



SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN
Enforcement Department

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Before Tahir Mahmood, Executive Director (Enforcement)

In the matter of

Bestway Cement Limited

UNDER SECTION 208, 160 AND 506 READ WITH SECTION 476 OF COMPANIES ORDINANCE, 1984

Number and date of notice	No. EMD/233/368/2002-3506-12 dated April 02, 2008
Date of hearing	June 19, 2008
Present	Mr. M. Javed Panni Counsel for the Directors Mr. M. Mussadiq Ali Khan Financial Controller

ORDER

This order shall dispose of the proceedings initiated through Show Cause Notice No. EMD/233/368/2002-3506-12 dated April 02, 2008 against the directors of Bestway Cement Limited (BCL) under the provisions of Section 208, 160 and 506 of the Companies Ordinance, 1984 (Ordinance).

2. Brief facts of the case are that examination of the annual audited accounts of BCL for the year ended June 30, 2007 (accounts) revealed that BCL has purchased 15,193 shares of Mustehkam Cement Limited (MCL), subsidiary of the Company, valuing Rs.1.961 million without approval of shareholders. In response to our query BCL informed that subsequent approval of shareholders under Section 208 of the Ordinance has been obtained in the AGM held on 31-10-2007. However, as per our record no such agenda item was found in the notice of said meeting as required under Section 160 of the Ordinance. It was also observed that BCL has advanced an amount of Rs.209 million to MCL during the year ended on 30-6-2007 against issue of right shares subsequent approval of which was obtained from the shareholders in the AGM held on 31-10-2007. The aforesaid advance was made in contravention to Section 208 of the Ordinance which requires that investment in associates should be made *under the authority* of a special resolution. It was further noticed from the records of BCL that it did not file a copy of special resolution passed under Section 208 of the Ordinance with the Registrar and the Commission as required under Rule 15 of the Companies (General Provisions and Forms) Rules, 1985 made under Section 506 of the Ordinance. Consequently, a show cause notice (SCN) was issued to the directors of BCL to explain as to why penal action may not be taken against them for the aforesaid contraventions.



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3. The SCN was responded by Mr. M. Javed Panni of MJ Panni & Associates (Counsel) on behalf of the directors of BCL. Submissions made by the Counsel have been summarized in Paras given below:

- a) The Company had purchased small number of shares numbering 15,193 for total consideration of Rs.1,960,728. These shares were purchased from small shareholders over a period of 10 months as and when small shareholders approached BCL to help them encash their investment. The shares were purchased in small lots and were not purchased with the object of investment. We are of the view that purchases of shares in such small numbers will not attract the provisions of Section 208 of the Ordinance.
- b) It is a standard corporate practice that holding/associated companies pay their share of additional issue of capital in advance of the payment date fixed for the shareholders. Such an advance payment is normally classified as “Advance against allotment of shares” or “Advance subscription money” It is perfectly legal for the majority shareholders to pay their subscription in advance. Such an advance only becomes investment on allotment of shares. We are of the view that it was not an advance as envisaged by Section 208 of the Ordinance.
- c) In our view it is absolutely lawful for the shareholders to rectify any omission or error falling under their jurisdiction by passing a special resolution within a reasonable time of release of funds. Furthermore, Section 208 just says that investment in an associated company/undertaking is to be authorized by a special resolution. It neither uses the word “prior” or “before” nor has a proviso that such an approval cannot be granted post facto. The law being not specific, it implies that rectification is not disallowed. This is an established legal covenant as well as general principal of law. The post facto approvals are absolutely legal because the shareholders have the absolute authority in the matters concerning them and the company.
- d) Form 26 was filed with CRO Islamabad on March 31, 2008 with late fee. Non-filing of the same with the Commission was an oversight.

4. Submissions of the Counsel were duly considered however were not found satisfactory. Therefore, in order to provide an opportunity of being heard to the directors of BCL, a hearing in the matter was held on June 19, 2008. The hearing was attended by the Counsel along with Mr. M. Musaddiq Ali Khan, Financial Controller of BCL who reiterated the arguments as were earlier submitted in written reply to the SCN.

5. I have considered the arguments put forward by the Counsel and also perused the documents on record. I have examined the relevant provisions of the Ordinance as well. However, I do not find myself convinced with the viewpoint of BCL. The justification that purchase of shares of MCL in small numbers will not attract the provisions of Section 208 of the Ordinance is not cogent. Law does not allow any such exemption. Investment in associates, irrespective of the amount of investment, should be made with



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approval of shareholders under Section 208 of the Ordinance. Furthermore, the plea that advance to MCL against right issue before obtaining shareholders approval and prior to acceptance of right was given as per standard corporate practice is also not valid. The BCL should have made payment at the time of acceptance of right issue and after approval of its shareholders. The statement that subsequent approval of advances to MCL against right issue and purchase of shares of MCL was obtained in AGM held on October 31, 2007 is also not convincing for two reasons. Firstly, agenda regarding approval of purchase of shares of MCL was not included in the notice of said AGM as required under Section 160 of the Ordinance. It has been noted from the minutes of AGM that resolution for approval of shares of MCL, already purchased and for purchase of further shares as and when required, was approved as other business contrary to the requirements of Section 160 and 208 of the Ordinance. Besides, the resolution did not indicate period and amount of investment to be made. Secondly, the statute does not envisage subsequent ratification of investments made by the companies in their associated concerns. The relevant provisions of law for making investments in associated undertakings have been stipulated in Section 208 of the Ordinance which provides that a company shall not make any investment in any of its associated companies or associated undertakings except *under the authority of a special resolution*. The Appellate Bench of the Commission in case of Gharibwal Cement (**SECP, 2003 CLD 131**) has defined the expression 'Under the Authority' as '*such words mean having consent of the shareholders prior to investment. Such an authority subsequently acquired cannot be termed as an act 'Under the Authority'*'. It was further held by the Appellate Bench *that investments made in associated company cannot be validated by virtue of subsequent ratification by shareholders and doctrine of substantial compliance cannot be resorted to where there has been a clear violation of mandatory provisions*. The default under Section 506 of the Ordinance is admitted as BCL has accepted late filing of Form 26 in Company Registration Office and non-submission of the same to the Commission.

6. For the forgoing, I am of the considered view that the provisions of Section 208, 160 and 506 of the Ordinance have been violated. However, considering the amount of equity investment and the fact that shares against the advance have already been issued I am inclined to take a lenient view and instead of imposing maximum penalty under Section 208 of the Ordinance impose a fine of Rs.20,000 on each director and direct the Chief Executive of BCL to recover interest on advance of Rs.209 million, at a rate not less than the weighted average cost of BCL, from the date of advance till the date of acceptance of right issue. For violation of Section 160 of the Ordinance I impose a fine of Rs. 50,000 on the Chief Executive of BCL. Considering submission of Form 26 in Company Registration Office no fine is imposed. However, directors of BCL are hereby strictly warned to ensure compliance with the requirements of statute in future.



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7. The Chief Executive and directors are hereby directed to deposit the aforesaid fine in the designated bank account maintained in the name of the Securities and Exchange Commission of Pakistan with MCB Bank Limited or pay through a demand draft in the name of the Securities and Exchange Commission of Pakistan within thirty days from the receipt of this order and furnish receipted bank voucher to the Commission, failing which proceedings for recovery of the fines as an arrear of land revenue will be initiated. It may also be noted that the said penalty is imposed on the Chief Executive and directors in their personal capacity; therefore, they are required to pay the said amount from their personal resources.

Tahir Mahmood
Executive Director (Enforcement)

Announced
September 9, 2008
Islamabad.