30,000
15	03-Nov-2009	Sale	21.85	100,000
16	04-Nov-2009	Sale	22.05	110,000
17	05-Nov-2009	Sale	22.25	500,000
18	06-Nov-2009	Sale	21.07	1,550,000
19	10-Nov-2009	Sale	19.80	800,000
20	16-Nov-2009	Sale	13.44	2,645,112
21	09-Dec-2009	Sale	20.54	50,000
22	10-Dec-2009	Sale	21.01	50,000
23	11-Dec-2009	Sale	20.22	50,000
24	14-Dec-2009	Sale	20.44	50,000
25	15-Dec-2009	Sale	20.40	50,000
26	16-Dec-2009	Sale	20.33	50,000
27	17-Dec-2009	Sale	21.01	50,000
28	18-Dec-2009	Sale	20.94	50,000
29	21-Dec-2009	Sale	20.72	50,000
30	22-Dec-2009	Sale	20.44	50,000

- b) On account of the aforementioned transactions, the Respondent made gain of Rs. 12,739,000/- (Rupees twelve million seven hundred thirty nine thousand only), computed in the manner prescribed in Rule 16 of the Companies (General Provisions and Forms) Rules, 1985 (the "Rules").

3. Section 224 of the Ordinance provides that where *inter alia* a more than ten percent shareholder of a listed company who is or has been the beneficial owner of any of its 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. The said Section 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, 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.

4. In the instant case, neither the matter of accrual of the aforesaid gain was reported by the Respondent in Part-D of the prescribed returns of beneficial ownership filed by her with this Commission for the aforementioned transactions, nor its tendering or recovery was reported to the Commission, as provided in Section 224 of the Ordinance. The Respondent was, therefore, intimated vide letter dated 15/10/2010 that the aforementioned liability accrued under Section 224(1) of the Ordinance is apparently still outstanding and the same may now be discharged by tendering the aforementioned amount of gain in favour of the Commission. Subsequent to issuance of reminder by this office and seeking extension in time by the Respondent, the matter was responded on 10/12/2010, by Mr. Syed M. Raza of Muneer and Associates, Advocates, Legal Consultants (the "**Legal Counsel**"). The Legal Counsel stated on behalf of the Respondent that "*our client did not make gain from the sale and purchase of shares of the Company rather, such transactions resulted in net loss*".

5. The plea of the Respondent was examined in the light of provisions of Section 224 of the Ordinance and Rule 16 of the Rules and was considered to be unsatisfactory. Thus, Notice under Section 224(2) of the Ordinance was served upon the Respondent on 21/12/2010 and personal hearing in the matter was fixed for 13/01/2011. On the given date, the Legal Counsel appeared before me on behalf of the Respondent and requested to withdraw the Notice on the plea that the sale and purchase made by the Respondent do not attract the provisions of Section 224(2) of the Ordinance. The arguments advanced by the Respondent in support of aforementioned contention in writing as well as verbally are summarized hereunder:-

- a) **The Respondent made net loss of Rs. 810,000:** The Respondent stated that “our client did not make gain from sale and purchase of shares of the Company rather, such transactions resulted in net loss of Rs.810,000/- as tabulated below:-

**Table-II**

No. of Shares	Purchase		Sale		Gain / (loss) per share (Rs.)	Gain / (loss) (Rs.)
	Date	Rate (Rs.)	Date	Rate (Rs.)		
750,000	16/06/09	23.78	06/07/09	22.00	(1.78)	(1,335,000)
1,500,000	23/06/09	21.65	06/07/09	22.00	0.35	525,000
					Net (loss)	(810,000)

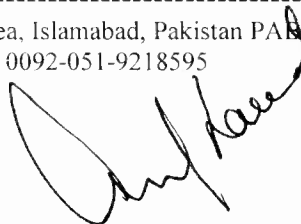
During the course of personal hearing, the Legal Counsel asserted that “since pursuant to Rule 16 of the Rules the loss is not adjustable, therefore, the Respondent is ready to tender gain of Rs. 525,000/- (calculated in above-given table)”.

- b) **Wordings of Section 224(1) depict the actual gain:** The Respondent contended that “actual wordings of Sub-Section (1) of Section 224, i.e. makes any gain by the purchase and sale, or the sale and purchase, depict the actual gain made through such trading, not any notional or theoretical gain arrived through any working/calculation. Further, there is a general principle that laws are based on natural justice, hence it is beyond comprehension that a 'notional gain' could be established and demanded, whereas factually there is no gain made or accrued, rather in reality loss has been sustained”.
- c) **Subordinated legislation could not be enforced beyond the objectives of its primary legislation:** The Legal Counsel pleaded that “as a matter of fact, Rule 16 of the Companies (General Provisions and Forms) Rules, 1985 is a subordinated legislation to the primary legislation, i.e. Section 224 of the Companies. Ordinance, 1984, thus as a principle of law, this subordinated legislation could not be enforced beyond the objectives of its primary legislation”.

6. I have considered the facts of the case, written and verbal submissions made by the Legal Counsel of the Respondent during the course of hearing and relevant provisions of law. My observations in this regard are as under:-

- a) **The Respondent made net loss of Rs. 810,000:** The assertion of the Legal Counsel has been considered and observed that the claimed “gain/loss” has been computed by matching the purchases dated 16/06/2009 and 23/06/2009 with sale dated 06/07/2009. Thus, the Legal Counsel has apparently calculated the aforesaid loss by-

I. Matching the transactions on chronological order instead of by applying the manner prescribed in Rule 16 of the Rules.



II. Considering that shares of the same class of the same listed company are not interchangeable/fungible

In order to ascertain the legitimacy of the contention, I have consulted the provisions of Section 224(1) of the Ordinance and Rule 16 of the Rules. For convenience Section 224(1) of the Ordinance is reproduced hereunder:

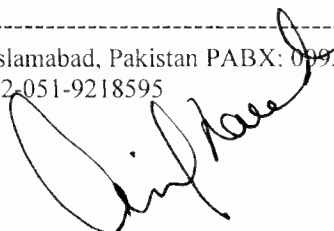
*“Where any director, chief executive, managing agent, chief accountant, secretary or auditor of a listed company or any person who is directly or indirectly the beneficial owner of more than ten per cent of its listed equity securities makes any gain by the purchase and sale, or the sale and purchase, 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”*

From the contents of the Section 224(1) of the Ordinance, it appears that it imposes certain conditions for accrual of tenderable gain i.e. the purchase and sale or sale and purchase of same class of shares must be made within the period of less than six months, by the officer/beneficial owner of the listed company. When these conditions are met then the amount of gain would be computed in the manner prescribed in Rules 16 of the Rules. While, the said Rule provides that for the purpose of computation of tenderable gain:-

“the purchase at lowest rates shall be matched against the sales at highest rates prevailing within the six months .....”

The reasons behind matching of transactions in the aforesaid manners are *inter alia* that phrase “any gain by the purchase and sale, or the sale and purchase, of any such security” appear in Section 224(1) of the Ordinance signifies, while Rule 16(2) of the Rules clearly states that securities of same class of a same listed company are fungible and interchangeable. Thus no distinction can be made between previously held and newly purchased shares, as the same are at par with respect to all practical purposes.

In the instant case, the Respondent has made two purchase transactions (vide Sr. No. 1-2 of the Table-I given in para 2 of the Order) of 750,000 and 1,500,000 shares of the Issuer Company on 16/06/2009 and 23/06/2009 at the rate of Rs. 23.78 and Rs. 21.65 respectively. Later on the Respondent made 28 sale transactions (vide Sr. No. 3 to 30 of the Table-I) from 06/07/2009 to 22/12/2009 at the rate ranging from Rs. 28.91 to Rs. 13.44 per share. Since the transactions have been made in same class of the shares as well as within the period of less than six months, therefore, the instant case falls in the ambit of Section 224 of the Ordinance. And pursuant to Rule 16 of the Rules the aforementioned purchases would be matched against the sales at highest rates prevailing within the six months. By applying the said manner, the purchase and



sale transactions made by the Respondent have resulted in tenderable gain of Rs. 12,739,000/- instead of Rs. 525,000 (as claimed by the Legal counsel in Table-II).

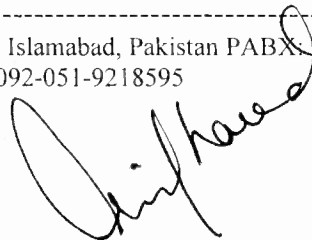
Thus in view of the foregoing discussion, I am of the considered opinion that the under reference transactions made by the Respondent fall within the ambit of Section 224 of the Ordinance and the amount of gain is required to be computed in the manner prescribed in Rule 16 of the Rules.

- b) **Wordings of Section 224(1) depict the actual gain:** The contention of the Respondent has been considered. Attention in this regard is invited to the contents of Section 224(1) of the Ordinance, which requires tendering of “*any gain*” made by the purchase and sale, or the sale and purchase, of securities. So, the word “any” before the word “gain” has significance.

As earlier mentioned, for accrual of tenderable gain, the Section 224 proposes some prerequisites i.e. the transactions must be made in same class of equity security of same listed company by a beneficial owner, within the period of less than six months. When these conditions are met, then the matter requires analysis whether “any gain”, has accrued or not, which means it necessitates a manner for computation of “any gain”. Plain reading of Section 224(1) of the Ordinance, suggests that the Section itself presupposes a way of matching of purchase(s) against sale(s), or sale(s) against purchase(s), and therefore there must be a principle upon which the difference of sale price and purchase price is to be determined and its answer is given in Rule 16 of the Rules. The said Rule provides that the amount of tenderable gain will be calculated by matching the purchases at lowest rates against the sales at highest rates prevailing within the six months. The rationale of this methodology will be discussed later on in para 6(c) of the Order. Hence, I am of the view that contention of the Legal Counsel does not have any merit, as the Section under reference speaks about recovery of ‘any gain’ and the said “any gain” is required to be computed in the manner prescribed in Rule 16 of the Rules.

In the instant case, the under reference transactions have admittedly been made by the Respondent in same class of shares i.e. ordinary shares of the Issuer as well as were made within the period of less than six months. Thus, the case meets all the prerequisites, laid down in Section 224(1) of the Ordinance. Now the next step is to check whether or not any gain was accrued on the said transactions. Under the prevailing Law and Rules, its answer may only be obtained by applying the manner given in Rule 16 of the Rules. By applying the said manner of calculation, the aforementioned transactions have been resulted in tenderable gain of Rs. 12,739,000/- to the Respondent.

It is worth mentioning that the Legal Counsel has admitted that the Respondent has made gain of Rs. 525,000/- which was calculated by it through matching the transaction in chronological order. The Legal Counsel during the course of hearing also admitted that the Loss made by the Respondent on the aforementioned transactions is not adjustable, as provided in Rule 16 of the rule. Thus, the Legal Counsel has also acknowledged the accrual of gain. Now the difference in opinion is



the application of manner for computation of tenderable gain. The Legal Counsel has calculated it by matching the transactions in chronological order, while legally the same is required to be computed in the manner prescribed in Rule 16 of the Rules and the same manner has also been applied by the Commission.

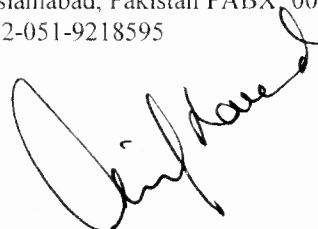
- c) **Subordinated legislation could not be enforced beyond the objectives of its primary legislation:** The assertion of the Respondent that *Rule 16 Rules, is a subordinated legislation to Section 224 of the Ordinance, thus this subordinated legislation could not be enforced beyond the objectives of its primary legislation* has been considered. In order to establish whether or not the Rule 16 is beyond the objective of its primary legislation, in my opinion, in first instance, we have to see what is the primary objective of the provisions of Section 224? In fact, the provisions of Sections 222-224 of the Ordinance are applicable on only particular class of persons. The Section 224(1) *inter alia* intends to persuade the said particular class of persons to concentrate on their fiduciary and ethical duties rather than indulging in trading activities, which may lead to many market-evils. That is why the Section speaks about the recovery of "any gain" made by the said persons on purchase and sale or sale and purchase of shares within the period of less than six months. Thus the law proposes to recover all possible gains out of shares transactions and even it does not allow the beneficial owners to minimize their gain by virtue of setting off their losses.

Hence keeping in view the spirit and objective of the provisions of Section 224 of the Ordinance i.e. squeezing of any gain, the Federal Government had no option other than specifying the manner prescribed in Rule 16 of the Rules. All others alternate manners of calculation like Matching of Transaction to Transaction, Average Method, FIFO, LIFO etc. do not meet the objective laid down in Section 224 of the Ordinance.

It is further pointed out that I have also consulted the relevant law in United States of America (**the "USA"**) wherein the matter of trading by directors, officer and principal shareholders is dealt under Section 16 of the Securities and Exchange Act, 1934 (the "**SEC Act, 1934**"). It has been observed that the said Section does not specify any method for computation of amount of profit (short swing profit). However, in USA the Court has determined, a methodology for calculation of short-swing profit, which is same as in Pakistan i.e. Lowest-in Highest-out rates are matched. It is worth mentioning that *Smolowe v. Delendo Corp. (1943, Circuit Court of Appeals, Second Circuit)* is the leading case regarding the construction of liability under Section 16(b) in the USA, wherein after detailed discussion, the court held that:-

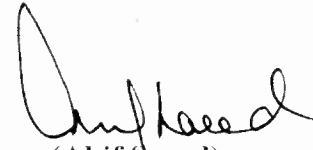
*"---The only rule whereby all possible profits can be surely recovered is that of lowest price in, highest price out-- within six months-- as applied by the district court. We affirm it here, defendants having failed to suggest another more reasonable rule...."*

Hence it can safely be inferred from the aforesaid discussion that the Rule 16 of the Rule is not only in conformity with the spirit and objective of Section 224 of the



Ordinance but also in accordance with practice set by court in USA. Thus, the contention of the Legal Counsel does not have any merit.

7. In view of the foregoing, I am of the considered opinion that the arguments presented by the Legal Counsel of the Respondent do not have any merit and substance. Hence, the request to withdraw the Notice is rejected and the Respondent is, hereby, directed to tender Rs. 12,739,000/- (Rupees twelve million seven hundred thirty nine thousand only) to the Securities and Exchange Commission of Pakistan as provided in section 224(2) of the Companies Ordinance, 1984, through a demand draft in favour of the Commission, within thirty days of the issue of this order.



(Akif Saeed)

Executive Director (SD)

Islamabad.

Announced on March 18, 2011