



SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN

[Islamabad]

Before Ali Azeem Ikram, Director (Enforcement)

Order

In the matter of

BATA PAKISTAN LIMITED

Under Section 226 read with Section 229 and Section 472
of The Companies Ordinance, 1984

Show Cause Notice No. and Date: EMD/233/556/2002 - 1103
dated November 5, 2008

Date of Hearing: November 27, 2008 and December 17, 2008

Present: Syed Aftab Hameed
Consultant
Hyder Bhimji and Company
Chartered Accountants
(On behalf of the Company Secretary, Bata
Pakistan Limited)

Date of Order: April 15, 2009

The case before me pertains to the proceedings initiated against Mr. S. M. Ismail, the Company Secretary of Bata Pakistan Limited ("Company") under Section 226 of the Companies Ordinance, 1984 ("Ordinance").

2. In order to dispose of the aforesaid matter, it is necessary to have a quick glance into the background facts leading to the issue of the Show Cause Notice ("SCN") by the Enforcement Department of the Commission. As per the annual audited accounts of the Company for the year ended December 31, 2007 ("Accounts"), it is noted that Trade and Other Payables (Note 9) includes an amount of Rs.17.155 million (2006: Rs.18.532 million) on account of "Deposits". Further, Note 9.3 with reference to Deposits states that, "These represent the security money received from the registered wholesale dealers, agency holders and other customers in accordance with the terms of the contract with them. Deposits from agency holders carry interest at the rate of 8.5% per annum. These are repayable on termination/completion of the contract and on returning the company's property already provided to them".

3. The Company, vide Commission letter dated September 4, 2008 was advised to confirm the compliance of Section 226 of the Ordinance and whether the relevant amount was kept in a separate

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SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN

*Company Law Division
(Enforcement Department)*

bank account as per said provision of law. The reply from the Company was received vide letter dated September 13, 2008, in which it was informed that the provisions of Section 226 of the Ordinance were not applicable in the case of security deposits, as being received by the Company, in view of the following facts:

(i) These security deposits were received from the registered whole sale dealers, distributors, agents and business associates of the Company under written contracts, repayable upon termination of the contracts or on demand and on returning the Company's properties already provided to them.

(ii) Huge investments against these security deposits have already been made by the Company in the manufacturing of stock of shoes at first instance and secondly in acquiring furniture, fixture provided to above customers.

(iii) The Company believes another separate investment of such deposits in special bank account was not called for.

(iv) The amounts of "employees" securities and personal accounts have been separately invested and shown as non-current liabilities and assets.

4. The Enforcement Department being dissatisfied with the explanation furnished by the Company, issued a SCN dated November 5, 2008 to the Company Secretary of the Company for probable violation of Section 226 of the Ordinance.

5. The reply to the SCN was received on November 8, 2008 from Mr. S. M. Ismail, Company Secretary of the Company, wherein it was requested to fix a date for hearing of the case and it was informed that Syed Aftab Hameed, FCA, Partner of Hyder Bhimji and Company, Chartered Accountants ("Consultant") will be representing the Company in the matter.

6. The hearing was fixed for November 27, 2008 where the Consultant explained in detail the point of view of the Company as earlier submitted by them. Written submissions were also provided containing the arguments of the Consultant. He, however, stated to make further submissions and requested for a second hearing opportunity. Another hearing was fixed for December 17, 2008 in which the Consultant appeared and gave the following further written submissions in support of his case:

(i) In the year 2004, an observation was raised by the predecessor to present Director Enforcement on the same issue where after the explanations were given by the Company and having been satisfied with the reply no further proceedings were initiated then.

(ii) The Company has no wish or need to utilize the money of deposits in its business operations because of exceptionally sound financial health of the Company whereby millions of rupees are available in the form of Cash/ Bank balances of about Rs.366 million.



SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN

Company Law Division
(Enforcement Department)

- (iii) There was absolutely no reasons or justifications for disobeying the provisions of Section 226 of the Ordinance particularly when SECP in the prior years had no objection for not separately investing such deposits.
- (iv) The Security Deposits for instance "Employees security deposits" that really come under the ambit of provisions of Section 226 of the Ordinance have been separately invested.
- (v) The Company has enclosed a dealership agreement with one of the agents/dealers.
- (vi) The Company provided following detail of Markup paid on the Deposits/Balances during last three years:

Particulars	2007		2006		2005	
	%age	Amount	%age	Amount	%age	Amount
Agents' Bal.	8.5	317,201	8.5	289,875	4.0	134,355
Business Associates	8.5	374,509	8.5	280,806	4.0	151,397
Employees	8.5	1,997,011	8.5	1,590,640	4.0	727,589
		2,688,721		2,161,321		1,013,341

- (vii) The Company has provided the breakup of Security Deposits as at December 31, 2007 and given the comparison with the value of stock & assets provided to its dealers and associates.

Description	Bal. as on 31-12-07	Amount of Security	Value of Stock & Assets Provided
Agents	5,487,258	3,855,000	62,915,808
Business Associates – K	4,590,878	3,425,000	45,255,060
Business Associates – BGs	588,739	807,000	12,797,979
Dealers Securities	5,433,207	5,433,208	15,409,377
Other Current Liabilities - Securities	855,000		
Rent Security	200,000		
	17,155,083	13,520,208	136,378,224

7. Before proceeding further, it is necessary to advert to the pertinent provision of law. These are contained in Section 226 of the Ordinance and are, to the extent relevant, reproduced as follows:

"Section 226. Securities and deposit, etc.

No company, and no officer or agent of a company, shall receive or utilise any money received as security or deposit, except in accordance with a contract in writing; and all moneys so received shall be kept or deposited by the company or the officer or agent concerned, as the case may be, in a special account with a scheduled bank;

Provided that this section shall not apply where the money received is in the nature of an advance payment for goods to be delivered or sold to an agent, dealer or sub-agent in accordance with a contract in writing."



SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN
Company Law Division
(Enforcement Department)

8. The aforesaid provisions of law are clear and explicit. The objective of these provisions is to secure the amounts collected from the contractors/dealers/agents of a company from being mis-utilized. Further, if kept in the companies own bank account such amounts are prone to be adversely affected in the event, for instance, of the company's insolvency.

9. Therefore the companies are required to act in the capacity of a trustee to the contractors/ dealers/agents by:

- (i) Receiving or utilizing any money received as security or deposit, only in accordance with a contract in writing.
- (ii) Keeping the deposits in a separate bank account.

10. The arguments extended by the Company have been analyzed and not found satisfactory as explained in the following paragraphs.

11. Under Section 182 of the Contract Act, 1872 ("the Act"):

an "Agent" is a person employed to do any act for another or to represent another in dealing with a third person, and that the person for whom such an act is done or who is so represented, is called his "Principal".

12. Clause 7 of the "dealership agreement" between the Company and Modern Shoes Palace, Sargodha (Dealer) states that:

"You (Dealer) will deposit a sum of Rs.10,000 (Rupees Ten Thousand Only) with the Company as security for the due performance and observance of the terms and conditions hereof. This amount will bear no interest and will be refundable when you cease to our "Registered Dealer" and after you have returned our Sign Board/Cross Board or any other furniture and fittings etc. given to you by the Company".

13. Please note that the term "Security deposits" for the purpose of an amount as shown in the accounts of the Company means:

"Any money placed with a person as earnest money or security for the performance of certain contract which is refundable unless the depositor has breached the terms of the contract. The money may be forfeited if the depositor fails in his undertaking". Such money is also termed as 'security deposit'. (Black's Law Dictionary, 8th Edition)

14. I have observed that the dealership agreement clearly provides for taking security deposits by the Company whereas it does not state anything as regards utilization of the funds collected in the name of security. As per the law all moneys so received shall be kept or deposited by the agent concerned in a special account with a scheduled bank.



SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN
Company Law Division
(Enforcement Department)

15. It is evident from the above that the deposits received by the Company were in fact "security deposits" and the Company failed to fulfill the requirement of the aforesaid provisions of the Ordinance which require the deposits of the dealers/contractors to be kept in separate bank accounts. The Company has wrongly assumed that the matter in question is exempt from the requirements as laid down in Section 226 of the Ordinance.

16. In view of the preceding, I am of a considered opinion that the Company is in violation of Section 226 of the Ordinance. An action, therefore, is necessary under Section 229 of the Ordinance, which provides that whosoever contravenes or authorizes or permits the contravention of any of the provisions of Section 226 shall be punished with a fine which may extend to five thousand rupees and shall also be liable to pay the loss suffered by the depositor of security on account of such contravention. However, I have considered the fact that the Company has disclosed all relevant details of the deposits and has also signed agreements with its dealers/agents to take security deposits for which I believe that appropriate amendments in the agreement need to be incorporated as regards utilizing the funds collected in shape of security deposits and placing them in a separate bank account. I am, therefore, inclined to take a lenient view of the default and instead of imposing penalty on the Company Secretary of the Company, hereby warn him to observe the law in letter and spirit in future and further direct him to incorporate necessary amendments in the agreements with the dealers/contractors to bring them in line with the Section 226 of the Ordinance. The Company is further directed to submit copies of the agreement, as amended in light of the above advice and duly signed by any two of Company's dealers, on or before December 31, 2009 to this office positively.

Ali Azeem Ikram
Director (Enforcement)

Announced
April 15, 2009
Islamabad