



Corporate Supervision Department
Company Law Division

Before Amina Aziz – Director (CSD)

In the matter of

Khyber Tobacco Company Limited

Number and date of notice: No. CSD/ARN/21/2015-155-161 dated July 16, 2015

Date of hearing: December 22, 2015

Present: Mr. M. Javed Panni, Authorized Representative

ORDER

**UNDER SECTIONS 160, 164, 246 AND SRO 1227 /2005 READ WITH 476 OF THE COMPANIES
ORDINANCE, 1984**

This order shall dispose of the proceedings initiated against directors including chief executive (together referred to as “respondents”) of **Khyber Tobacco Company Limited** (the “Company”). The proceedings against the respondents were initiated through show cause notice (the “SCN”) dated July 16, 2015 issued under the provisions of sections 160, 164, 246 and the Commission’s SRO 1227/2005 read with section 476 of the Companies Ordinance 1984 (the “Ordinance”).

2. The brief facts leading to this case are that examination of annual audited financial statements (the “Accounts”) of the Company for the year ended June 30, 2014 revealed that ‘non-current assets amounting to Rs73,456,430 were disclosed as transferred from ‘capital work in progress’ to ‘non-current assets held for sale’ representing carrying value of Green Leaf Thrashing Unit held for sale under agreement negotiated during the year. On explanation sought by the Commission regarding disposal of sizeable part of undertaking, the Company vide letter dated April 17, 2015, inter alia, submitted that sanction of members was sought for the disposal in the extraordinary general meeting (“EOGM”) of the Company that was convened on June 18, 2014 for holding election of directors. Perusal of the notice of the EOGM published in the newspaper on May 27, 2015, revealed that agenda of the EOGM included the sole business of election of directors and there was neither any agenda for seeking members’ sanction for disposal of assets nor any statement of material facts in this regard was attached thereto.



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3. Consequently the SCN was issued to the respondent as they, prima facie, contravened the following provisions of the Ordinance:

Section 160 (1) (b): As the notice of the EOGM did not include the business for disposal of non-current assets as special business;

Section 246 (1): As a statement of material facts containing the information required by the Commission's SRO 1227 / 2005 dated December 12, 2005 was not annexed to the notice of the EOGM, and hence the shareholders were deprived of the mandatory material information required to make a well informed decision regarding disposal of assets that was to be considered / approved at the EOGM; and

Section 164 (1): The notice of the EOGM did not include draft resolution that was to be presented for approval by shareholders.

4. In response to the respondents submitted reply through letter dated August 8, 2015. A brief of reply with reference to the contents of the SCN, following submission have been made:

- Till the year 2012, the Company's tobacco exports were increasing continuously yielding profits. Due to the increasing exports, the management decided to enhance the quality of re-dried tobacco and cut tobacco, which were the main export products. In December 2012, the management opened a letter of credit to import a used Green Leaf Threshing ("GLT") plant from Van Veen Machinery B.V. Netherlands. At the time of shipping the machinery for the export to Pakistan, the supplier demanded further amount of Euro 60,000. It took another couple of months before the Company paid the additional amount and got the plant shipped.
- Imports of other necessary accessories of GLT plant from Italy were completed by early 2014, when the environment significantly changed and export sales fell sharply. The Company having shortage of funds to complete the aforesaid project forecasted that the said project may push the Company towards financial crisis. Accordingly it was decided by the management to dispose of the GLT plant before its installation and to use the funds in other dire needs of the Company.
- As per our understanding of the above facts, the disposal of the said plant does not fall



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under the ambit of section 196(3)(a) of the Ordinance, that is "sell, lease or otherwise dispose of the undertaking or a sizeable part thereof, unless the main business of the company comprises of such selling or leasing. We understand that the disposal of undertakings or a sizeable part thereof means disposal of an undertaking which is in day to day use of the Company and the Company is generating income form the same and if such undertaking is sold it would badly hamper the earning capacity of the Company. From the facts explained above you would appreciate that facts of the case are completely different. On the basis of the above facts, please note that the Board of Directors of the Company (BOD) has exercised their powers to protect and safeguard the interests and wealth of the Company and its shareholders by disposing the GLT plant at the best possible price by calling bids through advertisements in the newspaper and selling the machinery to the highest bidder. The BoD tried their level best not only to save the Company from suffering loss but also to earn profit for the Company. Further due to the reason of protecting and safeguarding interests of the shareholders of the Company, the BoD has also obtained approval of the shareholders of the Company in the EOGM held on 18 June 2014. Copy of minutes of the meeting is attached as Annexure "A".

- With reference to the provision of section 160(1)(b), 164, 246 of the Ordinance and the SRO 1227/2005 dated 12 December 2005 regarding the attachment of the draft resolution and the explanatory statement of disposing of the assets is also irrelevant, as the plant was disposed of before even installation. As highlighted in above para, the approval of the shareholders for this transaction was not mandatory. Therefore, to protect and safeguard interest of the shareholders, the approval was obtained in EOGM without circulating the agenda, draft resolution and the information relating to the disposal of the GLT plant. The resolution and the material information for this transaction were available at the place of the EOGM for the information of the shareholders. Further, in case the transaction is intra vires, honest and to the benefit of the Company or the shareholders then the proceedings of the Company could not be declared invalid on account of a probable procedural lapse.
- We would like to quote that the proceedings of the EOGM and the decision made therein regarding the disposal of the uninstalled plant has already attained finality and



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is a closed transaction because no petition in terms of section 160(A) of the Ordinance has been filed by the shareholders challenging the proceedings of the meeting on account of material defect / omission in the notice or irregularity in the proceedings of the meeting within 30 days of the date of such meeting. It further proves that shareholders of the Company were satisfied with the decision of the general meeting and condoned all the irregularity, omissions and defects.

- Notwithstanding anything contained above, it is humbly stated that the BoD had no intention of depriving the shareholders from their right to make a well informed decision by not giving a notice along with draft resolution and material information according to the provisions of Sections 160, 164 and 246 read with SRO 1275/2005 of the Commission, the procedure was followed as per our interpretation of the provisions of the Ordinance and the rules. In case of any non-compliance, kindly guide us so that the exact procedure, if other than that, for the same transaction can be followed in future.
- We trust that the above explanation will suffice your requirements. We shall be pleased to provide you with any further information or clarification, in case so required, in respect of this letter. The BoD rightly expects that no adverse inference will be drawn against the BoD or any officer of the company upon their interpretation of the provisions of the law.

5. A hearing in the matter was fixed on September 29, 2015, however, the respondents requested for adjournment. Another hearing was fixed on November 3, 2015, however, the respondents through their representative Mr. M. Javed Panni, again requested for rescheduling the hearing to a later date. Finally, the hearing was held on December 22, 2015 before the undersigned and the respondents were represented by Mr. M. Javed Panni, who submitted a written reply and mainly reiterated the earlier stance of the respondents. It was further emphasized that the disposal of the GLT plant was made in the best interest of the Company and its shareholders and the alleged non-compliances of section 160, 164, 246 and the SRO 1227/2005 were due to the understanding of the respondents that since GLT plant disposed of before installation did not constitute a sizeable part of the undertaking of the Company, therefore, provisions of section 196 were not applicable. The respondents later on obtained approval of Company's shareholders in the EOGM as extra precautionary measure and based on their understanding of the law, did not



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circulate the agenda of disposal and related statement of material facts along with the notice of the EOGM. However, he accepted that there has been omission on the part of the respondents with regard to section 160, 164 and 246 read with SRO 1227. Based on the submissions, he requested for a lenient view.

6. Before proceeding further, it is necessary to advert to the following relevant provisions of Ordinance.

Section 160 (1) (b) of the Ordinance, inter alia, provides that *where any special business, that is to say business other than consideration of the accounts, balance-sheets and the reports of the directors and auditors, the declaration of a dividend, the appointment and fixation of remuneration of auditors, and the election or appointment of directors, 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.*

The Commission's SRO 1227/2005 dated December 12, 2005, issued pursuant to the provisions of section 246 (1) of the Ordinance, inter alia, requires that in case a listed company proposes to transact special business relating to sale, lease or disposal of sizeable part of undertaking, under section 196(3)(a) of the Ordinance, it shall annex a statement, pursuant to section 160(1)(b) of that Ordinance, detailing, as minimum, the following information, namely :-

- (i) Detail of assets to be disposed of i.e. its description, cost, revalued amount (if available), book value and approximate current market price/fair value. In case of disposal of land location and area proposed to be sold shall be disclosed;
- (ii) The proposed manner of disposal of the said assets; and
- (iii) Reasons for the sale, lease or disposal of assets and the benefits expected to accrue to the shareholders therefrom.



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Sub-section (1) of section 164 of the Ordinance provides that *with the notice for a meeting, the company shall send to the members copies of draft resolutions, other than routine or procedural resolutions, which are proposed for consideration in the meeting.*

Sub-section (8) of section 160 of the Ordinance, inter alia, provides that *every officer of a listed company who knowingly or willfully fails to comply with any of the provisions of section 160 shall be liable to a fine which may extend to fifty thousand rupees and in the case of a continuing default to a further fine which may extend to two thousand rupees for every day after the first during which the default continues.*

Sub-section (3) of section 164 of the Ordinance provides that *in the event of any default in complying with any of the provisions of this section, the company and every officer of the company who is knowingly or willfully a party to such default shall be liable to a fine which may extend to five thousand rupees if the default relates to a listed company and to a fine which may extend to two thousand rupees if the default relate to any other company.*

Sub-section (2) of section 246 of the Ordinance provides that *in the event of a default in complying with the order of the Commission issued under sub-section (1), the company, and every officer of the company who knowingly and willfully authorizes or permits the default, shall be liable to a fine not exceeding one million rupees and to a further fine which may extend to ten thousand rupees for every day during which the default continues*

7. I have analyzed the facts of the case, relevant provisions of the Ordinance, and submissions made by the respondents and my observations are as under:

- It has transpired that the respondents violated the provisions of section 160 (1) (b) of the Ordinance, as the notice of the EOGM neither contained any statement of business concerning disposal of GLT plant nor the statement of material facts containing the mandatory information in terms of SRO 1227/2005 was found attached to it.
- The respondents have pleaded that the GLT plant did not constitute the sizeable part of the undertaking of the Company because it was yet to be installed and was not operational and provisions of section 196 were not applicable. Therefore, they did not



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consider it necessary to circulate the agenda item regarding disposal of GLT plant in the notice of the EOGM and also did not circulate the statement of material facts and draft resolutions along with the notice. However, I have noted that the GLT plant constituted 14.32% of the total fixed assets of the Company having written down value of Rs513.061 million as of June 30, 2014, including the cost of GLT Plant. Moreover, the respondents have submitted that the plant and all the necessary accessories had been imported by the Company over a period of more than a year and it was ready for installation in early 2014. Based on these facts, the GLT plant which would have added substantially to the production capacity of the Company constituted a sizeable part, in my view and approval of shareholders for its disposal was required under section 196 of the Ordinance. However, these proceedings have not been initiated for violation of section 196 of the Ordinance.

- As the GLT plant constituted sizeable part of undertaking, as discussed above, therefore, in terms of the Commission's SRO 1227/2005, the respondents were required to disclose the mandatory information to the shareholders as part of statement of material facts along with the notice of the EOGM. However, they failed to comply with the requirements.
- Even otherwise, if the respondents' plea that the GLT plant did not constitute sizeable part of Company's undertaking, is accepted, it is clear that once they decided to seek shareholders' approval for disposal of the GLT plant, they were bound to follow the applicable legal provisions and the procedure prescribed by the law. Provisions of section 160 (1) (b) clearly provides that any business other than consideration of the accounts, balance-sheets and the reports of the directors and auditors, the declaration of a dividend, the appointment and fixation of remuneration of auditors, and the election or appointment of directors, is a special business. Therefore, seeking shareholders' approval for disposal of GLT plant was a special business. Therefore, in terms of section 160 (1) (b), it was mandatory for the Company to annex with the notice of EOGM a statement setting out all material facts concerning such business. The respondents' failure to comply with these provisions holds them liable for the violation.
- Section 164 (1) requires the companies to send to the members copies of draft resolutions, other than routine or procedural resolutions, which are proposed for consideration in the meeting. Since, the disposal of GLT plant was not a routine or procedural business, therefore, the Company was required to send the draft resolution to the shareholders



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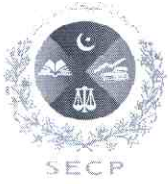
along with the notice of the EOGM. The respondents, however, failed to comply with the requirements.

8. It is important to highlight here that in addition to their responsibilities of overseeing and managing affairs of the Company, directors also have fiduciary duties towards the Company and its shareholders. They are, therefore, liable to a higher level of accountability which requires them to be vigilant and perform their duties with care and prudence. It is directors' responsibility to oversee the functioning of the company and ensure that proper systems are in place to ascertain due compliance of laws and regulations. They are supposed to have proper knowledge of laws and regulatory framework and are fully liable in respect of defaults committed by the company with regard to any law or regulation.

9. For the foregoing reasons, I am of the view that the provisions of sections 160 (1) (b), 164 (3) and the SRO 1227/2005 issued pursuant to section 246 of the Ordinance have been contravened. However, keeping in view the acquiescence of default and assurance by the respondents to observe meticulous compliance with the requirements of law in future, I take a lenient view in the matter and instead of imposing maximum fines on all the respondents, I hereby impose aggregate fine of Rs70,000 (Rupees seventy thousand only) on the respondents for violating the provisions section 160 (1) (b). The respondents are advised to deposit the fines as per following detail:

Name of Respondents	Total
1. Mr. Wasim ur Rehman, Chief Executive	Rs10,000
2. Mr. Muhammad Sayyad, Director	Rs10,000
3. Mr. Liaqat Ali Khan, Director	Rs10,000
4. Mr. Bilalzada, Director	Rs10,000
5. Mr. Shafiq Afzal Khan, Director	Rs10,000
6. Mr. Hazrat Bilal, Director	Rs10,000
7. Mr. Khalil-ur-Rehman, Director	Rs10,000
TOTAL	Rs70,000

In respect of violation of sections 164, 246 and SRO 1227/2005, the respondents are hereby warned to be careful in future and ensure meticulous compliance with applicable legal provisions.



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The aforesaid fine must be deposited in the designated bank account maintained with MCB Bank Limited in the name of the "Securities and Exchange Commission of Pakistan" within thirty days from the receipt of this order and receipted bank vouchers must be furnished to the Commission.

In case of non-deposit of the fine, proceedings for recovery of the fines as arrears of land revenue will be initiated. It may also be noted that the aforesaid penalties are imposed on the respondents in their personal capacity; therefore, they are required to pay the said amount from personal resources.

Amina Aziz
Director (CSD)

Announced:

January 13, 2016
Islamabad