

[Islamabad]

Before Ali Azeem Ikram, Director (Enforcement)

Order

In the matter of

M/s Pharmagen Limited

Under Sub-Section (2) & (3) of Section 227 read with Section 229 and Section 476 of the Companies Ordinance, 1984

Number and date of notice	No. EMD/233/656/2004-11348-11354 dated June 7, 2006
Date of hearing	September 19, 2006
Present	Mr. Parvez Sufi, Chief Executive on behalf of all the directors of M/s Pharmagen Limited
Date of Order	September 29, 2006

The case before me pertains to the proceedings initiated against M/s Pharmagen Limited (the "Company") and its present directors under Sub-section (2) and (3) of Section 227 read with Section 229 and 476 of the Companies Ordinance, 1984 (the "Ordinance").

2. The facts leading to this case, briefly stated, are that it has been noticed from the examination of annual accounts (the "Accounts") of the Company for the year ended June 30, 2005 that an amount of Rs.10,759,577 (2004: Rs.14,930,582) is payable to Provident Fund Trust (the "Fund") by the Company, which includes employees' and employer's contributions to the Fund along with mark-up thereon at the rate of 1% above the return on existing investments made by the Fund (Note 10.1 to the accounts).

3. The aforesaid review categorically identifies that the Company has withheld the funds and has not made payments to the Fund as required under the Ordinance and has thus contravened the provisions of Section 227 of the Ordinance. In view of the facts and circumstances narrated before, it was considered necessary to ascertain the extent of violations committed by the Company in consequence of violations of Section 227 of the Ordinance.

4. Consequently, a show cause notice dated June 7, 2006 was issued under Section 227(2) and (3) read with Section 229 and Section 476 of the Ordinance to the Directors of the Company, who prima facie had authorised and permitted the contravention of the provisions of Section 227 of the Ordinance:

5. The reply to the show cause notice was received from the Mr. Parvez Sufi, Chief Executive of the Company vide his letter dated July 13, 2006 on behalf of all the directors of the Company admitting the default and submitted that it was due to the financial and liquidity problems in the years 2001-2005, the

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company underwent business re-organisation and was also facing a severe debt burden and was forced to reschedule its financing. In order to improve the situation the Company carried out a restructuring of its debt profile and replaced the relatively expensive rescheduled debt through the issuance of Term Finance Certificates (TFC's) on October 17, 2003. These TFCs are also listed on the Lahore Stock Exchange. The Company also had to ensure a monthly contribution of Rs.7 million towards sinking fund maintained for the aforesaid TFCs as per the requirement of law. In addition to above, un-controlled prices of selling products and the upward rise in petroleum prices leads to major imbalance of cash flows.

6. The representative of the Company requested to condone this unwillful and unintentional contravention of the related provisions of law and also seeks the approval of the Commission for a repayment schedule consisting of 12 equal monthly installments commencing from July 2006 which would enable the Company to liquidate the unaudited outstanding Provident Fund balance, payable as on June 30, 2006 along with the markup accrued thereon amounting to Rs.9.5 million (2005: Rs.10.759 million) by June 30, 2007. It is pertinent to mention here that the company has already deposited the three installments of Rs.800,000 each and intimated to the Commission accordingly.

7. In order to provide an opportunity of personal hearing to the directors, the case was fixed for hearing on August 23, 2006, which was adjourned and re-fixed on September 19, 2006. Mr. Parvez Sufi, Chief Executive of the Company appeared on behalf of all the directors of the Company on the said date and argued the case. While admitting the default, it was submitted that the default occurred as the Company was facing tight liquidity problems after the issuance of TFCs. He further requested the approval of the Commission in respect of afore stated repayment schedule of entire outstanding liability of provident fund by June 2007. He requested that a lenient view of the default may be taken. He also assured that the directors would ensure strict compliance of this statutory provision in future.

8. Before proceeding further, it is necessary to advert to the provision of law, which has been violated by the Company, and its directors. These provisions are contained in Section 227 of the Ordinance and are, to the extent relevant, reproduced as follows:

“227. Employees’ provident funds and securities:

(2) Where a provident fund has been constituted by a company for its employees or any class of its employees, all moneys contributed to such funds, whether by the company or by the employees, or received or accruing by way of interest profit or otherwise from the date of contribution, receipt or accrual, as the case may be, shall either

(a) be deposited

(i) in National Savings Scheme;

(ii) in a special account to be opened by the company for the purpose in a scheduled bank; or

(iii) where the company itself is a scheduled bank, in a special account to be opened by the company for the purpose either in itself or in any other scheduled bank; or

(b) be invested in Government securities.

(c) in bonds, redeemable capital, debt securities or instruments issued by the Pakistan Water and Power Development Authority and in listed securities subject to the conditions as may be prescribed by the Commission.

(3) Where a trust has been created by a company with respect to any provident fund referred to in sub-section (2), the company shall be bound to collect the contribution of the employees concerned and pay such contributions as well as its own contributions, if any, to the trustees within fifteen days from the date of collection, and thereupon, the obligations laid on the company by that sub-

section shall devolve on the trustees and shall be discharged by them instead of the company.”

9. The aforesaid provisions of the law are clear and unambiguous. The objective of these provisions is to secure the amounts collected from the employees of the company as contributions to a Provident Fund for the benefits of the employees of the Company. The law requires that all moneys contributed by the employees as well as the company's contributions, if any, including the profit thereon must be deposited within fifteen days of the contributions to the trustees of the fund and shall be invested by the trustees of the Fund in securities referred to in Section 227(2)(a) to (c) of the Ordinance. The amounts collected from the employees as contributions to a Provident Fund are in the nature of trust moneys in the hand of the company and the same must be paid to the trustees within stipulated time.

10. Having heard the submissions and keeping in view the provisions of law, the arguments advanced by Mr. Parvez Sufi on behalf of directors of the Company that the moneys were not paid to the Fund due to liquidity constraints is not tenable because of the reason that the law makes it obligatory for the Company to pay the employees contributions as well its own contributions within fifteen days from the date of collection thereof. The Company has attempted to justify the above default by claiming that the interest charged on its contribution at 1% per annum above the return on existing investments made by the Fund. I would like to point out in this regard that the underlying purpose of Section 227(2) and (3) of the Ordinance is to protect the funds of the employees by obligating the Company/trustees to deposit contributions in the safe/secured modes of investment/deposits permitted in Section 227(2) of the Ordinance. It appears that payment towards the Fund is not prioritized by the Company and it does not take compliance of the law seriously. The directors, therefore, have violated the provisions of Section 227 of the Ordinance.

11. For the forgoing, I am of the view that the directors have breached the mandatory requirements of Section 227 of the Ordinance as they have failed to ensure timely payments to the Provident Fund. Breach of mandatory provisions of the Ordinance meant to secure the funds of the employees cannot be encouraged. An action, therefore, is necessary under Section 229 of the Ordinance which provides that whosoever contravenes or authorises or permits the contravention of any of the provisions of Section 227 shall be punished with a fine which may extend to five thousand rupees and shall also be liable to pay the loss suffered by the employees on account of such contravention. Considering that the default is agreed by the Company and has also assured that the balance amount shall be paid by June 30, 2007, I hereby, taking a lenient view of the default, instead of imposing fine on the Chief Executive and Directors of the Company, only impose fine of Rs.5,000 on the Chief Executive of the Company namely Mr Parvez Sufi and reprimand all the Directors of the Company to remain careful in future in compliance with the mandatory statutory provisions.

12. The Chief Executive of the Company is hereby directed to deposit the aforesaid fine of Rs.5,000/- within thirty days of the receipt of this Order in the Commission's designated bank account with Habib Bank Limited or pay by a DD/Pay order issued in the name of Commission and send a copy of the receipt vouchers 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 their movable and immovable property. It should also be noted that the said penalty is imposed on the Chief Executive in his personal capacity; therefore, he is required to pay the said amount from his personal resources.

Direction under Section 473 of the Ordinance

13. Before parting with this Order, it is necessary for me to issue directions regarding the aforesaid outstanding payable to Provident Fund Trust. I deem it appropriate in the said circumstances, to invoke powers contained in Section 473 of the Ordinance and direct the Company to:

- (i) Settle the entire outstanding amount including the interest charges accrued on the Provident Fund Liability by June 30, 2007.

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- (ii) Furnished the Auditors Certificate on the settlement of the entire liability of the Provident Fund Trust to this Commission within fifteen days of the period ending on June 30, 2007.

Ali Azeem Ikram
Director (Enforcement)

Announced
September 29, 2006
Islamabad