

2013CLD 82

Securities and Exchange Commission of Pakistan

Before Muhammad Ali, Chairman and Muhammad Asif Arif, Commissioner (Insurance)

AZMAT ALI SHEIKH, DIRECTOR/CHIEF EXECUTIVE OFFICER and 6 others--Appellants

VERSUS

EXECUTIVE DIRECTOR (ENFORCEMENT), SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN---

Respondent

Appeals Nos. 9 and IO of 2009, decided on 31st May, 2012.

Umar Farooq for Appellants

Muhammad Tariq Hussain, Director, Departmental representative.

Date of Hearing: 14th February, 2012.

ORDER

Appeal dismissed

[Companies Ordinance (XLVII of 1984)]--Sections 245 & 476--Securities and Exchange Commission of Pakistan Act (XLII of 1997), S.33---Securities and Exchange Commission (Appellate V Bench Procedure)

Rules, 2003, R.17(5)--Company which was required to prepare and file its profit and loss account and balance sheet for relevant quarters within prescribed period having failed to file the same accordingly, a penalty of Rs.20,000 on each Director of the company was imposed--Validity---Reasons for failure of company to comply with provisions of S.245(1)(b) of Companies Ordinance, 1984 like failure of transfer of record pertaining to the affairs of the company, including books of account; and other statutory books by ex-Management; and failure in hiring of right professionals, could not be considered as valid justification for the long delay in filing of the said accounts--"Maintenance of books of accounts pertaining to the affairs of the company, was the responsibility of the Management of the company present at the time of issuance of show-cause notice--New management of the company, ought to have instituted appropriate proceedings for transfer of shares in their name--Directors and Chief Executive of the company, were supposed to be well aware of their legal obligations in accordance with statutory requirement and consequences of said default---Company having failed to submit the accounts despite the issuance of show-cause notice and initiation of proceedings it could not be allowed to take a plea that the act was not done knowingly--- Default for first quarter continued for 265 days, while for second quarter for 142 days---Directors of the company in complete disregard to the direction of the authorities were adamant and had not submitted the accounts for the relevant period---Commission on appeal, in exercise of powers under Ss.245(3) and 476 of the Companies Ordinance, 1984 and R.17(5) of the Securities and Exchange Commission (Appellate Bench Procedure) Rules, 2003, enhanced the amount of fine imposed on the Directors of the company to the maximum fine of Rs.100,000 on each Director of the company.

This order shall dispose of Appeals Nos.9 and 10 of 2009 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the orders dated 27-01-2009 (the Impugned Orders") passed by the respondent.

2. In terms of clause (b) of subsection (1) of section 245 of the Companies Ordinance 1984, (the "Ordinance"), Pakistan Guarantee Insurance Company Limited [the "Company"] was required to

prepare and file its profit and loss account and balance sheet for first quarter ended 31-03-2008 within a period of one month of close of first quarter i.e., on or before 30-04-2008 and second quarter ended 30-06-2008 within a period of two months 'of close of the second quarter i.e., on or before 31-08-2008 with. The Commission. The Company, however, failed to submit the aforesaid accounts within the prescribed time.

3. Show cause notices dated 19-06-2008 and 6-10-2008 ("SCNs") were issued to the appellants for failure to submit quarterly accounts within the stipulated time period. The appellants replied to the SCNS and hearing in the matter was held, The respondent, dissatisfied with the response of the appellants, passed the Impugned Orders and imposed a penalty of Rs.20,000 on each appellant under subsection (3) of section 245 read with section 476 of the Ordinance.

4. The appellants preferred to file the instant appeal against the Impugned Orders. The appellants counsel argued that:--

- (a) the new Chief Executive was appointed under 05-11-2001 after the previous of directors ("BOD") holding resigned. The said agreement majority of shares to appellant an agreement on management/board majority of shares included transfer of No.1. The previous management with mala fide intent did not transfer the said shares to appellant No.1. The financial record belonging to the Company was not handed over to the present Chief Executive and management of the Company despite repeated written requests;
- (b) the Company could not submit the said accounts within the prescribed time because of non- availability of record pertaining to the affairs of the Company [including books of account and other statutory books). The previous management did not hand over the required record to the new management when the Company was acquired in the year 2001. Moreover, in order to compile the record and accounts of the Company, number of chartered accountant firms were hired but none of them could succeed in updating the record;
- (c) the Company had failed to raise its paid up capital to a minimum of Rs. 50 million under section 28 of the Insurance Ordinance, 2000 (the "Insurance Ordinance") and by virtue of directive issued by the Commission on 02-01-2003, the Company was stopped from underwriting insurance business in the year 2003. Since the business of the Company has ceased, it should not have been called upon to prepare and submit the quarterly accounts for first quarter ended S. 01-03-2008 and second quarter ended 30-6-2008;
- (d) the Company is non-functional since 2003. There is no staff left to prepare and submit the quarterly accounts. The respondent has failed to appreciate the said facts while passing the Impugned Orders there was no intentional default on the part of the management of the Company to commit the said statutory default.

5. The respondent argued that:--

- (a) in case the shares of the Company were not transferred to the appellants, the new management should have applied to the competent authority for remedy. Maintenance of books of accounts and record pertaining to the affairs of the Company is the responsibility of management of the Company which was in charge of the affairs at the time of issuance of SCN;

- (b) the Company should have made necessary arrangements to acquire the desired record much earlier when the transaction of acquisition was being carried out. The Company should have compiled financial data by the time of issuance of SCN as more than seven years have elapsed since the acquisition by the appellants in the year 2001. The appellants hired chartered accountant firms to compile the said data and requested for further time [latest by 31-12-2008) for filing of such accounts. No accounts were filed despite the expiry of requested time:
- (c) the Company had requested for further relaxation of time in order to prepare and submit its books of accounts and other statutory requirements however, the Company failed to submit the required accounts within the stipulated time. The Justification provided by the appellants that the Company is not liable to comply with the provisions of section 245 of the Ordinance as it not doing any business since the year 2003, is not valid;
- (d) non-availability of staff does not relieve the Company from preparation and circulation of accounts as required by law. The orders were passed after giving due consideration to the written as well as verbal submissions of the legal representative of the appellants on 21-01-2009. The Chief Executive and directors are supposed to be well aware of their legal obligations with regards to the statutory requirements; hence, the default was committed knowingly.

6. We have heard the parties. Section 245(1) and (3) of the Ordinance have been reproduced for ease of reference:--

Section 245. [Quarterly] accounts of listed companies.--(1) Every listed company shall—

- (a) within (one month] of the close of [first, second and third Quarter] of its year of account, prepare and transmit to the members and the stock exchange in which the shares of the company are listed a profit and loss account for, and balance-sheet as at the end of that [quarter], whether audited or otherwise: and
- (b) simultaneously with the transmission of the [quarterly] profit and loss account and balance-sheet to the members and the stock exchange, file with the registrar and the Commission such number of copies thereof not being less than three, as may be prescribed.

(2)

(3) If a company fails to comply with any of the requirements of this section, every director, including chief executive and chief accountant of the company who has knowingly by his act or omission been the cause of such default shall be liable to a fine of not exceeding one hundred thousand rupees and to a further fine of one thousand rupees for every day during which the default continues.]

Emphasis added

- (c) & (c) Due consideration to the written as well as verbal submissions of the appellants have been given regarding non-submission of quarterly accounts and balance sheet within the prescribed time. As per record, the said accounts have not been received in the Commission till date. Reasons like failure of transfer of record pertaining to the affairs of

the Company including books of account and other statutory books by ex-management and failure in hiring of right professionals could not be considered as valid justification for the long delay in filing of the said accounts. Maintenance of books of accounts pertaining to the affairs of the Company is the responsibility of the management of the Company present at the time of issuance of SCN, The new management ought to have instituted appropriate proceedings for transfer of shares in their name. The Company has not submitted (audited/unaudited] accounts to the Commission till date, which shows the non-serious attitude of the appellants towards compliance of the provisions of law; and

- (d) The directors and Chief Executive of the Company are supposed to be well aware of their legal obligations in connection with aforesaid statutory requirement and consequences of the said default. The appellants failed to submit the accounts despite the issuance of SCN and initiation of proceedings; therefore, they cannot be allowed to take a plea that the act was not done knowingly.

The accounts for first quarter ended 03-03-2008 were required to be filed by April 30-04-2008 but the default continued for 265 days while the accounts for second quarter ended 30-6-2008 were required to be filed by 31-08-2008 and the default continued for 142 days (calculated at the time of passing of the Impugned orders). The appellants in complete disregard to the direction of the respondent are adamant and have not submitted the accounts for the relevant period till date.

In view of the above and in exercise of powers conferred under section 245(3) read with section 476 of the Ordinance and rule 17(5) of the Appellate Bench Rules, 2002; we hereby, enhance the fine to the maximum fine of Rs. 100,000 on each director of the Company. The appeals are dismissed with no order as to cost.