

2013 C L D 1710

[Securities and Exchange Commission of Pakistan]

Before Tariq Hussain. Director (Insurance)

PAK KUWAIT TAKAFUL COMPANY LIMITED:

In the matter of Show Cause Notice Issue Date February 20, 2013, decided on 4th April, 2013.

Syed Wajahatullah Quadri, Chief Financial Officer of Messrs Pak Kuwait Takaful Company Limited.

ORDER

Order accordingly.

Companies Ordinance (XLVII of 1984)---Ss. 227 81. 229--Deduction of amount of provident fund from the company employee for deposit in the Provident Fund Account---Late deposit of amount in Provident Fund Account-- Company under provisions of S.227 of Companies Ordinance, 1984 was duty bound to deposit amount of Provident Fund within prescribed period of 15 days in provident fund Account, but company had failed to comply with said provisions of law and had been making payments after said period of 15 days--Company had admitted the delay---Directors of the company, in- addition to the day to day running of the company and the management of its business, also had some judiciary duties i.e. duties held in trust and some wider duties imposed by statute; and breach of those statutory duties, would be a criminal offence, punishable by fine or imprisonment--Directors, were gauged against a higher standard of accountability, which required them to be vigilant and perform their duties with due care--In the present case company and its Directors had failed to perform their duties with due care and prudence---Default of S.227 of the Companies Ordinance, 1984 having been established, penalty as provided under S.229 of the Companies Ordinance, 1984 could be imposed on the company and its Directors-Commission instead of imposing the penalty, took lenient view and condoned the company , due to; the fact that the act of late transfer/deposit of amounts to the Provident Fund had not harmed the interests of the employees of the Company---Company was issued a stern warning that in case of similar non- compliance in future, a strong action would be taken against it.

[Under section 227 read with section 229 of the Companies Ordinance, 1984)

TARIQ HUSSAIN, DIRECTOR (INSURANCE).---This Order shall ,dispose of the proceedings initiated against Messrs Pak Kuwait Takaful Company Limited ("the Company") for not complying with the provisions of section 227 of the Companies Ordinance, 1984 (the "Ordinance").

Background Facts

2. The relevant provisions of section 227 of the Ordinance require each company, registered under the Ordinance, to transfer all money or securities which is deposited by its employees in pursuance of their contracts of service with that company, within fifteen days from the date of such deposit in a special account to be opened in a scheduled bank, and that no portion of such amount may be utilized by that company except in the case of breach of employment contract on part of the employee as provided in that contract and after notice to the employee concerned. For the purpose of ready reference, subsections (1) and (3) of section 227 of the Companies Ordinance, 1984 (the "Ordinance") are reproduced below-

“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.

(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."

3. The Commission, vide its letter bearing reference No.ID/SD/PKTCL/2012/15073 dated December 5, 2012, had asked the Company to submit information related to deduction of Provident Fund amount from its employees and its deposit in the provident Fund account. In response, the Company vide its letter dated December 11, 2012 had provided the requisite information.

4. Upon examining the information provided by the Company vide its letter of December 11, 2012, it was observed mat the Company has been making late payments/transfers i.e. after more than 15 days from the date of deduction of the Provident Fund amounts during various months. Summary of late deposit of Provident Fund amount in the designated account of provident fund is as follows:-

Date of Deduction from Employees	Amount of Provident Fund Deducted from Employees	Total Amount of Provident Fund Deposited	Date of Deposit in the PF Account	Late By (No. of Days)
December 28, 2010	239,560	661,060	February 2, 2011	21
January 27, 2011	245,910	665,566	March 17, 2011	34
February 26, 2011	246,322	668,632	March 25, 2011	12
March 26, 2011	246,322	671,942	April 14, 2011	2
April 27, 2011	313,611	810,506	May 23, 2011	11
May 27, 2011	268,047	726,278	June 24, 2011	13
June 27, 2011	261,474	550,641	July 16, 2011	6
July 27, 2011	259,381	663,367	August 17, 2011	6
August 25, 2011	269,374	647,248	September 22, 2011	13

October 27, 2011	277,665	740,037	November 26, 2011	17
November 28, 2011	260,411	699,806	December 23, 2011	10
December 27, 2011	260,411	696,065	January 12, 2011	1

5. In view of the foregoing paras, it appeared that the Company had contravened the provisions of Section 227 of the Ordinance, which attract penal action against the Company as provided under section 229 of the Ordinance.

Show Cause Notice

6. Accordingly, the Show Cause Notice was issued on February 20, 2013 under section 227 read with section 229 of the Ordinance to the Chief Executive and Directors of the Company, calling upon them to show cause as to why the penalty, as provided under section 229 of the Ordinance, should not be imposed upon the Company and/or its Directors for not complying with provisions of section-227 of the Ordinance.

Company's Response to the Show Cause Notice

7. In response to the said Show Cause Notice, the Company, vide their letter of March 6, 2013, stated that:--

“ Pak-Kuwait Takaful Company Limited is mindful of its legal obligations as per the applicable provisions of Companies Ordinance 1984 ("Ordinance") and the Company has systems and procedures in place whereby compliance of all obligations is ensured to an optimum extent within the law.

Our shareholders comprise of International and Pakistani institutional investors who are extremely conscious of corporate good governance and there is a strong focus on compliance of all applicable legal provisions being ensured at all times. This is rejected by our Board of Directors who are the nominees of our shareholders. Our personnel are trained to adhere to these principles and Securities and Exchange Commission of Pakistan being the regulator can be assured that there are standards and good corporate practices in place so as to ensure compliance with the Ordinance.

Towards this you would be pleased to note that Pak-Kuwait Takaful Company Limited has in place a duly registered Provident Fund for the benefit of its employees. The affairs of the Provident Fund are managed by the trustees who are fully empowered to manage the operational matters without any interference from the Pak-Kuwait Takaful Company Limited Management.

The Provident Fund that has been set up by Pak-Kuwait Takaful Company Limited operates and functions independently as a separate legal body with its own bank account and management. The obligation of Pak-Kuwait Takaful Company Limited when it comes to the Provident Fund is to ensure timely transfer of contributions of its employees and itself to the designated bank account of the Provident Fund to ensure compliance with section 227 of the Ordinance.

There have been some inadvertent delays in the transfer of contributions in to the Bank Account of the Provident Fund, however these were involuntary in nature. None of the funds were at any' time utilized by Pak-Kuwait Takaful Company Limited management for its own purposes. We can assure you that

systems have been put in place where such delays are not repeated for any reason whatsoever. This is evidenced by the fact that deductions have been transferred without any delay in the year 2013. Rest assured such errors will not be repeated in the future.

Against this backdrop, Pak-Kuwait Takaful Company Limited would appreciate if the issue at hand of delayed transfers to the Provident Fund in the past could kindly be condoned by the Securities and Exchange Commission of Pakistan and no adverse action is taken against our organization."

8. The reply of the Company reveals that the Company has admitted the delays in transfers of the amounts to the Provident Fund on various instances/occasions.

Hearing of the Case and Subsequent Developments

9. Although, the Company had not requested for hearing in the matter, the Commission, on its own motion, had scheduled the hearing in the matter for March 26, 2013 at 11.00a.m., which was communicated to the Company via the Commission's hearing notices No.ID/Enf/Pak-Kuwait/2013/15868 dated March 12, 2013.

10. Accordingly, the said hearing was attended by Mr. Syed Wajahatullah Quadri, Chief Financial Officer of the Company (who will be referred to as- the "Company's representative" hereinafter).

11. Brief proceedings of the hearing of March 26, 2013 are as follows:-

- (a) Prior to the start of the hearing proceedings, the Company's representative handed over the blanket Power of Attorney to the Commission;
- (b) The said Power of Attorney was signed by Mr. Imtiaz Bhatti, Managing Director/Chief Executive Officer of the Company, wherein the reference¹ was made to the resolution of the Board of Directors of the Company dated. March 7, 2013, hence accordingly, the extracts of the said resolution of the Board was also provided to the Commission in which Mr. Imtiaz Bhatti, Managing Director/Chief Executive Officer was authorized by the Board to represent the Company and its Directors in any proceedings that may be brought against the Company by any department of the Commission in relation to the manner in which the affairs of the Company have been managed in the past. The said resolution of the Board also empowered/authorized Mr. Imtiaz Bhatti, Managing Director/Chief Executive Officer of the Company to delegate this power to any of the employees of the Company, which has been delegated to the Company's representative;
- (c) The Company's representative was asked to present the stance of the Company. to which the Company's representative stated that the intent of the Company was not mala fide, and that the Company had in fact maximized its profits on the Provident Fund account. which has ultimately benefited the employees of the Company;
- (d) The Company's representative, while clarifying the profitability aspect, stated that the Fund generated better profits and better returns all due to late transfer of amounts to the Provident Fund. He also mentioned that had these amounts been transferred to the Fund earlier, the Fund would not have generated this much profit. In this regard, a detailed working of the profits of the Provident Fund was provided, which revealed that amounts ranging from Rs. 550,641 to Rs.

810,506 were deposited with a delay from 1 day to 34 days, which generated profits at the rates from 10.25 per cent to 13.10 per cent with marginal profits rates that ranged from 2.96 per cent to 5.78 per cent), thereby benefiting the Fund by an amount of Rs.186,124;

- (e) The Company's representative, while admitting the default of the provisions of section 227 of the Ordinance, mentioned that the Company is not in contravention of the said section during the year 2013;
- (f) Finally, the Company's representative requested the Commission to take a lenient view and condone the Company for contravening the provisions of section 227 of the Ordinance.

Consideration of Company's Submissions

12. I have carefully examined and given due consideration to the written and verbal submissions of the Company (through the Company's representative, Mr. Syed Wajahatullah Quadri, Chief Financial Officer of the Company), and have also referred to the provisions of the Ordinance. I am of the view that there has been an established default of section 227 of the Ordinance, as the Company was required to transfer the amounts collected from the employees in respect of the Provident Fund in the designated bank account maintained for the purpose of the Provident Fund within 15 days.

13. However, before proceeding further, find it relevant to discuss the duties of the Directors. The Directors, in addition to the day-to-day running of the Company and the management of its business, also have some "fiduciary" duties i.e. duties held in trust and some wider duties imposed by statute and breach of these statutory duties will usually be a criminal offence, punishable by fine or imprisonment. Hence, the Directors are gauged against a higher standard of accountability which requires them to be vigilant and perform duties with due care. In the instant case, however, the Company and its Directors have failed to perform their duties with due care and prudence. As the Directors are supposed to be well aware of their legal obligations in connection with the aforesaid statutory requirement of section 227 of the Ordinance, as aforesaid, therefore, it could be legitimately inferred that the default was committed.

Conclusion

14. After carefully examining the arguments and studying the facts and findings of the case as mentioned in the above paras of this Order, the default of section 227 of the Ordinance is established, Therefore, the penalty as provided under section 229 of the Ordinance can be imposed onto the Company and/or its Directors.

15. Section 229 of the Ordinance states that:--

"Penalty for contravention of sections 226, 227 or 228.--- Whoever contravenes or authorises or permits the contravention of any of the provisions of section 226 or section 227 or section 228 shall be punished with a fine which may extend to five thousand rupees and shall also be liable to pay the loss suffered by the depositor of security or the employee on account of such contravention."

Order

16. In exercise of the power conferred on me under section 229 of the Ordinance, I, instead of imposing the penalty, take a lenient view; and thus, condone the Company due to fact that the act of late transfer

of amounts to the Provident Fund has not harmed the interests of the employees of the Company. Also, the Company is hereby issued a stern warning that in case of similar non-compliance in future a stronger action against the Company will be taken.

17. This Order is issued without prejudice to any other action that the Commission may initiate against the Company and/or its management (including the Chief Executive Officer of the Company) in accordance with the law on matters subsequently investigated or otherwise brought to the knowledge of the Commission.