



# SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN

NIC Building, Jinnah Avenue, Islamabad

Before Tariq Bakhtawar, Director Enforcement

In the matter of

The Haseeb Waqas Sugar Mills Limited

(Under Section 249 read with Section 498 of the Companies Ordinance 1984)

No. and date of show cause notice	EMD/249/Enf-I/100/2004-829 dated August 3, 2004
Date of final hearing	March 07, 2005
Present	Mr. Munawar Ali, General Manager Finance
Date of Order	June 30, 2005

## ORDER

This order shall dispose of the proceedings initiated against the Company and the directors of the Haseeb Waqas Sugar Mills Limited (hereinafter referred to as the "Company") for defaults made in complying with provisions of Section 249 of the Companies Ordinance, 1984 (the "Ordinance").

2. The Company was incorporated as a public company limited by shares in the year 1992. The shares of the Company are listed on the Karachi and Lahore Stock Exchanges. The paid up share capital of the Company is Rs.324 million divided into 32.4 million ordinary shares of Rs.10 each. The Company is principally engaged in the production and sale of refined sugar and its by-products. Its mills are located in Sheikhpura. The Company has 1,457 shareholders comprising individuals, joint stock companies, insurance corporations, financial institutions etc and as per pattern of shareholding annexed to the Directors' Report in the accounts for the year September 30, 2004, directors, their spouses and minor children hold 27.33% of the total shareholding which indicates that there is considerable public interest in the shares of the Company. The Board of Directors of the Company as per its annual report for the year ended September 30, 2004 comprises of the following persons:

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1.	Mian Muhammad Ilyas Mehraj, Chairman
2.	Mian Waqas Riaz, Chief Executive
3.	Mrs. Shahzadi Ilyas, Director
4.	Mrs. Bano Mehraj, Director
5.	Mrs. Zainab Waqas, Director
6.	Mst. Maiza Riaz, Director
7.	Hafiz Muhammad Irfan Hussain Butt, Director

3. The fact leading to this case, briefly stated, are that from the examination of annual accounts of the Company for the year ended September 30, 2003, it has been observed that the board of directors has declared an interim dividend at the rate of 10% amounting to Rs. 32.4 million on the basis of interim results for the period from October 1, 2002 to December 31, 2002. It has further been observed that total profits earned by the Company for the year amounts to Rs. 27.116 million only and the interim dividend paid by the Company during its first quarter exceeded the total amount available at the year end by Rs. 5.284 million. It has been further observed that at the time the Company had a history of losses and accumulated losses of the Company stood at Rs. 71 million.

4. The auditors of the Company Messrs M. Yousaf Adil Saleem & Co, Chartered Accountants in their report to the members also qualified the above violation in the following terms:

*Quote*

*"During the year the board of directors have declared interim dividend on January 29, 2003 at the rate of 10% amounting Rs. 32,400,000 on the basis of interim results for the period December 31, 2002. This dividend was subsequently paid to shareholders. The Company has accumulated loss amounting to Rs. 71,002,126. This dividend has been paid in contravention of Section 249 of the Companies Ordinance, 1984".*

*Unquote*

*d/c*



5. Failure of the Company to comply with mandatory requirement necessitated action against the Company and the directors in terms of Section 249 read with Section 498 of the Ordinance. Accordingly, a show cause notice dated August 3, 2004 under the provisions of Sections 249 read with Section 498 of the Ordinance was served on the Company and its directors calling upon them to show cause and to explain as to why penalty may not be imposed for the contravention of the Section 249 of the Ordinance.

6. The Company responded to the aforesaid notice through their letter dated August 20, 2004 and informed that proceedings under Section 265 of the Ordinance were earlier initiated by the Commission on the grounds that performance of the Company was not satisfactory and it was not paying any dividend to its shareholders. It was explained by the Company in response to the aforesaid proceedings that its profitability would be improved as business conditions remained better as compared to previous years and on the basis of financial results the management would be able to announce the dividend. Consequently, considering the good results of the first quarter ended on December 31, 2002 and expecting the same level of results in the remaining quarters, board of directors declared the interim dividend on January 29, 2003. Unfortunately, the on going momentum could not be sustained due to the decrease in selling price which was out of control of the management and ultimately the year was closed below the expected results.

7. The submissions of the Company were not found cogent and in order to provide an opportunity of personal hearing, the case was fixed for March 07, 2005 on which date Mr. Munawar Ali, General Manager Finance of the Company appeared on behalf of directors and the Company to plead the case.

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8. In the written submissions as well as during hearing of this case, it was contended that:

- i. Dividend was announced to abate the pressure of Securities and Exchange Commission of Pakistan, which had issued a Show Cause Notice under Section 265 of the Ordinance to investigate the affairs of the Company. A major ground, on which the said show cause notice was issued, happened to be non-payment of dividend to the shareholders and due to this stress, Company declared dividend.
- ii. In Company's letter dated August 13, 2003, it was stated that the decision for payment of dividend was not prudent but implied only to satisfy the shareholders and regulatory authorities.
- iii. Company earned good profits during the first quarter and foreseeing the same results in future announced interim dividends. However same level of profit could not be sustained in the subsequent quarters due to decision of Government to permit import of raw sugar during February/March 2003. This decision effected the production and also reduced the price of sugar and profits of the Company.

9. I have taken into consideration the submissions, made in writing as well as those at the time of hearing of this case and am of the view that the grounds taken by the Company are not convincing and do not support the contravention of law due to the following reasons:

- i. The law and regulation governing dividend, show that declaration of dividends by the Company, in excess of available profits, is a violation of law:

Section 249 of the Ordinance provides that;

Quote

*"No dividend shall be paid by a company otherwise than out of profits of the company."*

Unquote



Regulation 65 of Table A of first Schedule to the Ordinance also states that;

Quote

"No dividend shall be paid otherwise than out of profits of the year or any other undistributed profits"

Unquote

The submission that dividend has been declared due to pressure of Commission does not appears justified as the Commission has never desired any company to violate the mandatory provisions of law and as per the provisions of aforesaid laws the payment of interim dividend out of capital was illegal.

- ii. The submission of the Company that sales and production of the subsequent periods were affected due to Government's decision to allow import of raw sugar, has not been found correct. Company was required to submit proof of such a decision taken by the Government. The documents and newspaper cuttings provided by the Company did not reflect any such decision of Government which should have affected the earlier optimistic forecasts of Company in the first quarter of 2003. The Company should not have declared interim dividend unless it was certain of the future profitability, principally when there was no history of profits and had accumulated losses. Moreover, quarterly accounts also showed fluctuations and results did not merit declaration of interim dividend.

10. I have given due consideration to the relevant provisions of the law governing payment of dividend and after taken care of all the facts, I am of the opinion that the Company has violated the mandatory provisions of law and has acted against the interest of shareholders by paying dividend out of the capital of the Company. The decision of the directors to declare interim dividend was not prudent, as also acknowledged by the Company and the act caused loss of the capital to the Company. It was the fundamental responsibility of the Company and its directors to comply with the statutory requirements in managing the affairs of the Company. The payment of dividend out of capital of the company is *ultra vires* and a breach of fiduciary duty on

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the part of directors. The auditor have also expressed qualified opinion in the audit report and drawn attention toward contravention of Section 249 of the Ordinance. There are well known cases where payments were made out of capital and directors were held liable. In the English case of Towers v. African Tug Company [1904] Ch 904, where an interim dividend was paid and the annual balance sheet showed that the payment had been made out of capital, it was held, that the payment of the dividend being an act *ultra vires*, the directors were liable to replace the amount. In another English case, National Funds Assurance Company [1878] Ch. 118, it was held that the directors in making payments to shareholders out of capital, had acted *ultra vires* and committed a breach of trust and were therefore jointly and severally liable to make good the amount of all such payments.

11. I, therefore, in exercise of powers conferred on me under Section 249 read with Section 498 of the Ordinance, impose a fine of Rs. 25,000 on each director and the Company total amounting to Rs. 200,000 in the following manner:

S. No.	Name	Penalty (Rupees)
1.	Mian Muhammad Ilyas Mehraj	25,000
2.	Mian Waqas Riaz	25,000
3.	Mrs. Shahzadi Ilyas	25,000
4.	Mrs. Bano Mehraj	25,000
5.	Mrs. Zainab Waqas	25,000
6.	Mst. Maiza Riaz	25,000
7.	Hafiz Muhammad Irfan Hussain Butt	25,000
8.	M/S Haseeb Waqas Sugar Mills Ltd	25,000
Total		200,000

12. The Chief Executive and the directors of the Company are hereby directed to deposit, within 30 days of the date of receipt of this order, the aforesaid fines amounting to Rs. 200,000 (Rupees two hundred thousand only) in the Commission's designated bank accounts maintained with Habib Bank Ltd or pay by a demand draft / pay order issued in the name of the Commission and send a copy of the receipt to the Commission for information and record, failing which proceedings under the Land Revenue Act, 1967 will be initiated which may result in the attachment and sale of moveable and immovable property.

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13. The payment of dividend out of capital of the company is *ultra vires* and a breach of fiduciary duty on the part of directors and it is necessary for me to issue directions for making good the loss of capital of Rs. 5.284 million suffered by the Company due to imprudent decision of the . I direct the Company, to recover within 30 days of the date of this Order, the capital loss of Rs. 5.284 million from the directors. In this regard, the Company shall submit auditors' certificate after the payment of amount by the directors.

14. In case of non-compliance of the above directive, the Company and the directors shall be liable to action under Section 495 of the Ordinance, which provides that: Where any directive is given or order is issued by the Court, the officer, the Commission, the registrar or the Federal Government under any provision of this Ordinance, non-compliance thereof within the period specified in such direction or order shall render every officer of the company or other person responsible for non-compliance thereof punishable, in addition to any other liability, with fine not exceeding fifty thousand rupees and, in the case of a continuing non-compliance, to a further fine not exceeding two thousand rupees for every day after the first during which such non-compliance continues. If non-compliance or failure continues after conviction under sub-section (1), the officer or other person who is a party to such non-compliance or failure shall be liable to punishment with imprisonment which may extend to six months and fine not exceeding two thousand rupees for every day after the first during which such non-compliance continues, and shall further cease to hold office in the company and be disqualified from holding any office in any company for a period of five years.

*Bakhtawar*

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Tariq Bakhtawar  
Director Enforcement