



SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN
Securities Market Division

NIC Building Jinnah Avenue, Blue Area, Islamabad

Before The Executive Director (Securities Market Division)

In the matter of

Recovery of Tenderable Gain under Section 224(2) of the Companies Ordinance, 1984
From D.S. Industries Limited a Beneficial Owner of Pervez Ahmed Securities Limited

Date of Hearing : 06/08/2009

Present at hearing :

Representing the Respondent:

Mr. Salman Farooq

Company Secretary, D.S. Industries Limited

Assisting the Executive Director (SMD) :

I. Mr. Imran Inayat Butt,

Director (SMD)

II. Mr. Muhammad Farooq,

Joint Director (SMD)

Order

This order will dispose of the proceedings initiated under Section 224(2) of the Companies Ordinance, 1984 (the "**Ordinance**") by the Securities and Exchange Commission of Pakistan (the "**Commission**") through Show Cause Notice No. SM/BO/Co.222/1(88)2008 dated 17/07/2009 (the "**Notice**") against D.S. Industries Limited (the "**Respondent**") a more than ten percent shareholder of Pervez Ahmed Securities Limited (the "**Issuer Company**").

2. Brief facts of the case are that:-

- a) The Respondent made the following purchase and sale transactions as a more than ten percent shareholder of the Issuer Company within the period of less than six months:-

Sr. No.	Date	Nature of Transaction	No. of Shares	Rate per Share (Rs)
1	27/03/2008	Sale	11,000,000	62.15
2	28/03/2008	Purchase	11,000,000	62.48

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NIC Building, Jinnah Avenue, Blue Area, Islamabad, Pakistan PABX: 0092-51-9207091-94,
FAX: 0092-051-9218595



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3	01/04/2008	Purchase	367,500	72.06
4	02/04/2008	Purchase	2,500	75.82
5	03/04/2008	Purchase	900,000	78.33
6	07/04/2008	Purchase	500,000	79.50
7	05/05/2008	Purchase	500,000	72.06
8	10/06/2008	Purchase	265,000	52.60
9	11/06/2008	Purchase	31,000	57.95
10	12/06/2008	Purchase	42,000	59.81
11	13/06/2008	Purchase	63,000	57.54
12	16/06/2008	Purchase	29,500	59.19

- b) On account of the aforementioned transactions, the Respondent made gain of Rs. 3,136,980/- (Rupees three million one hundred thirty-six thousand nine hundred eighty only).
- c) The amount of gain has been computed in the manner prescribed in Rule 16 of the Companies (General Provisions and Forms) Rules, 1985 (the "Rules").

3. Section 224 of the Ordinance provides that where *inter alia* a more than ten percent shareholder of listed equity securities makes any gain by purchase and sale, or the sale and purchase, of any such security within a period of less than six months, such person is required to make a report and tender the amount of such gain to the company and simultaneously send an intimation to that effect to the Registrar of Companies and the Commission. The said Section further provides that where such person fails or neglects to tender or the company fails to recover, any such gain within a period of six months after its accrual, or within sixty days of a demand thereof, whichever is later, such gain shall vest in the Commission and unless such gain is deposited in the prescribed account, the Commission may direct recovery of the same as an arrear of land revenue.

4. Since neither the matter of accrual of the aforesaid gain nor its tendering or recovery was reported to the Commission, therefore, Notice under Section 224(2) of the Ordinance was served upon the Respondent on 17/07/2009 for providing it an opportunity of personal hearing on



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30/07/2009, which on the request of the Respondent was adjourned and re-fixed for 06/08/2009. On the given date Mr. Salman Farooq, Company Secretary of the Respondent (the "Representative") appeared before me and presented written submissions signed by Chief Executive of the Respondent.

5. In the beginning of the verbal submissions, the Representative stated that *Section 224(1) is only applicable where beneficial owner makes gain through purchase and sale and/or sale and purchase shares of listed company within a period of less than six months whereas in our case it is not the situation*". The verbal and written arguments advanced by the Representative in support of his foregoing contention are as under:-

- a) The Respondent had initially acquired these shares in May 2006 and in order to avoid capital gain tax on sale of shares which was expected to be imposed in the forthcoming Federal Budget for the year 2008-09, like some other companies, it sold its entire holding of 11,000,000 shares on March 27, 2008 at a price of Rs. 62.15 per share and repurchased same quantity i.e. 11,000,000 shares on March 28, 2008 at a price of Rs. 62.48 per share. This entire transaction does not come in the ambit of Section 224 of the Ordinance and to relate aforementioned transaction with the future purchase is also absolutely unjustified.
- b) Subsequent to the aforementioned transactions, which were made to avoid capital gain tax, the Respondent purchased 2,270,000 shares at price ranges from Rs. 72.06 per share to Rs. 79.50 per share from 01/04/2008 to 05/05/2008. Since the Issuer Company announced 17.5 percent bonus shares, therefore, the scrip became ex-bonus on 17/05/2008. On ex-bonus price, the Respondent purchased 430,500 shares from 10/06/2008 to 16/06/2008 at prices ranging from Rs. 52.60 per share to Rs. 59.81, which in the opinion of the Commission attract provisions of Section 224 of the Ordinance. These 430,500 shares were purchased at ex-bonus price and to compare the ex-bonus price with the previous price without taking the effect of bonus shares will not be justified. The share price of Rs. 52.60 after calculating the effect of 17.50 percent bonus shares becomes equal to Rs. 61.81 and similarly share price of Rs. 57.95 equals to Rs. 68.09, Rs. 59.81 equals to Rs. 70.28, Rs. 57.54 equals to 67.60 and Rs. 59.19 equals to Rs. 69.55. While calculating the price differential in the six month period all price changing factors i.e. dividend/bonus shares entitlements should also be part of that computation.
- c) All the laws are made to protect the people from any harm or loss due to unethical, immoral and illegal act of the others and behind that all the factors like misappropriation, misleading, and exploitation etc. are considered. Whereas in the instant case D.S Industries Limited sold and purchased 11,000,000 shares of the Issuer Company to avoid capital gain tax and thereafter acquired some additional shares from the market with approval of shareholders

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obtained under Section 208 of the Ordinance in Extraordinary General Meeting. Considering this particular situation it does not seem that D.S. Industries Limited has contravened Section 224 of the Ordinance.

6. Having considered and examined the arguments presented by the Representative of the Respondent verbally during the course of hearing as well as in writing, my findings in the light of prevailing Laws and Rules on the subject matter are as under:-

- (a) Concerning the Representative's plea that *transactions made to avoid capital gain tax do not attract provisions of Section 224 of the Ordinance and to relate the said sale with the subsequent purchases is absolutely unjustified*, it is pointed out that the matter of non-applicability of provisions of Section 224 of the Ordinance on certain transactions has been explained in the Proviso given under sub-section (1) of the same Section. For convenience the text of the Proviso is reproduced hereunder:-

"Provided that nothing in this sub-section shall apply to a security acquired in good faith in satisfaction of debt previously contracted".

Plain reading of the Proviso suggests that primary condition for non-applicability of under reference provisions of the Ordinance is that the security must be acquired in satisfaction of debt previously contracted. In the instant case, the transactions in question were made with the objective of avoiding capital gain tax, which do not meet the primary condition of the proviso. Hence I do not agree with the plea of the Representative that the transactions made with the purpose of avoiding capital gain tax do not fall in the ambit of the provisions of Section 224 of the Ordinance.

In connection with plea of the Representative that *some other companies also made same type of transactions i.e. with the motive of avoiding of Capital Gain Tax*, it is pointed out that the Commission has taken action wherever provisions of Section 224(2) of the Ordinance have been attracted.

- (b) The view point of the Representative regarding *the matching of sale transaction made on 27/03/2008 with future purchase (made in June 2008)* has been analyzed in the light of Rule 16 of the Rules, which provides the mechanism for matching of transactions, made within the period of less than six months, as under:-

- (1) *Any gain made from the purchase and sale, or sale and purchase, of a listed security within a period of less than six months, which is required to be reported to the Commission and the registrar, and to be tendered to the company under section 224 shall be computed in the following manner, namely:-*

- (i) *the purchase at lowest rates shall be matched against the sales at highest rates prevailing within the six months, and the recoverable amount*



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calculated with respect to every individual transaction by reference to the difference between the purchase price and the sale price of a any purchase and sale, or sale and purchase disregarding any other transactions, that is to say, the lowest in rate and highest out rate of the purchases and sales or the sales and purchases shall be matched; and

(ii) the purchases and sales shall be matched as aforesaid so long as the securities involved in the purchase and sale are of the same class and of the same listed company and for this purpose the shares shall be deemed as fungibles.

The Rule 16 of the Rules prescribes that for the sake of applicability of Section 224 of the Ordinance, the securities are fungibles and for calculation of tenderable gain, the purchases at lowest rates shall be matched against the sales at highest rates prevailing within the period of less than six months. The same method for calculation of tenderable gain has been applied in the instant case. It is pointed out that the under reference transactions have admittedly been made, within the period of six months. Thus assertion of the Respondent that matching of sale transaction made on 27/03/2008 with purchase transactions made from 10/06/2008 to 16/06/2008 is unjustified does not have any merit.

- (c) In connection with plea of the Representative regarding *comparison of purchases made at ex-bonus price with the previous price without taking the effect of bonus shares*, it is stated that Section 224 of the Ordinance necessitates three prerequisites for accrual of tenderable gain i.e. the transactions in same class of equity of same listed company and within the period of less than six months. Since the transactions made by the Respondent meet all the aforementioned requirements, therefore, the provisions of Section 224 of the Ordinance are attracted in the instant case. It is further pointed out that the Section 224 *ibid* imposes *inter alia* condition of time based transactions rather than event based transactions. Whilst, the Representative has split the transactions on the basis of the event of declaration of bonus shares by the Issuer, on the plea that some transactions (specifically sale) were made at the price prevailing prior to becoming ex-bonus of the scrip and purchases were made at ex-bonus price. But, the Section 224 does not allow making such discrimination in transactions.
- (d) In addition to above, I have also consulted sub-rule (3) of 16 of the Rules which allows making certain adjustments/deduction from the amount of tenderable gain. The text of the said sub-rule is reproduced hereunder:-

Any loss arising out of any transaction in a listed security shall not be set-off against the gain arising out of such security computed in the manner aforesaid:

Provided that the amount of brokerage, stamp duty and other expenditure actually paid or incurred in making the gain may be deducted by the person by whom it is to be reported or tendered subject to production of such documentary evidence in support of



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the payment having been made or expenditure having been incurred as may be acceptable to the company.

From the contents of the aforementioned sub-rule it appears that for the applicability of provisions of tenderable gain, the price paid or received in actual by the beneficial owner, would be considered the prices of the transactions. The Rule 16(3) of the Rules does not allow making any other adjustment or deduction from the amount of tenderable gain except the cost actually incurred for making the transactions. In the instant case, the Representative has argued to adjust the bonus effect on purchase transactions made in June 2008 by considering purchase price of 265,000 shares as Rs. 61.81 instead of Rs. 52.60, Rs. 68.09 of 31,000 shares instead of Rs. 57.95 and so on. In this regard, I am of the considered view that the adjustment of bonus effect in purchases can not be allowed, as it does not meet the criteria laid down in sub-rule (3) of 16 of the Rules. Obviously, the Rules do not allow me to consider purchase price as Rs. 61.81 per share when the transaction was actually made by the Respondent at Rs. 52.60 per share. It is pointed out that in the instant case the sale and purchase transactions have been taken, for calculation of tenderable gain, at the rate actually paid/received by the Respondent. Thus, the plea of the Respondent does not have any substance.

- (e) Notwithstanding above, it is stated that as per record of Karachi Stock Exchange closure of transfer books of the Issuer Company took place from 19/05/2008 to 24/05/2008. Thus, the scrip became ex-bonus on 19/05/2008. The closing price of the scrip on 16/05/2008 was Rs. 96.55 and its ex-bonus price on 19/05/2008 (Monday) was Rs. 82.17 per share. The Respondent in order to avoid capital gain sold 11,000,000 shares on 27/03/2008 and purchased the same number of shares on 28/03/2008. Later on, before the determination of bonus entitlement, the Respondent increased its holding from 11,000,000 to 13,270,000 and received 2,322,250 bonus shares on it. Subsequently, the Respondent purchased further 430,500 at the rates ranging from Rs. 52.60 to Rs. 59.81 from 10/06/2008 to 16/06/2008, which are much below from ex-bonus price of the scrip. This decline in share price of the Issuer Company is after the impact of bonus issue which was accounted for in the opening price for 19/05/2008. Furthermore, this decline in the share price of the Issuer Company was in line with the general market trend as witnessed through movement of KSE-100 Index.
- (f) Concerning the assertion of the Representative that *all the laws are made to protect the people from any harm or loss due to unethical, immoral & illegal act of the other* it is stated that certainly the laws are made to protect the interest of general public. It is pointed out that in case of a listed company general public is minority shareholder, while, directors, chief executive, more than ten percent shareholders are considered privileged persons and they have access to material information which is not available to the minority shareholder. They may trade based on the material information and make gain. Thus to protect the interest of general public, Section 224 of the Ordinance, debars the said privileged persons from retention of gain, made on account of transactions, executed within the period of less than six months.
- (g) Concerning the plea of the Representative that the *Respondent has not contravened Section 224 of the Ordinance as shares were acquired from the market with approval of shareholders*



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obtained under Section 208 of the Ordinance in Extraordinary General Meeting, it is pointed out that Section 208 provides that a company shall not make any investment in any its associated companies or associated undertakings except under the authority of special resolution, which shall indicate the nature and amount of investment and terms and condition attaching thereto. Thus, the resolution passed under Section 208 authorizes the investing company to make only investment in its associated company. The Section 208 does not speak that resolution passed under this section has overriding effect on other provisions of the Ordinance. Thus, the Representative' plea does not have any merit

7. In view of the foregoing, I am of the considered opinion that the arguments presented by the Representatives of the Respondent do not have any merit and substance. Hence, the request of the Representatives to withdraw the Notice is rejected and the Respondent is, hereby, directed to tender Rs. 3,136,980/- (Rupees three million one hundred thirty-six thousand nine hundred eighty only) to the Securities and Exchange Commission of Pakistan as provided in section 224(2) of the Companies Ordinance, 1984, through a demand draft in favour of the Commission, within thirty days of the issue of this order.

(Akif Saeed)
Executive Director (SM)

Islamabad.
Announced on 17/11/09