



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. I

In the matter of

Appeal No. 16 of 2008

1. Mr. Reyaz Shaffi
 2. Mr. Ijaz Ahmed Khan
 3. Mr. Adeel Shaffi
 4. Mr. Muhamamad Iqbal
 5. Mr. Arif Shaffi
 6. Mr. Sheikh Aftab Ahmed
 7. Mr. Asif Shaffi
- (All directors of Pakistan PVC Limited)

... APPELLANTS

Versus

Director (Enforcement)
Securities and Exchange Commission of Pakistan

... RESPONDENT

Date of hearing

22/10/12

ORDER

Present:

For the Appellants:

Mr. Sami ud-din (Advocate)

Ms. Ambreen Abbasi (Advocate)

For the Respondent:

Ms. Amina Aziz, Director (Enforcement Department)

Ms. Zohra Sarwar Khan, Deputy Director (Enforcement Department)



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1. This order is in appeal No. 16 of 2008 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the order (the "Impugned Order") dated 28/04/08 passed by the Respondent.
2. On examination of annual accounts of Pakistan PVC Limited (the "Company") for the year ended 30/06/07, it transpired that an amount of Rs. 31.563 million (2006: 30.941 million) was payable to Provident Fund Trust ("the "Trust") by the Company on account of provident fund contribution. Note 3.3 of the accounts of the Company stated that monthly contributions were made both by the Company and employees to the fund at the rate of 8.33% of the basic salary. The record of the Company maintained with the Commission reflected that earlier a penalty of Rs. 5,000 was imposed on the then Chief Executive Officer of the Company vide order dated 08/12/05 for violation of section 227 of the Companies Ordinance, 1984 (the "Ordinance") for the financial year ended 30/06/04. The continuous increase in the amount payable to the Trust reflected that the Company was not making any effort to rectify the default.
3. Show cause notice dated 15/02/08 ("SCN") was issued to the Company and the Appellants under section 227 read with section 229 and 476 of the Ordinance. The Company and the Appellants filed reply to SCN and hearing in the matter was held. It was contended that the Company is facing liquidity crunch which has resulted in delay in payment of outstanding amount to the Trust. The Appellants requested for a lenient view and further added that the Company is in litigation with its ex-employees in the matter of the payment of their final dues including payment of provident fund. The Respondent taking a lenient view and instead of imposing fine again directed the CEO in terms of section 473 of the Ordinance to appoint statutory auditor to evaluate and verify the amount due to the Trust and also verify the amount of provident fund under litigation. Further, the Respondent directed that the amount so



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accessed along with the interest due thereon, other than the amount under litigation, shall be deposited in the bank account as provided in section 227 of the Ordinance.

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

- a) the Respondent erred in his decision as there had been no violation of section 227 of the Ordinance. The duty on the Company to pay employees provident fund contributions is a contractual obligation emanating from the Subscription Agreement and Pakistan PVC Officers Provident Fund Trust Deed (the "Trust Deed") and is not a statutory obligation under section 227 of the Ordinance;
- b) rule 7 of Pakistan PVC Officers Provident Fund Rules (the "Rules") shows that the Company's contribution is calculated and paid after the employee's contribution has been deducted from the salary. Accordingly, it follows that if salaries are not actually paid, there can be no money contributions and there *can be no obligation* to secure such contributions under section 227 of the Ordinance. The relevant provision of section 227 (3) of the Ordinance uses the language...*"collect the contribution ...and pay..."* This further supports that if there are no salaries, the Company cannot collect money contributions from employees nor pay its own contribution. In the instant case, it is the Subscription Agreement and the terms of Trust Deed which create the duty to *actually pay* the money contributions at a specified time. Accordingly, the distinction between *paying* provident fund contributions and *securing* provident contributions should be acknowledged; and



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c) the Company has settled outstanding payments of contributions in the amount of approximately Rs. 30 million and only Rs. 1,163,865 remains outstanding. Alternatively, the Company should be allowed to pay in installments the contributions towards the Trust as in the case of *Messrs. Metropolitan Steel Corporation Limited* cited at 2006 CLD 654, wherein, it was held that the company must repay the outstanding amount to fund (provident fund) in seven monthly installments keeping in view of the liquidity position of the company.

5. The department's representative argued that:

a) section 227(2) of the Ordinance requires that all money contributed to the provident fund should be deposited by a company in the manner prescribed therein. The deposit of the provident fund with a trust has also been recognized by section 227(3) of the Ordinance. The aforesaid requirements are statutory and have to be complied in letter and spirit. The contractual obligations arising out of Subscription Agreement, the provisions of the Trust Deed and the Rules cannot supersede the statutory requirements;

b) the provident fund contributions do not need to be actually paid to the Trust for section 227 of the Ordinance to come into operation. Section 227(3) of the Ordinance mandates a company to collect the contribution of the employee concerned and make its own contribution. Section 227 of the Ordinance does not distinguish between *paying* provident fund contributions and *securing* provident contributions towards the Trust as contended by the Appellants' counsel; and



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- c) the Appellants have already accepted their obligations under section 227 of the Ordinance by settling outstanding payments of contributions towards the Trust. The remaining contributions should be made forthwith and without any further delay as already sufficient time has lapsed.
6. We have heard the parties. 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;



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

(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

(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 subsection (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 subsection shall devolve on the trustees and shall be discharged by them instead of the company

Emphasis Added

- a) the aforesaid provision of the law is clear and unambiguous. Appellants are under a statutory and not merely a contractual obligation to make provident fund contributions towards the Trust. The Subscription Agreement, Trust Deed and the Rules cannot override the provisions of the Ordinance and in case of a conflict, statutory obligations will override contractual obligations;



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- b) pursuant to section 227(3) of the Ordinance, the Company is bound to collect the contribution of the employees concerned and pay such contributions as well as its own contributions to the Trust. Section 227 of the Ordinance casts a duty upon the Company to ensure timely payment of the provident fund contribution to the Trust and not merely *securing* the provident fund contribution as suggested by the Appellants' counsel. In case salaries are not paid to the employees, company is still required to treat both the contribution towards the provident fund made by the company and the employee as 'provident fund payable' in its accounts. The employee had already sustained loss of profit/ return on their respective unpaid provident fund entitlements. Had the provident fund contribution made on time, such would have been substantial profit/ return to the employees for that period; and
- c) the Appellants have already accepted the Impugned Order through their implied conduct and have contended that a sum of approximately Rs 30 million outstanding towards the Trust has been paid and only an amount of Rs 1,163,865 remains outstanding and have requested to allow the Company to pay the remaining outstanding amount in reasonable installments. The Appellants have relied on schedule of amounts paid (annexure P11, P 12 of the written arguments) and on annual report 2012 (annexure P 13 of the written arguments) to establish that the payments have been made to the Trust. The figures provided in the schedule of amount paid (annexure P11, P12) cannot be verified. The present Chief Executive Officer is directed to appoint statutory auditor who shall evaluate and verify the amount due to the Trust at the time of passing the Impugned Order and the payments made thereafter and shall also verify the amount of provident fund under litigation in order to independently verify the contentions of the Appellant.

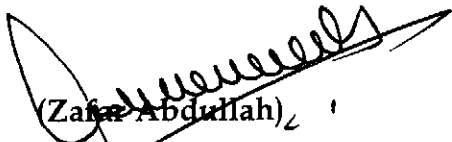


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Further, the present Chief Executive Officer is directed to submit a report in this respect to the Respondent within 60 days of this Order and the trustees of the Trust are directed to facilitate the aforementioned audit.

Upon the verification of provident fund contributions through the aforementioned audit, the Appellants shall submit the balance outstanding amount in equal monthly installments latest by 31/03/13.

In view of the above the appeal is dismissed with no order as to cost.


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


(Imtiaz Haider)
Commissioner (SMD)

Announced on: 16/11/12