



SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN

Adjudication Department- I

Adjudication Division

Before

Shahzad Afzal Khan - Director/ Head of Department

In the Matter of

Kohinoor Industries Limited

Number and Date of SCN: CSD/ARN/30/2015-141 dated June 16, 2023

Date of Hearing: September 04, 2023; and September 11, 2023

Present: Mr. Rashid Sadiq- Managing Partner, RS Corporate Advisory and
Mr. Azeem Rashid, RS Corporate Advisory

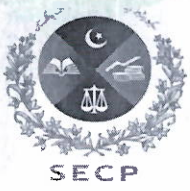
ORDER

Under Section 236 of The Companies Act, 2017 Read with Section 479 thereof

This Order shall dispose of proceedings initiated by the Securities and Exchange Commission of Pakistan (**the Commission**) in the matter of Show Cause Notice dated June 16, 2023 (**the SCN**) under Section 236 of the Companies Act, 2017 (**the Act**) read with Section 479 thereof issued to Kohinoor Industries Limited (**the Company**) and its board of directors hereinafter collectively referred as **the Respondents**.

2. Brief facts of the case are that annual audited financial statements of the Company for years ended June 30, 2020, June 30, 2021 and June 30, 2022 (**the Accounts**) revealed that the Company has not submitted the Auditor's Review Report on the Statement of Compliance (**SoC**) with the Listed Companies (Code of Corporate Governance) Regulations, 2019 (**the Regulations**) while filing the Accounts with the Commission and also not uploaded the same at website of Pakistan Stock Exchange (**PSX**).

3. The Commission through a notice (**the Notice**), to call for information from the Company for the years 2020 and 2021 under section 254 of the Act dated April 13, 2022, to provide comments on the aforesaid observation. The Company vide letter dated July 07, 2022 submitted that it could not attach Auditor's Review Report due to oversight but had sent all information including Auditor's Review Report to all the shareholders and also uploaded the same at Company's website.



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4. It has been observed that the regulations 36(1) and (2) of the Regulations requires that:

"(1) It is mandatory that the company shall publish and circulate a statement, as given under Annexure A to these Regulations, along with their annual reports to set out the status of their compliance with the requirements of these Regulations and the said statement shall be specific and supported by necessary explanations.

(2) It is mandatory that the company shall ensure that the statement of compliance is reviewed and certified by statutory auditors as per relevant Regulations specified by Commission."

5. From the aforesaid it appears that the Respondents failed to submit the Auditor's Review Report on the SoC with the Regulations while filing the Accounts with the Commission, thus, *prima facie*, have contravened the provisions of section 236 of the Act. Consequently proceedings under 236 of the Act read with section 479 thereof were initiated against the Respondents through serving the SCN. Section 236 of the Act provides that:

"236. Penalty for improper issue, circulation or publication of Financial Statements. — If any copy of financial statements is issued, circulated or published without there being annexed or attached thereto, as the case may be, a copy each of (i) any component of financial statements, reports, or statements referred therein, (ii) the auditors' report, (iii) review reports on the statement of compliance, (iv) the directors' report and (v) the statements of compliance, the company, and every officer of the company who is in default shall be liable to a penalty of level 1 on the standard scale."

6. In order to provide opportunity of personal representation, hearing in the matter was fixed for September 04, 2023, that was adjourned on the request of the Respondents. The hearing was later fixed for September 11, 2023 wherein Mr. Rashid Sadiq and Mr. Azeem Rashid of RS Corporate Advisory appeared as Authorized Representative (AR) of the Respondents and made following verbal arguments:

- SoC was prepared, reviewed by auditor but the auditors' review report thereon was inadvertently missed to be submitted to the Commission along with Accounts. However there is no requirement under section 236 of the Act to circulate/ publish auditor's review report, rather it requires review reports on statement of compliance to be circulated.
- Requirements of regulation 36(1) and 36(2) of the Regulations have been fully complied as no SoC for the purpose of section 236 have been specified by the Commission. This understanding has also been confirmed by the opinion received



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from CSD of the Commission stating that the SoC referred in section 226(2) of the Act is different from SoC under the Regulations.

7. Subsequent to the hearing, the AR vide letter dated September 25, 2023 submitted written response and relevant extracts thereof are provided hereunder:

"3. The Commission has issued the SCN under Section 236 of the Act for not attaching SOC as required under regulation 36 of the Regulations with the annual reports of the Company. We may, therefore, first look at the requirements of regulation 36 of the Regulations which are reproduced hereunder:

'36. Compliance Statement and Auditor Review.- (1) It is mandatory that the company shall publish and circulate a statement, as given under Annexure A to these Regulations, along with their annual reports to set out the status of their compliance with the requirements of these Regulations and the said statement shall be specific and supported by necessary explanations.

(2) It is mandatory that the company shall ensure that the statement of compliance is reviewed and certified by statutory auditors as per relevant Regulations specified by Commission.'

4. *The regulation 36(1) of the Regulations provides that a SOC is required to be published and circulated along with the annual report of a listed company. The Company has attached the SOC in its annual reports as per requirements of the aforementioned regulation and, therefore, fully meet the obligation placed on it. The regulation 36(2) of the Regulations provides that the SOC as per regulation 36(1) of the Regulations shall be reviewed and certified by statutory auditors. The Company has got the SOC reviewed and certified by its statutory auditors and copies of the same for the year 2020, 2021 and 2022 are attached herewith. Therefore, the Company also fully complied with the requirements of regulation 36(2) of the Regulations.*

5. *Having established that the Company has fully complied with the requirements of regulation 36(1) and 36(2) of the Act, we may now look at the provision of Section 236 of the Act under which the SCN has been issued to the Respondents. The same is reproduced here below:*

'236. Penalty for improper issue, circulation or publication of Financial Statements.-If any copy of financial statements is issued, circulated or published without there being annexed or attached thereto, as the case may be, a copy each of (i) any component



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of financial statements, reports, or statements referred therein, (ii) the auditors' report, (iii) review reports on the statement of compliance, (iv) the directors' report and (v) the statements of compliance, the company, and every officer of the company who is in default shall be liable to a penalty of level 1 on the standard scale.'

6. In the context of Section 236 of the Act, Section 226 and 227 of the Act are also relevant, therefore, the same is reproduced here below:

'226. Duty to prepare director's report and statement of compliance. (2) The Commission may by general or special order direct such class or classes of companies to prepare a statement of compliance.

227. Contents of directors' report and statement of compliance. - (4) The board shall make out and attach to the financial statement such statement of compliance as may be specified.

(5) The directors' report and statement of compliance must be approved by the board and signed by the chief executive and a director of the company.'

7. You will kindly appreciate that Section 236 of the Act refers to the statement of compliance under the aforesaid provision of the Act which has not yet been specified by the Commission, This is abundantly clear from the clarification issued by the commission dated 22 February, 2018. Accordingly, the SOC under the Regulation is different from the SOC which is to be specified by the Commission in terms of provisions of the Act and, therefore, the SOC referred to in Section 236 of the Act is the SOC under the Act and not under the Regulations.

8. This is also noteworthy that Section 236 of the Act requires 'review reports on statement of compliance and does not refer to auditors' review reports. Moreover, in terms of Section 227(5) of the Act, the SOC under the Act must be signed by the chief executive and a director of the company while the SOC under the Regulations must be signed by the Chairman Board of directors as per format of SOC provided in Annexure A attached to the Regulations.

9. In light of the above submissions, the Company has fully complied with the requirements of regulations 36(1) and 36(2) of the Regulations as well as Section 236 of the Act as no SOC has been specified by the Commission for the purposes of Section 236 of Act for which different requirements have been laid down in the Act as adumbrated hereinabove and accordingly, the SCN issued to the Respondents is without jurisdiction.



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10. Without prejudice to the above submissions on jurisdiction and legal issues, we place here below the following precedents which indicates that the Commission has not taken any action with regard to defaults under the Regulations. Accordingly, we request for equal treatment on the basis of binding precedents with regard to the matter at hand for just and fair dispensation.

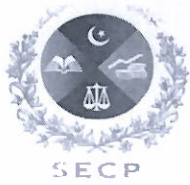
- a) Sana Industries Limited, 31 January, 2023
- b) Macpac Films Limited, 28 September, 2022

11. There are a large number of other orders where no action was taken by the Commission and copies of the same can be presented if required by the Commission.

12. With respect to above mentioned binding precedents, the recent judgement of the Supreme Court in the case of Mst. Samrana Nawaz v. MCB Bank Ltd. (PLD 2021 SC 581) provides categorical instruction in the matter in the following terms:

"7. We are, however, bound by the judgment delivered by a Bench of co-equal strength, i.e., a three-member Bench, in the said case and therefore cannot hold otherwise. It is now a well-established principle of practice and procedure of this Court that the earlier judgment of a Bench of this Court is binding not only upon the Benches of smaller numeric strength but also upon the Benches of co-equal strength; a Bench of co-equal strength cannot deviate from the view held by an earlier Bench, and if a contrary view has to be taken, then the proper course is to request the Hon'ble Chief Justice for constitution of a larger Bench to reconsider the earlier view. For, the law declared by this Court should be clear, certain and consistent, as it is binding on all other courts of the country, under Article 189 of the Constitution of Pakistan, 1973. The doctrine of binding precedent promotes certainty and consistency in judicial decisions, and ensures an organic and systematic development of the law.

13. A different treatment in relation to the Company will be unfair, unjust and discriminatory treatment and would contravene the letter and spirit of the scheme envisaged under Section 20(6)(c) of the SECP Act, 1997 and Article 25 of the Constitution as was held in the matter of ANS Capital (Pvt) Limited v. Director (SMD) reported at 2017 CLD 686, in Appeal No. 29 of 2016 (Mr. Salman Hussain Chawala, Nominee Director, NIT (Paramount Spinning Mills Limited) v Director (CSD), SECP), by the Lahore High Court, Lahore in the case of Nishat Mills Limited v. SECP Appellate Bench and in cases, Mst. Gul Jan v. Naik Muhammad (PLD 2012 SC 421, Administrator District Council Larkana v Ghulab Khan (2001 SCMR 1320).



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Ghulam Murtaza v The State (PLD 2009 Lahore 362) and Zahid Ullah v NWFP Public Service Commission through Chairman Peshawar (PLD 2010 Peshawar 2).

14. Accordingly, it is submitted that deviation from binding precedents is contrary to the Constitution and the provisions of the SECP Act, 1997 which mandates that the law should be applied in a uniform manner to ensure a just and fair dispensation.

15. It is further submitted that fine could only be imposed on substantial finding of guilt as was held by the Supreme Court in the case reported as 2011 PLD 778 in the matter of SECP vs First Capital Securities Corporation Limited. You will appreciate that even in the absence of the requirement to establish guilt it is incumbent upon the commission to not merely penalize purely technical violations which action is not justified in the absence of a substantial finding of guilt as specifically instructed by the Supreme Court of Pakistan in the case of Securities and Exchange Commission of Pakistan v. First Capital Securities Corporation Limited (2011 PLD 778) in the following manner:

"20. It should also 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. It is not sufficient either in the case of this law, or any other law, merely on the basis of a technical contravention to arbitrarily impose a fine of either the full amount or 50% or 75% or any other arbitrarily chosen figure; a condign punishment is the requirement of law and equity.

21. In view of the aforesaid, this appeal has no merits and is hereby dismissed."

16. Reliance is also placed on Commission's binding precedents in Appeal No 40 of 2014 dated 24 August, 2015 in the matter of Fauji Cement Company Limited and Next Capital Limited in Appeal No. 26 of 2015 dated 24 July, 2015 for determination whether default was committed knowingly and willfully.

17. Accordingly, you will appreciate that there was no deliberate act of non-compliance on the part of the Respondents for not attaching auditors review report on SOC under the Regulations with annual reports sent to the SECP and the same were duly sent to all the shareholders along with annual reports. This is without prejudice to the submission that SCN under Section 236 of the Act is without jurisdiction for the simple reason that SOC mentioned in Section 236 of the Act



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is different from the SOC required under the Regulations. Therefore, the SCN may please be withdrawn without any adverse consequences for the Respondents in order to ensure fairness and justice in the application of the law administered by the Commission for the beneficial regulation of the capital markets it oversees.

18. It is further submitted that the power to impose penalties under Section 479(3) of the Act for violation of Section 176 of the Act have been delegated through SRO 1545 (I)/2019 dated 06 December, 2019 (I)/2017 (hereinafter the 'Delegation Notification') to the HOD (Adjudication-I).

19. In relation thereto, it is submitted that delegation of power in terms of the Delegation Notification for issuance of the SCN and imposition of penalty of level 1 violates the provisions of Section 479 of the Act. The same is reproduced hereunder for ease of reference:

Section 479 of the Act:

"479. Adjudication of offences and standard scale of penalty. - (1) There shall be a standard scale of penalty for offences under this Act, which shall be known as - the "standard scale".

(2) The standard scale consists of -

<u>Level</u>	<u>Limit of Penalty</u>	<u>Per day penalty; during which the default continues</u>
1	Upto Rs. 25,000	Upto Rs. 500
2	Upto Rs. 500,000	Upto Rs. 1,000
3	Upto Rs. 100 Million	Upto Rs. 500,000

(3) Where a penalty is provided for any default in complying with, any of the provisions of this Act or a directive of the Commission or the registrar or other authority empowered to issue a directive under any provisions of this Act, it shall be adjudged and imposed-

- (a) where any person shall be liable to a penalty of level 1, by the officer who is in charge of the company registration office in which the company is registered: Provided that the Commission and the registrar shall have concurrent jurisdiction under this clause;
- (b) where any person shall be liable to a penalty of level 2, by the registrar designated for the purpose: Provided that the Commission shall have



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- concurrent jurisdiction under this clause; and;
- (c) where any person shall be liable to a penalty of level 3, by the Commission or an officer authorised by it.

4) Notwithstanding anything contained in sub-section (3), the Commission may, by an order in writing empower any officer to exercise the powers conferred by the said sub-section in respect of any case or class of cases, either to the exclusion of, or concurrently with, any other officer.

(5) The penalty as aforesaid shall be imposed after giving the person concerned an opportunity to show cause why he should not be punished for the alleged offence, contravention, default or non-compliance and, if he so requests, after giving him an opportunity of being heard personally or through such person as may be specified.

(6) The penalty imposed under this section by the Commission, the registrar designated for the purpose or the officer in-charge of the company registration office, shall be without prejudice to any other action for the violation or contravention as provided under the relevant provision of this Act." (emphasis provided)

20. You will appreciate that Section 479(3) of the Act as reproduced above refers to categories of persons authorized to penalize the defaults. Accordingly, it is submitted that the power under Section 479(3) and (4) of the Act cannot be delegated in its entirety to any officer by the Commission and the Commission is empowered to delegate such powers only with respect to any case or class of cases by an order in writing which was not done, the exercise of jurisdiction, therefore, is not lawful as no order in writing was passed with respect to any case or class of cases as mandated under Section 479(4) of the Act. **The delegation of powers under Section 479 of the Act cannot be achieved only through a notification under Section 10 of the SECP Act, 1997.**

21. Accordingly, the proposed delegation is a deviation from the prescribed process as 'where procedure [has] been provided for doing a thing in a particular manner then same should be done in that manner alone and not in any other way or it should not be done at all; otherwise it would be considered non-compliance of the legislative intent and would be deemed illegal' (emphasis provided) as amply recognized, acknowledged and upheld by the Pakistani judiciary.

22. It is submitted with due respect, that a decision contrary to the binding precedents and other issues delineated herein would impinge on the rights of the Directors to due process and fair trial in terms of Article 4 of the Constitution



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and to be treated in accordance with law which is guaranteed under Article 10A of the Constitution as a fundamental right.

23. *It is submitted, with due respect, that the SOC was duly prepared and reviewed by the statutory auditors and the same has been included in the annual reports circulated to the members of the Company. Copies of the annual report for the years 2020, 2021 and 2022 are attached hereto.*

24. *In light of the above, it is prayed that the SCN be withdrawn without any adverse consequences for the Respondents who are devoted to demonstrating regulatory compliance and commit to ensuring compliance with the applicable law to the best of their abilities."*

8. I have gone through the facts of the case, the written and verbal submissions made by AR and state that:

(i) Applicability of Section 236 of the Act

The applicable regulatory framework is explicit and clear requiring the companies to publish and circulate a SoC with the Regulations, duly reviewed and certified by their statutory auditors, to set out the status of their compliance with the requirement of the Regulations. The term "specified" has been defined in section 2 of the Act whereby it means,

"(67) "specified" means specified through regulations made under this Act;"

Therefore, the contention of the Respondent that no SOC has been specified by the Commission under section 236 of the Act is not reasonable. The requirement under section 236 of the Act when read with requirements prescribed under regulations 36(1) and 36(2) of the Regulations wherein it is clear that the auditors' review reports on SoC with the Regulations is required to be issued, circulated or published under Section 236 of the Act. Therefore, the argument by the AR that section 236 of the Act only requires publishing the review reports on the statement of compliance and not the auditors review report on SoC, is not tenable.

(ii) Plurality of Statements

The stance of AR that statement of compliance mentioned in Section 236 of the Act has not yet been specified by the Commission and it is different from the SoC required under the Regulations, authenticating the same from a clarification issued by the Commission in 2018, is not tenable. As the referred clarification only distinct the statement of compliance required under Section 226(2) of the Act from



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the one required under the Regulations and does not apply on issuance of other statements of compliance and review reports thereon required to be issued, circulated or published under section 236 of the Act. It is noted that the requirement under Section 236 of the Act is for issuing, circulating or publishing "statements" of compliance and review reports on the statement of compliance, which includes all the statements of compliance and review reports thereon prescribed under the applicable regulatory framework and not one or any specific statement of compliance and review report thereon. Accordingly, penalty prescribed under Section 236 of the Act is not for issuing, circulating or publishing a *specific statement of compliance or review report thereon* but it makes the company and every officer of the company who is in default liable to be penalized for not issuing, circulating or publishing the required statements of compliance or review reports on the statement of compliance.

In view of the above, it is evident that the Respondents were non-compliant with the provisions of Section 236 of the Act by not attaching the auditors' review report on the SoC with the Regulations along with the Accounts filed with the Commission and uploaded at PSX website.

(iii) Judgement by another Bench

In the context of the request by the AR for equal treatment on the basis of binding precedents for just and fair dispensation of justice, it is stated that every case has distinct facts and circumstances., therefore, decision in one case may not be treated as binding precedent for other cases. Furthermore, in the recent judgement of the Islamabad High Court in the case of PKP Exploration Limited vs Federal Board of Revenue (PTD 2021, 1644), it was held that decisions of quasi-judicial forums in one case are not bonding for other similar cases before such tribunal. For reference relevant abstract of the judgement is reproduced below:

"A precedent, therefore, is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed as ratio decidendi. The concrete decision is binding between the parties to it, but it is abstract ratio decidendi which alone has the force of law as regards to the world at large."

As per articles 189, 203GG and Constitution of Pakistan, 1973, decisions of Supreme Court are binding on other Courts, decision of Court binding on High Court and Courts subordinate to it and decision of High Court binding in Subordinate Courts respectively.



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13.....*Given that it is an adjudicatory forum of a quasi-judicial nature established by statute, it is vested with no inherent power.The consequences of the decision of the Tribunal are limited to the case it decides and do not travel beyond the four corners of the subject-matter before it in appeal. In other words, neither the Constitution nor any statute envisages a law-declaring function for the Tribunal. Its decision do not become binding precedents. The reasoning of the Tribunal in one case could be treated by tax authorities as a persuasive precedent in a subsequent case where the subject-matter is the same or similar. But the persuasive quality or cogent reasoning of a decision of the Tribunal does not transform it into a legally binding precedent for officials exercising executive or adjudicatory authority under tax, statutes, just as the most compelling and potent decisions of District Courts do not make such decisions binding precedents."*

It is evident from the aforesaid that the precedents may be considered as reference but are not binding for the competent forum and accordingly each case can be decided on its merits and facts.

(iv) Jurisdiction of the Matter

With respect to the AR's observation on jurisdiction of the matter it is stated that, Section 10 of the SECP Act 1997 provides for the delegation of the Commission's functions or powers. Under the said Section 10 of the SECP Act, the Commission may delegate any of its powers to any of its officer and such delegation may be subject to certain conditions and limitation. From, the text of the said Section 10 of the SECP Act, it is clear that not only delegation of the Commission's power to any of its officers is optional but also setting any condition and/ or limitation with such delegation is also optional. For ease of reference, the said Section 10 of the SECP Act is reproduced as under:

*"10. Delegation of the Commission's functions or powers.- (1) The Commission may, subject to such conditions and limitations as it may deem fit to impose, delegate any of its functions or powers under this Act or any administered legislation to one or more Commissioners or any officer of the Commission.
(2) A delegation under this section shall not prevent the concurrent performance or exercise by the Commission of the functions or powers so delegated."*

The aforesaid provision leaves, imposing of any condition or limitation on the delegation of its powers solely at the discretion of the Commission. The use of word, "may" has been considered in the case (2004 PTD SC 2187 Abu Bakar



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Siddique and others vs Collector of Customs, Lahore and others). In paragraph 9 of the judgement/verdict, the author judge, Honorable Justice Muhammad Nawaz Abbasi states that, "it is well settled that the use of the word, 'may' is discretionary, an enabling word... the use of the word, 'may', in the statute in the plain meaning is to give discretion to the public authorities to act in their opinion in the manner in which such authorities deem proper." Therefore, it is contended that the delegation of powers pursuant to Section 10 of the SECP Act is not contrary to the scheme of the SECP Act 1997 but rather is the enabling provision which empowers the Commission to delegate its powers and structure the use of such powers. Moreover, the delegation of power to the Officers of the Commission is appropriately issued and also notified in the Official Gazette.

9. Keeping in view the above, the non-compliance of Section 236 of the Act is established and the said contravention attracts penal provision contained in Section 236 of the Act read with Section 479 thereof. I, therefore, in exercise of the powers conferred under Section 236 of the Act, hereby conclude the proceedings initiated through the SCN by imposing a penalty of **Rupees twenty thousand only (Rs. 20,000/-)** on the Company and warn all the remaining Respondents to ensure meticulous compliance with the applicable legal and regulatory framework in future in letter and spirit.

10. The aforementioned penalties must be deposited in the designated bank account maintained with MCB Bank Limited or United Bank Limited in the name of the Securities and Exchange Commission of Pakistan within thirty (30) days from the receipt of this Order, and duly deposited bank challan shall be furnished to the Commission. In case of non-deposit of the penalties, proceedings for recovery under Section 485 of the Act as arrears of land revenue will be initiated.

11. Nothing in this Order may be deemed to prejudice the operation of any provision of the Act providing for imposition of penalties in respect of any default, omission or violation of the Act.

Shahzad Afzal Khan
Director/ HOD
Adjudication Department-I

Announced: November 14, 2023
Islamabad