

Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. I

In the matter of

Appeal No. 53 of 2011

EFU General Insurance Limited

...Appellant

Versus

Executive Director/Securities Market Division,
Securities and Exchange Commission of Pakistan

...Respondent

Date of hearing

19/02/15

ORDER

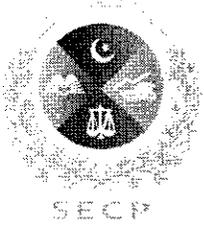
Present:

For the Appellants:

1. Mr. Hasan Mandviwala, Advocate
2. Mr. Naveed-ul-Haq Advocate Supreme Court

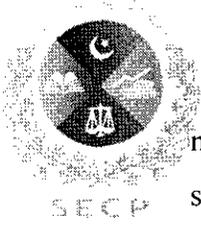
For the Respondent:

Mr. Muhammad Farooq, Joint Director, SMD



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1. This order is in appeal No. 53 of 2011 filed under section 33 of the Securities and Exchange Commission of Pakistan Act (the "Commission"), 1997 against the order dated March 18, 2011 (the "Impugned Order") passed by the Respondent.
2. The brief facts of the case are that EFU General Insurance Limited ("Appellant") made purchase and sale transactions as a more than ten percent shareholder of EFU Life Assurance Limited (the "Issuer Company") within the period of less than six months. On account of the transactions, the Appellant made gain of Rs. 64,894.928/-, computed in the manner prescribed in Rule 16 of the Companies (General Provisions and Forms) Rules, 1985 (the "Rules"). The Appellant tendered Rs. 54, 013,826/- in favour of the Issuer on 27/12/08. Whilst, the accrual of balance amount of gain Rs. 10,881,102/- was neither reported by the Appellant, nor its tendering or recovery was intimated by the Commission as provided section 224(2) of the Companies Ordinance, 1984 (the "Ordinance"). The Appellant was, therefore, intimated vide letter dated 24/11/09 that as provided in section 224 of the Ordinance, the amount of the aforementioned balance has now vested in favour of the Commission. Mandviwalla and Zafar Advocates and Legal Consultants ("Legal Counsel") submitted their response vide letter dated 09/12/09.
3. Show Cause Notice dated 18/02/10 ("SCN") was issued to the Appellant under section 224 of the Ordinance. Hearings on the matter were held on 01/06/10 and 08/12/10. Mr. Adil Shafi, Senior Associate and Ms. Sana Iftikhar appeared on behalf of the Appellant and made their submissions. The Respondent dissatisfied with the response of the Appellants held that the arguments presented by the Appellant have no merit, the request to withdraw SCN was rejected and the Appellant was directed to tender Rs. 10,881,102 to the Commission as provided in section 224(2) of the Ordinance.
4. The Appellant has preferred instant Appeal against the Impugned Order. The Appellant's counsel argued that the Respondent has misconstrued and misconceived the applicability of section 224 of the Ordinance. Section 224 of the Ordinance, requires the owner to (i)



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make a report and (ii) tender the amount of gain to the Issuer Company and simultaneously (iii) send an intimation to this effect to the Registrar and the Commission only under the following circumstances:

- a. When the owner makes any gain by the purchase and sale of any shares of the Issuer Company within a period of less than six months; or
- b. When the owner makes any gain by the sale and purchase of any shares of the Issuer Company within a period of less than six months; and
- c. The Owner either directly or indirectly consistently continues to be the beneficial owner of more than ten percent shares of the Issuer.

Further, it is contended that the Appellant tendered Rs. 54, 013,826/- in favour of the Issuer Company on 27/12/08 as gain made on purchase and sale of shares during the period from 18/06/07 to 14/12/07 in compliance with section 224 of the Ordinance and notification of the same was provided to the Commission pursuant to the letter dated 27/12/07. Subsequently the Appellant purchased 20,162,580 shares of Issuer Company on 17/12/07 when the Appellant was not a shareholder of Issuer Company. Before this transaction, the Appellant was neither a 'direct' nor an 'indirect' beneficial owner of the shares of EFU Life Assurance Limited for the purposes of section 224(2) of the Ordinance. After 17/12/09, the Appellant only purchased shares of Issuer Company as evident from the details of purchases listed from serials 23 to 35 of the table contained in paragraph 2 of the Impugned Order and did not sell any shares it purchased from 17/12/07 to 10/06/08. Therefore, since no shares were sold, the provisions of section 224 (1) of the Ordinance will not be attracted and the Respondent erred in linking the purchase and sale of shares occurring between 18/06/07 and 14/12/07 with only the purchase of shares occurring between 17/12/07 and 10/06/08. The Respondent's assertion, therefore, that the transactions resulted in the gain of PKR 64,894,928 is incorrect and erroneous. Moreover, the selling and re-purchasing of shares by the Appellant was a market based exercise as the rates they were sold at were determined by the market forces. The shares were sold on 14/12/07 at Rs. 524.55 per share and were re-purchased by the Appellant on 17/12/07 at Rs. 525.75 per share (i.e. at Rs. 1.20 more



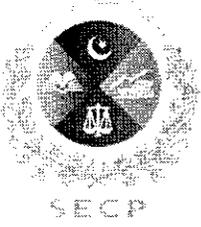
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than they were sold at) hence resulting in a loss to Appellant. Paragraph 7 (c) and 7 (e) of the Impugned Order, transpires that the Respondent has forcefully applied the provision of section 224 of the Ordinance, in the instant case to merely give effect to the spirit of section 224 of the Ordinance, which is misapplication of law. Reliance is placed on *Khan Gul Khan and Other (2010 SCMR 539)*. Reliance is also on placed on the judgment of the Supreme Court of Pakistan cited at *2011 CLD 907*, wherein the Honorable Supreme Court of Pakistan while discussing the objective of Section 224 of the Ordinance in Civil Appeal No. 946/2005, has held that:

“----- in no case SECP is entitled to the gains. ----- It should be clarified that since the penal provision is stringent in nature it should be applied in an appropriate manner. In applying such a provision SECP should always bear in mind the importance of determining not merely a technical contravention but a substantial finding of guilt in relation to the person on whom the fine or penalty is being levied.

In view of the above, it is prayed that the Impugned Order may be set aside and declaration to the effect may be issued that no gain has been made by the Appellant and as no such gain has been made, therefore no gain vests with the Commission.

5. The department's representatives conceded that in view of the cited judgment of the Honourable Supreme Court above, the gain cannot vest with the Commission.
6. We have heard the parties and the perused the judgments of the Superior Courts cited by the Appellants. It is settled law in light of judgment cited above of the Supreme Court of Pakistan that the gain will remain under all circumstances property of the company and shall not in any manner vest with the Commission, therefore in the instant matter the demand raised through Show Cause Notice dated 18/03/10, has become infructuous. Further, the Appellate Bench of the Commission while deciding Appeal No. 49/2011 filed by Mrs. Nasreen Humayun Shaikh, a beneficial owner of Azgard Nine Limited vide Order dated 19/06/13, held that:



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“rule 16 of Rules has not been framed within the four corners of section 224 of the Ordinance. The Bench further held that “the rule 16 of the Rules is inconsistent with the statute and contradicts the express provisions of the statute from which it derives authority. The Appellant cannot be burdened to submit a gain, which never accrued to her in first place”.

The Appellate Bench in the said Appeal calculated the amount of gain by matching the purchase and sale transactions in sequential manner rather than by applying lowest in highest out manner prescribed in Rule 16 of the Rules. The amount of tenderable gain in the instant matter (at the time of issuance of Notice) was calculated pursuant to the manner provided in Rule 16(2) of the Rules, which has been declared “inconsistent with the statute” by Appellate Bench of the Commission in its earlier order. If the amount of tenderable gain is recalculated in light of the decision of Appellate Bench, no gain is made by the Appellant in the instant case. In view thereof this Bench finds merits in the arguments of the Appellant and impugned order is set aside.

Fida Hussain Samoo
Commissioner (Insurance)

Tahir Mehmood
Commissioner (CLD)

Announced on: 03 MAR 2015