



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

NICL Building, 63 Jinnah Avenue, Islamabad

Before

Shahzad Afzal Khan – Director/ Head of Department

In the Matter of

Thatta Cement Company Limited

Number and Date of SCN: CSD/ARN/576/2019-58 dated August 2, 2023

Dates of Hearing: September 14, 2023

Present: Mr. Muhammad Aslam Sheikh, CEO and
Mr. Muhammad Abid Khan, Company Secretary

ORDER

Under Section 134 and Section 199 of the Companies Act, 2017 read with Regulations 3, 5 and 8 of the Companies (Investment in Associated Companies or Associated Undertakings) Regulations, 2017

This Order shall dispose of the proceedings initiated against Thatta Cement Company Limited (the Company) and its board of directors (collectively referred to as the Respondents) through Show Cause Notice (the SCN) dated August 2, 2023 issued under Section 134 and Section 199 of the Companies Act, 2017 (the Act) read with Regulations 3, 5 and 8 of the Companies (Investment in Associated Companies or Associated Undertakings) Regulations, 2017 (the Investment Regulations).

2. Brief facts of the case are that:

- a. the notice dated October 6, 2022 of Annual General Meeting (AGM) of the Company, *inter alia*, disclosed following special business:

“to consider and, if deem fit, pass with or without any amendment / modification following resolutions as special resolutions:

RESOLVED that the time period for providing advance / loan facility to Thatta Power (Private) Limited, the Subsidiary Company to the extent of total amount of Rs 300 million as approved / renewed by the shareholders in the Annual General Meeting held on October 15, 2021, be and is hereby extended further for a period of one year till the holding of next Annual General Meeting to be held on or before October 27, 2023 to meet the requirements of Regulation 5(7) of Companies (Investment in Associated Companies or Associated Undertakings) Regulations, 2017 dated December 6, 2017.”



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- b. it was observed that the Company failed to submit mandatory information regarding terms and conditions for granting running finance facility, required to be provided in the statement of material facts under Section 134 of the Act read with regulation 3 of the Investment Regulations.
- c. it was also observed that the Company failed to submit mandatory requirement of due-diligence certification to the members by the directors and the provision to the members of a duly signed recommendation of the due-diligence report in the general meeting called for approval of special resolution as required by regulations 3(3) and 3(4) of the Investment Regulations.
- d. the Accounts of the Company for the year ended June 30, 2022 revealed that the Company has granted loan to its subsidiary company namely; Thatta Power (Private) Limited, carrying a markup at the rate of 3 months KIBOR plus 2.62% per annum payable on quarterly basis extended further for a period of one year till October 27, 2023 after getting approval from its members in the AGM held on October 27, 2022. However, note 18 to the Accounts reflects an amount of Rs. 9.288 million (2021: Rs. 0.427 million) as interest receivable from its subsidiary due to non-recovery of mark-up on regular basis which is in contradiction with the requirements of Section 199(2) of the Act read with Regulation 5(6) of the Investment Regulations.
3. The Securities and Exchange Commission of Pakistan (the Commission) through letter dated December 15, 2022, sought necessary clarifications regarding the non-compliance of the Act and the Investment Regulations. In response thereto, the Company vide letter dated January 12, 2023, *inter alia*, provided following explanation:
- *The terms and conditions for granting running finance facility should be mentioned in the statement of material fact attached with notice of AGM. However, we would like to inform you that the terms and conditions of the Loan/Advance facility have been disclosed in note 14 on page no. 64 of unconsolidated financial statements of the Company.*
 - *Thatta Power (Private) Limited is a subsidiary company and the board of directors of Thatta Cement Company Limited reviews the financial performance and cash flow position of the Subsidiary Company at regular intervals. Moreover, the financial statements of the Subsidiary Company are also consolidated with the financial statement of the holding Company at quarterly, half-yearly and at the year end. Therefore, as per our understanding, the preparation of a separate due diligence report is not required by the Company.*
 - *The loan facility carries markup at the rate of 3 months KIBOR plus 2.62% per annum payable on quarterly basis as disclosed in note 14 of unconsolidated financial statements. The Company receives the markup on regular basis according to terms and conditions. However, at the year-end markup remained outstanding due to lack of funds with the subsidiary Company.*
4. In view of the aforesaid:
- a. the Company by not providing mandatory information regarding terms and conditions for granting running finance facility in the statement of material facts



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along with the notice of AGM of 2022, *prima facie*, violated the requirements of Section 134 of the Act read with regulations 3(1)(a)(B)(iv)(v) and 3(1)(c)(iii)(iv) of the Investment Regulations.

- b. the Company by not fulfilling the requirement of due-diligence certification to the members by the directors as well as not providing duly signed recommendation of the due diligence report in the general meeting; called for approval for the special resolution for investment pursuant to Section 199 of the Act, *prima facie*, violated the requirements of regulations 3(3) and 3(4) of the Investment Regulations.
- c. the Company by not recovering mark-up from its subsidiary on regular basis, *prima facie*, violated the requirements of Section 199(2) of the Act read with regulation 5(6) read with regulation 8 of the Investment Regulations.

5. Therefore, taking cognizance of the alleged non-compliances, proceedings were initiated against the Respondents through serving the SCN requiring them to show cause in writing within fourteen (14) days, as to why penalty, as provided, should not be imposed on them.

6. In this regard, the Company through its letter dated August 16, 2023 *inter alia*, submitted that:

Disclosure of Terms and Conditions for Running Finance Facility:

We acknowledge the importance of transparent communication with our stakeholders. However, we would like to clarify that the terms and conditions of the loan/ advance facility, including the fact that the Company did not obtain any collaterals or securities for providing financial support to the subsidiary Company have been disclosed in note 14 on page no. 64 of the unconsolidated financial statements of the Company. We understand the need to include such details in the statement of material facts in the future to align with regulatory requirements.

Subsidiary Company Oversight and Due Diligence Report:

The Board of Thatta Cement Company consistently reviews the subsidiary financial performance and integrates its financial statements with those of the holding Company. Given this integration, the preparation of a separate due diligence report is deemed unnecessary. However, going forward, we commit to ensuring that these requirements are strictly adhere to in all relevant instances.

Recovery of Mark-up from Subsidiary:

We acknowledge the observation regarding non-recovery of mark-up from our subsidiary, Thatta Power (Private) Limited. The reason for the outstanding amount of markup at the year-end was due to constraints faced by our subsidiary company. We have taken steps to address this issue promptly, and the outstanding amount has been subsequently received by the Company.



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7. To provide opportunity of personal representation, hearing in this matter was fixed for September 14, 2023, wherein Mr. Muhammad Aslam Sheikh, CEO and Mr. Muhammad Abid Khan, Company Secretary appeared before the undersigned as the Authorized Representatives (the **Representatives**) and submitted that:

- *Company has always been compliant. The loan given to subsidiary Company is renewed annually.*
- *The disclosures given in financial statements also mentioned regarding the loan.*
- *The management will ensure future compliance.*
- *The amount of mark-up is being received, accordingly, evidence of receipt will be shared.*
- *Lenient view in the matter is requested.*

8. Subsequently, the Company through its letter dated September 18, 2023 submitted the copy of bank instrument and ledger of accrued markup/interest as evidence highlighting the outstanding markup amounting to Rs.19.5 million was adjusted against the receivable from the Company, while the remaining amount of Rs. 1.329 million was paid on March 17, 2023.

9. Relevant legal provisions are reproduced as hereunder:

Section 134(3) of the Act:

Where any special business is to be transacted at a general meeting, there shall be annexed to the notice of the meeting a statement setting out all material facts concerning such business, including, in particular, the nature and extent of the interest, if any, therein of every director, whether directly or indirectly, and, where any item of business consists of the according of an approval to any document by the meeting, the time when and the place where the document may be inspected, shall be specified in the statement."

Section 134(12)(a) of the Act, states that:

Any contravention or default in complying with requirement of this section shall be an offence liable in case of a listed company, to a penalty of level 3 on the standard scale."

Regulations 3 (1)(a)(B)(iv)(v)(vi) and 3(1)(c)(iii)(iv) of the Investment Regulations states that:

3. *Information to be disclosed to members.- (1) The company shall disclose following information in the statement annexed to the notice, pursuant to subsection (3) of section 134 of the Act, of a general meeting called for considering investment decision under section 199 of the Act-*

(a) *Disclosures for all types of investments,-*

(B) *General disclosures:-*

(iv) *salient features of the agreement(s), if any, with associated company or associated undertaking with regards to the proposed investment;*

(v) *direct or indirect interest of directors, sponsors, majority shareholders and their relatives, if any, in the associated company or associated undertaking or the transaction under consideration;*



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- (vi) in case any investment in associated company or associated undertaking has already been made, the performance review of such investment including complete information/justification for any impairment or write offs;
- (c) In case of investments in the form of loans, advances and guarantees, following disclosures in addition to those provided under clause (a) of sub-regulation (1) of regulation 3 shall be made,-
- (iii) rate of interest, mark up, profit, fees or commission etc. to be charged by investing company;
- (iv) particulars of collateral or security to be obtained in relation to the proposed investment;"

Regulations 3(3), 3(4), 5(6) and 8 of the Investment Regulations states that:

3(3) The directors of the investing company while presenting the special resolution for making investment in an associated company or associated undertaking shall certify to the members of the investing company that they have carried out necessary due diligence for the proposed investment before recommending it for members' approval.

3(4) The duly signed recommendations of the due diligence report shall be made available to the members for inspection in the general meeting called for approval of the special resolution for investment pursuant to section 199 of the Act.

5(6) Interest, mark up, profit, fees or commission, as the case may be, shall be recovered periodically by the investing company in line with the terms and conditions approved by the members.

8. Penalty.- Any contravention of the regulations shall be punishable with a penalty which may extend to five million rupees and, where the contravention is a continuing one, with a further penalty which may extend to one hundred thousand rupees for every day after the first during which such contravention continues."

Section 199 (2) and 199 (6) of the Companies Act, 2017 provides:

199(2) The company shall not invest in its associated company or associated undertaking by way of loans or advances except in accordance with an agreement in writing and such agreement shall inter-alia include the terms and conditions specifying the nature, purpose, period of the loan, rate of return, fees or commission, repayment schedule for principal and return, penalty clause in case of default or late repayments and security, if any, for the loan in accordance with the approval of the members in the general meeting:

Provided that the return on such investment shall not be less than the borrowing cost of the investing company or the rate as may be specified by the Commission whichever is higher and shall be recovered on regular basis in accordance with the terms of the agreement, failing which the directors shall be personally liable to make the payment:



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Provided further that the directors of the investing company shall certify that the investment is made after due diligence and financial health of the borrowing company is such that it has the ability to repay the loan as per the agreement

199(6) Any contravention or default in complying with requirement of this section shall be an offence liable to a penalty of level 3 of the standard scale and in addition, shall jointly and severally reimburse to the company any loss sustained by the company in consequence of an investment which was made without complying with the requirements of this section."

10. I have analyzed the facts of the case, relevant provisions of the Act and that of the Investment Regulations, written responses submitted and arguments made by the Representatives and state that:

i. Disclosure of Terms and Conditions – AGM Notice

The notice dated October 6, 2022 of the Annual General Meeting (AGM), failed to submit mandatory information regarding terms and conditions for granting running finance facility, required to be provided in the statement of material facts under Section 134 (3) of the Act read with regulations 3(1)(a)(B)(iv)(v) and 3(1)(c)(iii)(iv) of the Investment Regulations.

Furthermore, Company's stance vide letter August 16, 2023, of disclosing the relevant information in note 14 on page no. 64 of the unconsolidated financial statements of the Company is not cogent. Section 134 (3) of the Act specifically requires that where any special business is to be transacted at a general meeting, there shall be annexed to the notice of the meeting a statement setting out all material facts concerning such business.

Hence, default in term of Section 134 of the Act read with regulation 3 of the Investment Regulations is established as admitted by the Respondents.

ii. Due Diligence in terms of Regulation 3 of the Investment Regulations for investment made in Thatta Power (Private) Limited (Subsidiary)

As per regulation 3(3) and 3(4) of the Investment Regulations the Company was required to provide due-diligence certification to the members by the directors along with duly signed recommendation of the due diligence report in the general meeting for approval for the special resolution for investment.

Company's stance that its subsidiary company namely; Thatta Power (Private) Limited's financial statements are consolidated with the financial statement of the holding Company at quarterly, half-yearly and at the year end and therefore the preparation of a separate due diligence report is unnecessary is not tenable, hence, violation of regulations 3(3) and 3(4) of the Investment Regulations is attracted.

iii. Recovery of mark-up from Thatta Power (Private) Limited (Subsidiary)

As per the requirement of Section 199(2) of the Act read with regulation 5(6) of the Investment Regulations the Respondents were required to recover the



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markup periodically. The Company has granted loan to its subsidiary company namely; Thatta Power (Private) Limited, carrying a markup at the rate of 3 months KIBOR plus 2.62% per annum payable on quarterly basis extended further for a period of one year till October 27, 2023 after getting approval from its members in the AGM held on October 27, 2022. However, note 18 to the Accounts reflects an amount of Rs. 9.288 million (2021: Rs. 0.427 million) as interest receivable from its subsidiary due to non-recovery of mark-up on regular basis.

The Respondents agreed to the non-compliance vide letter dated August 16, 2023 as failure to comply with the given requirements as highlighted above of not recovering the amount to from the subsidiary periodically.

The requirement of the proviso to Section 199 (2) of the Act is explicit, requiring the companies to recover the return on a regular basis. The Respondents while recovering the amount subsequently are in non-compliance to the provisions of Section 199 of the Act. Hence, default in term of Section 199 of the Act is established as admitted by the Respondents.

11. In view of the foregoing and while taking cognizance of the matter, I am of the view that the Respondents have contravened with the requirements prescribed in terms of Sections 134 and 199 of the Act read with regulations 3 and 5 of the Investment Regulations. Therefore, in exercise of the powers conferred under Sections 134(12)(a) and 199(6) of the Act, I, hereby impose an aggregate penalty of Rs. 700,000/- (Rupees Seven Hundred Thousand Only) on the Respondents in the following manner:

Sr. #	Name of the Respondents	Penalty (Rs.)
1.	Mr. Khawaja M. Salman Younis, Chairman & Director	50,000
2.	Mr. Muhammad Aslam Sheikh, Chief Executive & Director	50,000
3.	Ms. Naheed Memon, Director	50,000
4.	Mr. Noor Muhammad, Director	50,000
5.	Mr. M. Jamshaid Malik, Director	50,000
6.	Mr. Saleem Zamindar, Director	50,000
7.	Mr. Kamran Munir Ansari, Director	50,000
8.	Thatta Cement Company Limited through the Chief Executive	350,000
	Total:	700,000

12. The Respondents are, hereby, directed to deposit the aforesaid amount of penalty in the designated bank account maintained in the name of the *Securities and Exchange Commission of Pakistan* with MCB Bank Limited or United Bank Limited within thirty (30) days from the date of this Order and to furnish a receipted bank challan to the Commission forthwith. In case of failure to deposit the penalty, the proceedings under Section 485 of the Act will be initiated for recovery of the fines as arrears of land revenue.



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13. Nothing in this Order may be deemed to prejudice the operation of any provisions of the Act providing for imposition of penalties on the Respondent in respect of any default, omission or violation thereof.

A handwritten signature in blue ink, appearing to read 'SAK', is written over a horizontal line.

Shahzad Afzal Khan
Director/ HOD
Adjudication Department-I

Announced:
October 31, 2023
Islamabad