

[Islamabad]

Before Ashfaq Ahmed Khan, Director Enforcement

Order

In the matter of

Honda Atlas Cars (Pakistan) Limited

Date of final hearing:

December 26, 2006

Present:

**Sardar Abid Ali Khan
Company Secretary**

**Mr. Asad Murad
Chief Financial Officer**

**Mr. Munawar-Us-Salam
Legal Counsel
Cornelius Lane and Mufti,
Advocates**

Date of Order:

January 22, 2007

This order shall dispose of the proceedings initiated against the Chairman, Chief Executive Officer and Directors of Honda Atlas Cars (Pakistan) Limited (the “Company”) for making unauthorized investments in its associated undertakings in violation of the provisions of Section 208 of the Companies Ordinance, 1984 (the “Ordinance”).



Securities and Exchange Commission of Pakistan
Enforcement Department

2. The brief facts of the case are that while examining the annual audited accounts of the Company for the year ended March 31, 2006, it was observed from Note 14 to the said accounts that investments amounting to Rs.634.843 million have been made with related parties i.e. two open ended funds, Atlas Stock Market Fund (Rs.165.36 million) and Atlas Income Fund (Rs.386.10 million) and one closed end fund, Atlas Fund of Funds (Rs.83.38 million), hereinafter called as “Atlas Funds” which are being managed by Atlas Asset Management Limited (AAML), an associated company of the Company. The Company, vide letter No.EMD/233/448/2002 dated July 25, 2006, was asked to furnish justification and evidence as to whether shareholders authorization was obtained for making above referred investment in the Atlas Funds. In reply, vide letter dated August 4, 2006, the Company took the plea that investment in Atlas Funds have been made on the basis of an advice from it’s lawyers, as to the applicability of Section 208 (1) of the Ordinance, according to which Atlas Funds have been constituted pursuant to trust deeds executed between the NBFC i.e AAML in its capacity as the manager/advisor and the respective trustees, in accordance with the NBFC Rules, 2003. There are no partners or directors of the Atlas Funds since these are not partnership or companies. The securities issued by these Funds would also not be voting shares. On the basis of the foregoing, the Atlas Funds would not be associated companies of the Company. As such, based on this interpretation, the authorization from shareholders was not required in terms of Section 208 of the Ordinance. As the reply was not found satisfactory, a Show Cause Notice dated November 14, 2006 was issued to all the directors of the Company including its Chairman and the Chief Executive Officer to explain as to why penal action may not be taken under Sub-Section (3) of Section 208 of the Ordinance for the aforesaid contravention. Letter dated December 11, 2006 was received in reply to the Show Cause Notice through Company’s legal



Securities and Exchange Commission of Pakistan Enforcement Department

counsel M/s Cornelius, Lane and Mufti (hereinafter called as “Legal Counsel”) on behalf of all the directors. The reply contained the relevant sections of the Ordinance along with the definition of “Associated Companies” and “Associated Undertakings” as defined in the Ordinance. It was reiterated in the reply that the funds are not owned or controlled by the Company. There are no partners or directors of the Funds. The Securities issued are not voting and hence the Funds do not fall under the purview of term “associated companies”. It was further stated that Show Cause Notice has been based on the presumption that Atlas Funds and AAML are associates of the Company whereas the term “associate” has not been defined in the Ordinance and the same does not fall within the scope and purview of the Ordinance. Further, it was specifically averred that Section 208(3) of the Ordinance may only be applicable in case the failure to comply with the requirements of Section 208(1) of the Ordinance is knowingly and willfully. In view of the above submissions and advice of the legal counsel, they were of the view that Section 208(3) of the Ordinance did not apply to the facts and circumstances of the subject case.

3. In order to provide an opportunity of personal hearing, the case was fixed on December 26, 2006 on which date Sardar Abid Ali Khan, Company Secretary, Mr. Asad Murad, Chief Financial Officer and Mr. Munawar-Us-Salam, Legal Counsel appeared before the undersigned. They presented same arguments as given in the written submissions. However, it was further submitted that Central Depository Company Pakistan Limited (CDC) is the Trustee and legal owner of these funds which are governed by the Trust Act, 1882 whereas AAML being the asset management company, is the investment advisor/manager only and which advises/manages these Funds.



Securities and Exchange Commission of Pakistan Enforcement Department

4. According to prevalent legal framework, in the first instance an Asset Management Company (AMC) is formed which gets approval of the Commission for appointment of a Trustee for floatation of a mutual fund and thereafter mutual fund is established based on a trust deed between the trustee and AMC. After establishment of mutual fund, the AMC manages and advises the mutual funds fully in interest of the stakeholders. The AMC provides management/advisory services to open ended and closed end schemes and are paid management fee as compensation. This fee remains a fixed percentage of monthly average of net fair value of assets managed by the management company. The AMC is responsible for all the acts it undertakes on behalf of a mutual fund. This implies that the management of an AMC may be regarded as the management of the mutual fund. In the present case AAML and the Company are associated companies for having two common directors and thus have common management. It may be mentioned that the term ‘undertaking’ has been interpreted as any business, work or project which one engages in or attempts as an enterprise analogous to business or trade (Mian Muhibullah Kakakhel, Excellent Legal Words & Phrases, Vol.III, Kahsmir Law Times, 1996, P.5406 AIR 1968 SC 554). As the Atlas Funds are fully managed/advised by the AAML management, therefore, it could safely be concluded that the Atlas Funds are “associated undertakings” of the Company. Accordingly, Section 208 of the Ordinance is applicable to the Company for the purposes of investment in the Atlas Funds for the reason that these are associated undertakings of the Company. Therefore, the Company should have obtained the approval of its shareholders by way of a special resolution before making this investment.

5. Further, the representatives of the Company on a query as to whether advice of the legal counsel was obtained prior to making the investments, admitted that the advice of the legal counsel regarding the applicability of Section 208 of the Ordinance was obtained after making the



Securities and Exchange Commission of Pakistan Enforcement Department

investments in question. They however informed that these investments have not caused any revenue loss to the Company and present rate of return was about 12.5% p.a. The argument that this investment has not caused any revenue loss is not a valid reason for violating the mandatory provisions of law by making unauthorized investments in associated undertakings. It is important to mention that the Company's paid up capital as on March 31, 2006 is just Rs.420 million whereas the said investment which is of Rs.634.843 million, is more than the paid up capital of the Company. It may further be added that investments were made in the Atlas Funds on November 24, 2004, December 13, 2004 and June 14, 2005 whereas the legal advice was obtained on May 11, 2006 i.e. after passage of more than one year of initial investment. This fact speaks that the act was done prior to obtaining of a legal opinion and hence is construed as willful.

6. For the foregoing reasons, it is evident that the Chairman, the Chief Executive and the Directors have violated the provisions of Section 208 of the Ordinance and have not exercised due care while making investments in the associated concerns. The default is established, however, as no financial loss seems to have been caused, I instead of imposing maximum penalty of Rs.1,000,000 as prescribed by Sub-section (3) of Section 208 of the Ordinance, take a lenient view of the default and impose a fine of Rs.100,000 on each of the directors as follows:

Mr. Yusuf H. Shirazi	Rs.100,000
Mr. Mamoru Suwama	Rs.100,000
Mr. Kenichi Ozeki	Rs.100,000
Mr. Aamir H. Shirazi	Rs.100,000
Mr. Jawaid Iqbal Ahmed	Rs.100,000
Mr. Masaaki Suzuki	Rs.100,000
Mr. Motohide Sudo	Rs.100,000



Securities and Exchange Commission of Pakistan
Enforcement Department

7. The afore-named directors are directed to deposit the aforesaid fine in the designated bank account maintained in the name of Securities & Exchange Commission of Pakistan in the Habib Bank Limited within 30 days of the date of this order and furnish a receipted challan to the Commission in this regard.

Ashfaq Ahmed Khan
Director Enforcement

Announced
January 22, 2007
Islamabad