



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. III

In the matter of

Appeal No. 36 of 2011

1. Mr. Khalid Mumtaz Malik
2. Mr. Sadruddin Hashwani
3. Mr. Anwar Moin
(All directors of OPI Gas (Pvt.) Ltd) Appellants

Versus

Director (Enforcement) Respondent

Date of hearing 09/04/13

ORDER

Present:

For the Appellant:

Mr. M. Javed Panni, Corporate Consultant

Department representative:

Mr. Bilal Rasul, Director (Enforcement)

Mr. Alshah Ali Raza, Deputy Director (Enforcement)



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1. This order is in appeal No. 36 of 2011 filed under section 33 of Securities and Exchange Commission of Pakistan Act, 1997 ("the SECP Act") against the order dated 10/01/11 (the "Impugned Order") passed by the Respondent.
2. The facts leading to the case are that the Enforcement Department ("the Department") of the Securities and Exchange Commission of Pakistan ("the Commission") while examining the annual audited accounts ("the Accounts") of OPI Gas (Pvt.) Ltd ("the Company") for year ended 30/06/09 observed that an amount of Rs. 55 million was advanced to Hashwani Hotels Limited ("HHL"), an associated undertaking of the Company, which carried mark-up at the rate of 3 months KIBOR plus 2% per annum. The Company passed a special resolution in its Extraordinary General Meeting held on 27/12/08 ("EOGM") for making investment upto Rs. 120 million. The ledger account of HHL maintained in the books of the Company provided that the Company had been making payment as advance to HHL since 03/01/09. On 05/02/09, the approved limit of Rs. 120 million had been exhausted as till that date the Company had made a total advance of Rs. 130 million to HHL. From 05/02/09 to 30/06/09, the Company had also made an advance of Rs. 100 million to HHL. The Company, thus, had made a total advance of Rs. 230 million to HHL which was Rs. 110 million in excess of the approved limit of Rs. 120 million.
3. Show Cause Notice ("SCN") dated 19/10/10 under section 208 read with section 476 of the Companies Ordinance ("the Ordinance") was issued to the Company and its directors for making additional investment in HHL in excess of the approved limit of Rs.120 million in terms of special resolution. The Appellants' representative filed reply to the SCN and hearing in the matter was held. The Respondent, dissatisfied with the response of the Appellants,



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passed the Impugned Order and imposed penalty of Rs 100,000 on each of the Appellants.

4. The Appellants have preferred the instant appeal against the Impugned Order. The Appellants' Representative argued that the Company had made investment in accordance with the special resolution passed under section 208 of the Ordinance. The advance against approved limit of Rs. 120 million was made from time to time in accordance with the special resolution. The special resolution was an open ended approval and did not restrict its application to one time investment or upto a period of one year. The Respondent failed to take into account the periodical repayments made by HHL and was not right in reaching the conclusion that total advance of Rs. 230 million had been made which is Rs.110 million in excess of the approved limit of Rs.120 million. The entries made in the Company ledger revealed that for the period 03/01/09 to 02/02/09, the total advances amounted to Rs.105 million. On 07/02/09, an amount of Rs. 30 million was repaid which had brought the outstanding balance down to Rs. 75 million. Through subsequent repayments the outstanding amount was reduced to zero on 25/02/09. During the period 03/01/09 to 30/06/09, an amount of Rs. 234 million was advanced of which an amount of Rs. 175 million was repaid. As a result the net outstanding advance at close of the accounting period stood at Rs. 59 million only. The net advanced amount, therefore, at no time exceeded the approved amount of Rs. 120 million.
5. The department's representative argued that section 208(1) of the Ordinance postulates that a company cannot make an investment in any of its associated companies or associated undertakings except under the authority of special resolution indicating nature and amount of investment and terms and conditions attached thereto. The special resolution authorized investment of



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Rs. 120 million which cannot be construed as a blanket investment approval to be used on a rollover basis. The said authority extinguishes as soon as the investment reaches the approved limit. The special resolution indicated that the Company had passed a resolution for making an advance up to Rs. 120 million. The ledger account of HHL, however, maintained in the books of the Company provides that the Company had been making payment as advance to HHL since 03/01/09. On 05/02/09 the approved limit of Rs. 120 million was exhausted as till that date the Company had made a total advance of Rs.130 million to HHL. From 05/02/09 to 30/06/09, the Company continued making advances of an additional Rs. 100 million to HHL. The Company had, therefore, made a total advance of Rs. 230 million to HHL which is Rs. 110 million in excess of the approved limit of Rs. 120 million.

6. We have heard the parties. Special resolution under section 208(1) of the Ordinance passed in the EOGM and sections 208 of the Ordinance are reproduced for ease of reference:

Special resolution

the Company be and is hereby authorized to make investments in the form of advance/loan in M/s Hashwani Hotels Limited (HHL), an associated company as per terms and conditions given hereunder:

Name of investee Company: Hashwani Hotels Limited (HHL)

Amount: Up to Rs.120,000,000/-
(Rupees One Hundred
and Twenty Million)

Nature: Short Term Advance

Rate of Return: 3 Months KIBOR + 2%

Further Resolved that the Chief Executive of the Company be and is hereby authorized for an on behalf of the Company, to make the investment to the aforementioned extent at such time as the Chief Executive may think



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appropriate and to realize such investments as and when deemed fit and proper to the best interest of the Company.

208. Investments in Associated companies and undertaking. - (1) A company shall not make any investment in any of its associated companies or associated undertakings except under the authority of a Special resolution which shall indicate the nature period and amount of investment and terms and conditions attached thereto.

Provided that the return on investment in the form of loan shall not be less than the borrowing cost of investing company.

Explanation: *The expression 'investment' shall include loans, advances, equity, by whatever name called, or any amount, which is not in the nature of normal trade credit.*

Emphasis Added

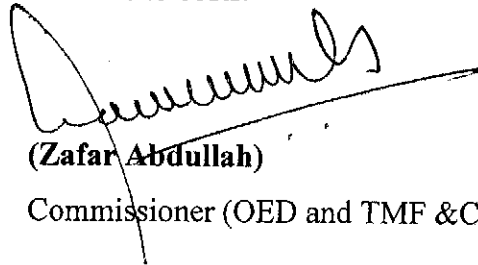
section 208 of the Ordinance clearly sets out the requirement to pass a special resolution at the time of making advances in associated companies. Section 208 of the Ordinance requires that the special resolution "... shall indicate the nature period and amount of investment and terms and conditions attached thereto." In the instant case the Appellants passed a special resolution to make investments in the "*form of advance/loan in M/s Hashwani Hotels Limited (HHL), an associated company...*" upto to an amount of Rs. 120 million. It was further resolved that the Chief Executive was authorized to make the investment, "... as the Chief Executive may think appropriate and to realize such investments as and when deemed fit and proper to the best interest of the Company.". The special resolution clearly states that the Company is authorized to invest upto an amount of Rs. 120 million and the wordings of the resolution has not restricted it to be a one-off investment or investment made within a time frame. In accordance with the special resolution, the amount of Rs. 120 million could be given as advance to HHL on a recurring basis as long as the total amount advanced did not exceed the limit upto Rs. 120 million. In the instant case, there were periodical repayments and the outstanding amounts

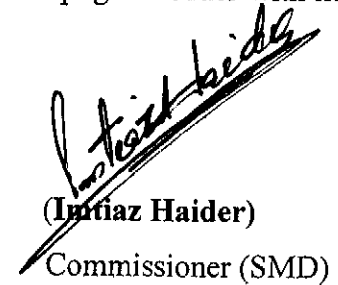


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had been brought down considerably. The net outstanding advance at close of the accounting period stood at Rs. 59 million only and at no point exceeded the approved limit of Rs. 120 million. The Respondent, therefore, had wrongly assumed given the recurring nature of the investment that the amount had exceeded by Rs. 110 million to Rs. 230 million.

The threshold of Rs.120 million set out in the special resolution was never breached, as such; no violation of section 208 of the Ordinance was committed as alleged. In view of the foregoing, we set aside the Impugned Order with no order as to costs.


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


(Imtiaz Haider)
Commissioner (SMD)

Announced on 22/05/13