

Appeal No.53 of 2010, decided on 13th July, 2012.

Securities and Exchange Commission of Pakistan

Before Imtiaz Haider, Commissioner (SM) and Mohammed Asif Arif, Commissioner (Insurance)

K.D. Rajani for Appellant

Shahzad Afzal, Joint Director and Haris Bin Tipoo

Deputy Director, Departmental Representatives

YOUNUS DAWOOD, CHIEF EXECUTIVE, M/S. DYL MOTORCYCLE LIMITED and 4 others---Appellants

DIRECTOR (ENFORCEMENT)/ADDITIONAL REGISTRAR OF COMPANIES, SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN

[Securities and Exchange Commission of Pakistan Act (XLII of 1997)---Section 33---Companies Ordinance (XLVII of 1984), Ss. 214, 216 & 476--Failure of the Directors of the company to disclose the nature of their concern and interest in the contract or arrangement in the meeting of Board of Directors---Directors had participated in the meeting to form quorum at the time of discussion and voted for equity investment in associated company in contravention of provisions of Ss.214 & 216 of the Companies Ordinance, 1984--Director (Enforcement) of the Commission vide impugned order imposed penalty of Rs.2,000 each on the Chief Executive and Directors of the company--Validity--By virtue of S.214 of the Companies Ordinance, 1984, Director of a company having concern or interest in a contract or arrangement made by the company was required to disclose the direct interest and was not allowed to take part in the discussion or vote on the contract or arrangement in which he was interested -- -Presence of interested Director was not counted for the purpose of forming quorum of a Board of Director's meeting at which such contract or arrangement was discussed in terms of S.216 of the Companies Ordinance, 1984--Directors of the company had failed to comply with the provisions of S.214 of the Companies Ordinance, 1984--Company had altered the statement of material facts by adding para concerning the Director's interest---Penalty was rightly imposed on the Directors on their failure to comply with the provisions of S.214 of the Companies Ordinance, 1984--In absence of any reason to interfere with impugned order, appeal was dismissed, in circumstances.]

ORDER

This order shall dispose of Appeal No.53 of 2010 filed under section 33 of the Securities and Exchange Commission of Pakistan (the 'Commission') Act, 1997 (the "SECP Act") against the order dated 22-10-2010 (the "Impugned Order") passed by the Respondent.

2. Examination of the annual audited accounts for year ended 30-06-2008 (the "Accounts") of DYL Motorcycles Limited (the 'Company') revealed that the Company has made equity investment of Rs.175.090 million by acquiring 442,148 (2007: nil) -ordinary shares at Rs.396 each of Balochistan Engineering Works, Limited ('YBEWL') (an associated company). During the year under review the Chief Executive/directors of the Company were also the Chief Executive/directors of the associated company. Respondent department vide its letter dated 14-9-2009 advised the Company to furnish minutes of the meeting of the Board of Directors ('BoD') held during the year. In response, the Company vide its letter dated 14-10-2009 submitted the relevant information which revealed that the Appellants/ directors had participated in the meeting and had passed the following resolution dated 3-6-2008:--

'Resolved that the Company be authorized to make investment of Rs.175,090,608 in Balochistan Engineering Works Limited.

To get the approval of share holders, Board of Directors decided to hold Extra Ordinary General Meeting of the Company on June 25, 2008. The Secretary was asked to issue notice of E.O.G.M. to all the members accordingly, with copies of draft resolution.

3. Analysis of the documents and reply submitted by the Company reflected that the Appellants/directors had not disclosed the nature of their concern and interest in the meeting of the BOD held dated 03-06-2008. The Appellants/Directors participated In the meeting to form quorum at the time of discussion and voted for equity investment in BEWL in contravention of section 214 and section 216 of the Companies Ordinance, 1984 (the 'Ordinance').

4. Show Cause Notice dated 10-05-2010 ('SCN') was issued to the Chief Executive and directors of the Company under section 214(6) and section 216(3) read with section 476 of the Ordinance. The Appellants submitted written reply and hearing in the matter was held. The Respondent, not satisfied with the response passed the Impugned Order and imposed penalty of Rs .2,000 (Rupees Two Thousand Only) each on the Chief Executive and directors of the Company.

5. The Appellants preferred to file the instant appeal against the Impugned Order. The Appellants counsel argued that:

(a) equity investment of Rs. 175.090 million in BEWL was made in accordance with the approval of shareholders in the Extra Ordinary General Meeting ("EOGM") held on 25-06-2008. The notice of EOGM to the shareholders is in accordance with section 160(1)(b) of the Ordinance and is a testimony that the directors had disclosed their concern and interest for the proposed resolution; and

(b) investment made in associated company with the approval of shareholders as required under section 208 of the Ordinance cannot be deemed as contravention of section 214 or section 216 of the Ordinance.

6. The Department representatives argued that:--

(a) the Statement of material facts under section 160(1)(b) of the Ordinance provided by the Company along with the letter dated 14-10-2009 has been cross examined with the copy of Statement provided with the rejoinder to the Notice, The Company has altered the Statement and the para concerning the directors' interest and concern had been added later on; and

(b) the Chief Executive/ directors have failed to comply with the provisions of section 214 of the Ordinance by not disclosing the nature of their concern and interest in the meeting of the BoD held on 3-6-2008. Similarly, the directors including Chief Executive participated in the meeting to form quorum and voted for equity investment in BEWL in contravention section 216 of the Ordinance. '

7. We have heard the parties. Sections 214(1) and (6) and 216(1) and (3) of the Ordinance have been reproduced for ease of reference:--

214. Disclosure of interest by director.-

(1) Every director of a company who is in any way, whether directly or indirectly; concerned or interested in any contract or arrangement entered into, or to be entered into, by or on behalf of the company shall disclose the nature of his concern or interest at a meeting of the directors:

Provided that a director shall be deemed also to be interested or concerned if any of his relatives, as defined in the Explanation to subsection (1) of section 195, is so interested or concerned.

(6) A director who fails to comply with subsection (1) or sub-section (2) shall be liable to a fine which may extend to five thousand rupees.

Emphasis added

216. Interested director not to participate or vote in-proceedings of directors.--

(1) No director of a company shall, as a director, take any part in the discussion of, or vote on, any contract or arrangement entered into, or to be entered into, by or on behalf of the company, if he is in any way, whether directly or indirectly, concerned or interested in the contract or "arrangement, nor shall his presence count for the purpose of forming a quorum at the time of any such discussion or vote; and if he does, vote, his vote shall be void.

(2) Every director who knowingly contravenes any of the provisions of subsection (1) or subsection (2) shall be liable to a fine which may extend to five thousand rupees.

Emphasis added

(a) and (b) By virtue of section 214 of the Ordinance, a director of a company having concern or interest in a contract or arrangement made by the company is required to disclose the direct or indirect interest. Similarly, interested director is not allowed to take part in the discussion or vote on the contract or arrangement in which he is interested. The presence of interested director is not counted for the purpose of forming quorum of a BoD meeting at which such contract or arrangement is discussed in terms of section 216 of the Ordinance.

The aforesaid provisions of law are clear and explicit. In the instant case, it is evident that the Appellants/directors of the Company failed to comply with the provisions of section 214 of the Ordinance by not disclosing the nature of their interest in the BOD meeting held on 03-06-2008. The Company has altered the Statement of material facts under section 160(1)(b) of the Ordinance by adding para concerning the directors interest. We take strong exception to the fact that the Appellants/directors have provided fabricated copy of such Statement of material facts and would argue the respective department to take serious

notice of such appellant submission of fabricated documents in future. The arguments of the Appellants are that equity investment of Rs. 175.090 million in BEWL was made in accordance with the approval of shareholders in the EOGM and the notice of such EOGM to the shareholders was in accordance with section 160(1)(b) of the Ordinance does not absolve the Appellants from violation of section 214 and section 216 of the Ordinance.

In view of the above, we see no reason to interfere with the impugned order: The appeal is dismissed with no order as to costs

Appeal dismissed