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Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO III

In the matter of

Appeal No. 47 & 48 of 2012

Disposable Utensils Industries (Pvt) Ltd

...APPELLANT

Versus

Head of Department (Enforcement), Securities and Exchange Commission of
Pakistan

...RESPONDENT

ORDER

Date of hearing

29/11/12

Present:

For the Appellant:

Mr. Faisal Latif, Consultant

Mr. Imran Shafique, Advocate

Mr. Arsalan Abbas, Manager

Department representatives:

Mr. Bilal Rasool, Additional Registrar of Companies /Director (Enforcement)

Ms. Sumaira Siddiqui, Joint Director (Enforcement)

Appellate Bench III

Appeal No 47 and 48 of 2012

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1. This order is in appeal No 47 and 48 of 2012 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 (the "SECP Act") against the orders dated 11/10/12 (the "Impugned Orders") passed by the Respondent.
2. Facts leading to the case are that Disposable Utensils Industries (Pvt.) Ltd (the "Company") filed the annual audited accounts (the "Accounts") of the Company for the year ended 30/06/09 as required under section 242 of the Companies Ordinance, 1984 (the "Ordinance"). The auditors' report attached with the accounts indicated that Sajjad Hasnain & Co, Chartered Accountants (the "Auditor") had audited the Accounts of the Company and have given an unqualified opinion in their report to the members dated 27/09/09. The examination of the Accounts revealed certain observations which required clarifications from the Company as well as the Auditor:
 - i) *The Company appears to be a Medium Sized Entity as per the criteria defined in the Fifth Schedule of the Ordinance and is required to follow the Accounting and Financial Reporting Standard (AFRS) for MSEs. It has been observed that the accounting policy does not provide the 'statement of compliance' as required by Para 1.3 of AFRS and ICAP Circular No. 06/2007 dated November 02, 2007.*
 - ii) *'Advances, Deposits, prepayments and other receivables' amount to Rs. 2.028 million as compared to Rs. 0.213 million in the previous year. Please explain reasons for the aforesaid variation along with the breakup of amounts against each head.*
 - iii) *The financial statements do not include the 'Cash flow statement' and the 'Statement of changes in equity' as required under Para 1.1 of AFRS.*
 - iv) *The Company has accumulated losses amounting to Rs. 102 million including current year loss of Rs. 6 million. The current liabilities of Rs. 98 million have exceeded the current assets of Rs. 3 million by Rs. 95*



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million. The aforesaid raise doubts about the affairs of the Company to continue as a going concern. The Company's assessment to continue as a going concern has not been made in the financial statements as required under Para 1.6 of AFRS.

- v) *The Annual Accounts do not include the 'Directors' Report' as required under section 244 and section 236 of the Ordinance.*
- vi) *'Creditors, accrued and other liabilities' amount to Rs. 84 million as compared to Rs. 0.70 million in the previous year. Please explain reasons for the aforesaid variation along with the breakup of amounts against each head.*
- vii) *The Company has incurred 'financial expenses' of Rs. 2 million in the current year. Please explain."*

3. The Company, in reply to its letter dated 21/02/12, failed to respond to each of the observations raised by the Respondent and instead submitted an un-filed revised audited accounts ("Revised Accounts") of the aforesaid year which were audited by the auditor and was not filed with the Company Registration Office (the "CRO"). The review of the Revised Accounts submitted by the Company revealed that the figures reported in the said accounts had been re-grouped and re-arranged in the manner which created doubt about the accuracy of the Accounts filed by the Company. Most of the adjustments apparently were made to reduce the Company's losses from Rs. 102 million to Rs. 53 million. The comparative chart of the Accounts and the Revised Accounts is reproduced for ease of reference:



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(Amount in Rupees)

Head of Accounts	Revised Accounts for the year 2009	Accounts for the year 2009
Balance Sheet		
Current Liabilities		
Due to Directors	31,999,800/-	-
Creditors, Accrued and Other Liabilities	7,086,863/-	84,243,832/-
Provision for taxation	31,245/-	-
Current Assets		
Cash and Bank Balances	4,825,604/-	50,680/-
Profit and Loss Account		
Accumulated Loss brought forward	(46,274,021/-)	(96,387,087/-)
Accumulated Loss for the year	(53,075,869/-)	(102,976,718/-)

4. The Auditor, in response to the query raised by the Respondent, denied to have performed duties as the statutory auditor of the Company and categorically stated that they have not conducted audit of the said Accounts nor filed any consent with the Company in this regard. In order to verify the stance of the Auditor, Form 29 filed by the Company with the CRO was pursued which indicated that the appointment of the Auditor as the 'statutory auditor' of the Company in the said years. The Company did not, however, file the consent of the Auditor with the CRO.

5. Show cause notice dated 14/03/2012 ("SCN") was issued to the Company under section 492 of the Ordinance as it appeared that the Company had misstated the Accounts. During the proceedings under the aforesaid provision of the Ordinance, the Auditor, vide letter dated 30/05/12 once again denied to



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have performed the audit of the Company for the year ended 30/06/09 and did not verify the audit report dated 21/01/11 given by the Auditor on the Revised accounts and filed by the Company with the CRO.

6. The Auditor vide his letter dated 22/06/12 changed the stance given in the earlier reply to the Commission with regard to the audit of the Revised Accounts of the Company for the year ended 30/06/ 09 and stated that the audit of the Revised Accounts was conducted by them and the earlier letter was written on the basis of misunderstanding. Further, the Company through letter dated 11/07/12 submitted adjustment details incorporated in the Revised Accounts for the year ended 30/06/09 and also adjusted entries recorded in the comparative accounts for the year ended 30/06/08. The adjustments made in the Revised Accounts portrays that the Company has misstated the figure of creditors in the accounts. The serious concerns raised in the Impugned Order were:

- a) the Revised accounts included overwhelming adjustments, among others, apparently to reduce the Company's losses from Rs. 102,976,087 to Rs. 53,075,869 due to which the accounts of the Company appeared to be misleading;
- b) the Revised Accounts decreased creditors and created liabilities of directors by Rs. 25 million, decreased cash in hand and increased creditors by Rs. 4 million;
- c) the Auditor at first denied to have performed audit of the Company or issued any report on the Revised Accounts of the Company for the year 2009 and later on accepted the same;



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- d) the audit report given on the Revised Accounts for the year ended 30/06/09 was signed on 21/01/11 which was after the audit report dated 25/12/10 given by the Auditor on the accounts filed by the Company for the year ended 30/10/10;
- e) the annual audited accounts of the Company for the year ended 30/10/2010 filed by the Company disclosed comparative figures of Revised Account issued by the Company for the year 2009 which were not audited at the time of issuance of the said accounts nor had the Auditor reported the aforesaid fact in his report to the members; and
- f) the Auditor of the Company had failed to modify his opinion along with reasons for the issuance of Revised accounts for the year 2009 which would further the user's understanding of the audit report.
7. The Respondent on the basis of the above events and transactions suggesting that the Company and the Auditor have submitted contradictory statements to the Commission passed an *interim order* and recommended initiation of proceedings under section 231 of the Ordinance to inspect the books and accounts of the Company. The Respondent through a separate *order of inspection* authorized Mr. Bilal Rasul, Director, Ms. Sumaira Siddiqui, Joint Director and Mr. Moeed Hassan, Assistant Director to inspect the books of accounts and the books and papers of the Company for the relevant period.



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8. The Appellant has preferred appeal No 47 of 2012 against the *interim order* and appeal no 48 of 2012 against the *order of inspection*, collectively referred to as Impugned Orders. The appeals arise from the same facts and are clubbed together for decision. The Appellant's counsel argued:

- a) the Respondent during the proceedings of section 492 of the Ordinance passed the *order of inspection* under section 231 of the Ordinance. The passing of such order during proceedings under section 492 of the Ordinance are not warranted by law, as such, the *order of inspection* is illegal and invalid;
- b) SCN was not issued under section 231 of the Ordinance and the *order of inspection* was passed without affording an opportunity of hearing, which is against the principle of natural justice. The Respondent should have issued an SCN and only after complying with the process the *order of inspection* should have been issued; and
- c) the appeals are maintainable under section 33 of SECP Act and should be decided on merits.

9. The department representative argued that:

- a) the *order of inspection* was passed to ascertain the true facts of the case. The Appellant and the Auditor submitted contradictory statements and the facts could not be established from the perusal of accounts of the Appellant only and inspection of books and accounts of the Company was necessitated. In order to ascertain ,whether or not



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misstatement has been made by the Company, the Respondent passed the *order of inspection* under section 231 of the Ordinance;

- b) there is no requirement of issuing an SCN before passing an order under section 231 of the Ordinance. The *order of inspection* can be passed by an officer authorized by the Commission through an order stating the reasons; and
- c) the appeals are not maintainable. The appeal No 47/12 has been filed against an *interim order* which is not appealable under section 33(1) (d) of the SECP Act, whereas, appeal No 48/12 has been filed against the *order of inspection* which is an administrative order and is not appealable under section 33(1) (a) of the SECP Act.

10. We have heard the parties and have gone through the record. Our para wise findings on the issues are as under:

- a) the proceedings under section 492 of the Ordinance have not been concluded. The Respondent during the proceedings under section 492 of the Ordinance passed an *interim order* and recommended initiation of proceedings under section 231 of the Ordinance. The *interim order* has not prejudiced the Appellant in any way, as it only seeks further information through an inspection under section 231 of the Ordinance. The inspection report in all likelihood will provide the requisite information to the Respondent to arrive at a fair decision as to the applicability of section 492 of the Ordinance in this particular case. We do not see as to how the *interim order* and the recommendation for initiation of an inspection is against the spirit of section 492 of the Ordinance;



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b) section 231(1) and (2) of the Ordinance is reproduced for ease of reference:

231. *Inspection of books of account by registrar, etc.-* (1) *The books of account and books and papers of every company shall be open to inspection by the registrar or by any officer authorised by the Commission in this behalf if, for reasons to be recorded in writing, the registrar or the Commission considers it necessary so to do.*

(2) *It shall be the duty of every director, officer or other employee of the company to produce to the person making inspection under sub-section (1) all such books of account and books and papers of the company in his custody or under his control, and to furnish him with any such statement, information or explanation relating to the affairs of the company, as the said person may require of him within such time and at such place as he may specify.*

Emphasis added

The legislature has envisaged that the accounts and books and papers of every company should be open for inspection by the officers of the Commission and the only pre-requisite is that *reasons for inspection should be recorded in writing*. We have perused the *order of inspection* which has been passed in compliance with the requirements of the law and is a reasoned order within the meaning of *section 24A (2) of the General Clauses Act, 1897*. We also place reliance on case titled *Ofspace (Private) Limited vs. Federation of the Islamic Republic of Pakistan and 3 others* cited at *2012 CLD 923*, wherein, it has been held that the '*order of inspection*' is administrative order and does not require issuance of SCN; and



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c) section 33(1) of the SECP Act is reproduced for ease of reference:

33. Appeal to the Appellate Bench of the Commission.- (1) Except as otherwise provided any person aggrieved by an order of the Commission passed by one Commissioner or an officer authorized in this behalf by the Commission, may within thirty days of the order, prefer an appeal to an Appellate Bench of the Commission constituted under sub-section (2)

Provided that no appeal shall lie against ----

- (a) an administrative direction given by a Commissioner or an officer of the Commission;
- (b) *an order passed in exercise of the powers of revision or review;*
- (c) *a sanction provided or decision made by a Commissioner or an officer of the Commission to commence legal proceedings; and*
- (d) an interim order which does not dispose of the entire matter.

Emphasis added

The Appellant has filed appeal No 47/12 against the 'interim order' and such orders are not appealable under section 33(1) (d) of the SECP Act. The contention of the Appellant regarding the maintainability of the appeal No 47/12 is, therefore, without merit.

The divisional bench of the Sindh High Court, Karachi in the above referred case titled *Ofspace (Private) Limited vs. Federation of the Islamic Republic of Pakistan and 3 others* cited at 2012 CLD 923 has interpreted section 231 of the Ordinance and has declared it as an administrative order/ direction for inspection and conducting preliminary inquiries into the affairs and books of accounts and papers of the Company. In terms of

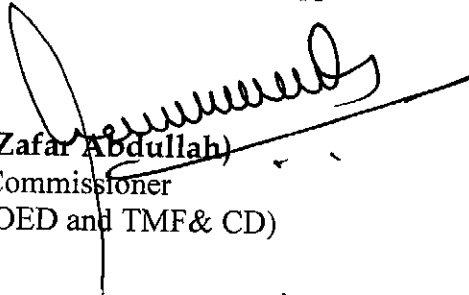


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section 33(1) (a) of SECP Act above, an appeal shall not lie against an administrative direction, as such, the appeal No 48/12 is not maintainable.

Before parting with the order, it merits mentioning here that regulators around the globe decide the issues arising out of non-compliances/defaults on the basis of information available to them. It is, therefore, the prime responsibility of the Commission as regulator to collect information for effective enforcement of the laws being administered by it. Non-provision of information hampers the capability of the Commission to effectively discharge the mandate entrusted. In the absence of relevant information, the Commission cannot be expected to make fair, just and impartial decisions. Non-provision of information by the regulatees / persons concerned has far reaching effects, even more than non-compliance/default, as it obstructs the grant of justice. We at the Commission have "Zero Tolerance" for regulatees who refuse to co-operate for provision of information. The legislature being fully cognizant of the critical importance of the provision of information to the Commission prescribes and ascribes not only special status to the inspector(s) but also recommends severe consequence for non-provision of information.

In view of the above, we do not see any reason to interfere with the Impugned Orders. The appeals are dismissed with no order as to cost.


(Zafar Abdullah)
Commissioner
(OED and TMF& CD)


(Imtiaz Haider)
Commissioner (SMD)

Announced on: 13/12/12