



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 The Attock Oil Company Limited, a Beneficial Owner of Attock Refinery Limited

Date of Hearing : 23/07/2009

Present at hearing :

Representing the Respondent:

- |                              |   |
|------------------------------|---|
| (i) Mr. Rehmat Ullah Bardaie | Company Secretary, The Attock Oil Company Limited |
| (ii) Mr. Ahmed Hayat Lak     | Manager Legal, The Attock Oil Company Limited     |

Assisting the Executive Director (SMD) :

- |                           |                          |
|---------------------------|--------------------------|
| (i) Mr. Imran Inayat Butt | Director (SMD)           |
| (ii) Mr. Muhammad Farooq  | Joint Director (SMD)     |
| (iii) Mr. Nazim Ali       | Assistant 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. S.M.(B.O)C.O.222/11(34)81 (the "**Notice**") dated 09/07/2009, against The Attock Oil Company Limited (the "**Respondent**"), a more than ten percent shareholder of Attock Refinery Limited (the "**Issuer Company**").

2. Brief facts of the case are that:-

- The Respondent *inter alia* purchased 500,000 shares of the Issuer on 19/10/2007 at the rate of Rs. 248.12 per share and sold 60,000 shares on 11/04/2008 at the rate of Rs. 264.82 per share. The transactions were made within the period of less than six months.

- b) On account of the aforementioned transactions, the Respondent made gain of Rs. 1,002,000/- (Rupees one million two thousand only), 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 was reported by the Respondent in Part-D of the prescribed returns of beneficial ownership filed by it with this Commission for the aforementioned transactions, nor its tendering or recovery was reported to the Commission, as provided in Section 224(2) of the Ordinance, therefore, the Respondent was intimated vide this office letter dated 25/06/2009 that as provided in Section 224 of the Ordinance, the amount of the aforementioned gain has now vested in favour of the Commission. The Respondent was advised to respond the matter, latest by 10/07/2009. The Company Secretary of the Respondent responded the matter vide letter dated 26/06/2009 (received in this office on 03/07/2009). The Company Secretary stated that:-

*"Kindly note that the transaction pertaining to 60,000 shares sold on April 11, 2008 relate to the shares purchased on May 11, 2007 and reported to you on May 24, 2007. Therefore, the provision of Section 224(2) of the Companies Ordinance, 1984 is not applicable in this case".*

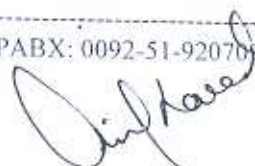
5. The plea of the Company Secretary of the Respondent was examined in the light of provisions of Section 224 of the Ordinance and Rule 16 of the Rules and was considered to be untenable. Thus, Notice under Section 224(2) of the Ordinance was served upon the Respondent on 09/07/2009 for providing it an opportunity of personal hearing on 23/07/2009. The Company



Secretary of the Respondent filed written submissions in this regard on 21/07/2009. On the given date Mr. Rahmat Ullah Barddaie, Company Secretary and Mr. Ahmed Hayat Lak, Manager Legal of the Respondent (the “**Representatives**”) appeared before me and stated that provisions of Section 224 of the Ordinance are not attracted in the instant matter and requested to withdraw the Notice. The Representatives further stated that arguments in favour of the aforesaid plea have been given in detail in the written submissions. The arguments advanced by the Representatives in support of their foregoing contention in writing as well verbally are as under:-

- a) The Respondent adopting first-in, first-out (the “**FIFO**”) basis, sold 60,000 shares on 11/04/2008, which relate to shares purchased on 18/05/2007.
- b) The provisions of section 224 of the Ordinance are applicable to shares sold within a period of six months, while, extending the restriction imposed by said section on the shares retained beyond a period of six months would be an oppressive interpretation of the Law in terms of Article 23 of the Constitution of Islamic Republic of Pakistan, which provides that every person is entitled to acquire and dispose of property. Section 224 of the Ordinance is an exception and clog on free exercise of property rights and thus should be construed strictly and narrowly.
- c) The shares deemed as fungible under the Rule 16 of the Rules are the ones that fall under the category of such shares to which Section 224 and Rule 16 are attracted. For the purpose of Section 224 of the Ordinance, the securities are fungible only for the period of six months. Subsequent to the expiry of six months of their purchase/sale the securities do not remain fungible.
- d) The concept of fungibility as reflected in the Notice is not in consonance with established accounting practices and also beyond the scope of Section 224 of the Ordinance.

6. After going through the written submissions and verbal arguments advanced by the Representatives during the course of hearing, it appears that the whole arguments of the Representatives revolve around the views that shares of the same class are fungible for a limited period i.e. till the expiry of six months of their purchase or sale and for the purpose of applicability of Section 224 of the Ordinance the shares purchased and sold or sold and purchased must be same. Having considered and examined the written submissions and the verbal arguments, my findings in the light of prevailing Laws and Rules on the subject matter are as under:-



- a) Concerning the Counsel's plea that *the Respondents adopting FIFO basis, sold 60,000 shares on 11/04/2008, out of its previous holding purchased on 18/05/2007*, it is pointed out that the manner of calculation of tenderable gain has been narrated in Rule 16 of the Rules. For convenience the said rule is reproduced hereunder:-

(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:-*

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

(b) *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.*

It is worth mentioning that the Rule neither speak about the use of FIFO method nor about LIFO method nor about average/weighted average cost. It simply says 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 six months. The same method for calculation of tenderable gain has been applied in the instant case. During the course of hearing the Representatives accepted that the under reference purchase and sale transactions were made by the Respondents, which fall within the period of six months.

Furthermore, it is pointed out that the under discussion issue had also been elaborated in Circular No. 2 of 1971 dated 26/06/1971 of the then Securities and Exchange Authority of Pakistan (when the subject-matter of "Trading by directors, officer and principal shareholders" was regulated under Securities and Exchange Ordinance, 1969). The said Circular inter alia states:-

*"A view has been expressed that for the purpose of matching sales and purchases, the securities sold should be same as were purchased during the period. This view is not correct. Securities are fungible and it would, therefore, not be necessary ever to show that the particular security which is sold is the one which was purchased. Purchases and sales would be*

*Signature*

*matchable so long as the securities involved in the purchase and sale are of the same class."*

Hence, in my opinion, the plea of the Representatives that *the transactions in question do not attract provision of the Section 224 of the Ordinance, as adopting FIFO method sale was made out of previous purchase* does not have any merit.

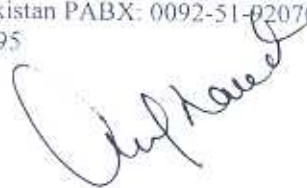
In addition to above it is pointed out that the adoption of FIFO basis is an accounting treatment for the inventories by the Respondent and there is possibility that different entities may adopt different accounting policies in this concern, but the Rule 16 of the Rules prescribes a uniform mode of computation of amount of tenderable gain across the board. Moreover, accounting policy adopted by a company does not have overriding effect on the Rules, made by the Federal Government.

Notwithstanding above, I have also consulted International Accounting Standard (IAS) 2, which provides Cost Formula (inter alia FIFO) for inventories. But this IAS is applicable to all inventories except inter alia "*Financial Instruments*". The term *Financial Instrument* has been defined in IAS 32, which among others include "*an Equity Instrument of another entity*". Thus, as per my understanding the IAS 2 is not applicable on equity investments.

- b) Regarding the view point of the Representatives that *the applicability of Section 224 of the Ordinance on the shares retained beyond a period of six months would be an oppressive interpretation of the Law in terms of Article 23 of the Constitution of Islamic Republic of Pakistan*. In this concern, it is pointed out that the Section 224 does not prohibit the beneficial owner from making purchase and sale or sale and purchase transactions within the period of less than six months, but it simply provides that the beneficial owner is not entitle to retain the amount of profit, if made on account of such transactions. Thus, in my opinion, the plea of the Representatives does not have any merit.
- c) I do not agree with the view point of the Representatives that *the securities are fungibles only for the period of six months*. For the sake of arguments if the proposed view is accepted, then it would not only lend the redundancy to whole scheme envisaged in Section 224 of the Ordinance and Rule 16 of the Rules, but, also cause several implications.

For instance, whenever transactions carried out by a beneficial owner would attract the provisions of Section 224 of the Ordinance, the beneficial owner may take stance that the sale was made out of previously held shares, resultantly; the beneficial owner would be able to defeat the purpose of the law.

In addition to above, attention in this regard is invited to Section 224 of the Ordinance which provides that:-



*"Where any .....the beneficial owner of more than ten per cent of its listed equity securities makes any gain by the purchase and sale, or the sale and purchase, of any such security within a period of less than six months ....."*

Thus, the words "or the sale and purchase" appear in Section 224 of the Ordinance itself suggest that the securities of the same class are fungible. And this concept has explicitly been expressed in Rule 16(1)(b) of the Rule, which provides that:-

*"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"*

Hence, in terms of above-mentioned Rule purchase and sale transactions shall be matched so long as the securities involved are of the same class and of the same listed company. If both these conditions are met, the shares are fungible. In the instant case, the Respondent has purchased and sold same class of shares of the same issuer company, within the period of less than six months.

- d) Based on the preceding discussion, I also do not agree with the view point of the Representatives of the Respondent that *the concept of fungibility reflected in the Notice is beyond the scope of the Ordinance.*

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. 1,002,000/- (Rupees one million two thousand 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 01/09/09