



***Before Tahir Mahmood, Executive Director (Enforcement)***

***In the matter of***

**Gharibwal Cement Limited**

<b>Number and date of show cause notice:</b>	EMD/233/378/2002-2122-2128 dated June 9, 2009
<b>Date of hearing:</b>	August 27, 2009
<b>Present:</b>	Mr. Iqbal Ahmed Rizvi

***ORDER UNDER***

**Section 196 and section 208 read with section 473 and section 476 of the Companies Ordinance, 1984**

The Order will dispose off the proceedings initiated against the directors of Garhibwal Cement Limited (the “Company”) for violating the mandatory provisions of Section 196 and Section 208 of the Companies Ordinance, 1984 (the “Ordinance”) by making investments in the associated company namely Balochistan Glass Limited (“BGL”) with out the mandatory authority of the shareholders of the Company and even of the board of directors of the Company in terms of Section 208 and Section 196 of the Ordinance respectively. BGL was an associated company in terms of Section 2 of the Ordinance, due to the common directorship of Mr. Mohammad Tousif Peracha, Chief Executive Officer of the Company and the BGL.

2. The facts leading to this case are that examination of annual audited accounts (the “accounts”) of the Company for the years ended June 30, 2008 revealed transactions with the associated BGL. The Commission vide letter dated September 19, 2008 sought clarification from the Company regarding transactions with the associated BGL and required to furnish complete detail of such transaction. On examination of the statement of account maintained in the books of the Company reflecting transactions with the associated BGL, it revealed that the Company had made an advance of the amount of Rs. 10 million which was transferred on October 12, 2007, through a loan account of Bank of Punjab, increasing the total receivable balance from the associated BGL to Rupees 25 million (including Rs. 15 million for purchase of glassware for advertisement purpose) on the date of transfer of said loan amount. Further, note 40 to the accounts also reflected ‘other income’ amounting to Rs. 3,342,567 on the advance granted to associated BGL, for which the Company provided the quarter wise mark-up income recovered from associated BGL starting from July 2007 till June 30, 2008. However, the Company, as required, did not submit the copy of the minutes of the board meeting approving such advance by passing a resolution to the associated BGL in terms of section 196 and evidence of compliance of section 208 of the Ordinance.

3. In view of the above, that the Company obtained a bank loan for its own purpose, and transferred it to the associated company in violations of Section 196 and Section 208 of the Ordinance, a show cause notice dated June 9, 2009 was issued to the following directors of the Company:

1. Mr. Mohammad Tousif Peracha, Chairman & CEO;



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2. Mr. A. Rafique Khan, Director;
3. Mr. Tabassum Tousif Peracha, Director;
4. Ms. Asma Khan, Director;
5. Mr. Asif M. Ali, Director;
6. Mr. M. Saleem Peracha, Director (Removed from the board of directors with effect from December 3, 2007) and
7. Mr. Ali Rashid Khan, Director.

4. The Company Secretary of the Company made a reply to the show cause notice, vide his letter dated June 22, 2009 and stated that Mr. Muhammad Tousif Peracha, the chairman and CEO of the Company and the major shareholder, had been providing the funds to the Company as and when required in order to meet the short term liquidity needs of the Company toward new dry process cement plant and Rs. 880.938 million was payable to him as of October 12, 2007 which was subsequently increased to Rs. 1,419.363 million as at the end of the year. Similarly, Mr. Muhammad Tousif Peracha was the CEO of BGL had been providing funds in order to meet the short term liquidity needs of BGL. Rs. 281.564 million was payable to him by BGL which was subsequently increased to Rs. 329.373 million as at the end of the year. It was further stated that on October 12, 2007 there were immediate funds requirements to BGL to meet its working capital requirements. The CFO of the Company was suggested by the CEO to take his funds from his loan account in the Company and transfer the same to his loan accounts of BGL. This transaction was incorrectly recorded as transaction between the associated companies.

5. As the reply was not satisfactory therefore it was decided to fix a hearing in the matter. Mr. Iqbal Ahmad Rizvi, appeared before me, on August 27, 2009 as an authorized representative. During the hearing, Mr. Rizvi, emphasized that this was the mistake of Company's CFO who could not follow the instructions of CEO and instead of transferring amount from CEO's personal account, routed the transaction from Company's account. He however, admitted that the financial statements reflect this transfer of funds as transaction between the associated companies. He failed to submit any document reflecting the instructions of CEO to CFO for transfer of amount from his account to BGL. He after discussion requested for a lenient view keeping in view the fact that the Company has recovered the amount along with mark-up from BGL. He informed that the CEO of the Company has removed the CFO of the Company due to his poor insight into the matter.

6. Before proceeding further, it is necessary to advert to the provision of the Ordinance, which has been violated by the directors of the Company. Sub-section (2) of Section 196 of the Ordinance requires:

***“196-Powers of director:***

*(2)The directors of a company shall exercise the powers on behalf of the company, and shall do so by means of a resolution passed at their meeting namely to make loans and to invest the funds of the company”*

*And Sub-section (4) of Section 196 states the penal provision as:*

*(4)Whosoever contravenes any provision of this section shall be punishable with a fine which may extend to (one hundred) thousand rupees and shall be individually and severally liable for losses or damages arising out of such action”.*

As per the accepted principles of the corporate governance, the board of directors of a company plays a pivotal role in supervising the affairs of the company, and as per the requirement of the Ordinance, the compliance of the mandatory provisions of the Ordinance can not be denied by the board of directors. In the



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instant case, the board did not make any deliberation to make an advance of Rs. 10 million which was primarily obtained for the own purpose of the Company from Bank of Punjab, and passed any resolution for the purpose, defeating the requirement of Section 196 of the Ordinance, and the supervisory role of the board comprising majority of non-executive directors. Further, the advance was made when the operations of the Company were closed.

7. The other important provision of the Ordinance that was denied, was making of advance to the associated company without seeking the mandatory authority of the members through a special resolution in terms of Sub-section (1) of Section 208 of the Ordinance, which requires:

***“208-Investments in associated companies and undertakings:***

*(1) A company shall not make any investment in any of its associated companies or associated undertakings except under the authority of a special resolution which shall indicate the nature, period and amount of investment and terms and conditions attached thereto:*

*Provided that the return on investment in the form of loan shall not be less than the borrowing cost of investing company.*

*Explanation:- The expression ‘investment’ shall include loans, advances, equity, by whatever name called, or any amount which is not in the nature of normal trade credit.*

*(3) If default is made in complying with the requirements of this section, every director of a company who is knowingly and willfully in default shall be liable to fine which may extend to one million rupees and in addition, the directors 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.*

Regarding the said advance, I am of the considered view that the directors of the Company violated the mandatory provisions of Section 208 of the Ordinance on the following grounds:

- (i) The advance of Rs. 10 million made to the associated BGL was not a normal trade credit;
- (ii) The advance was made by the Company and the funds were arranged from a loan account maintained with the Bank of Punjab, which was obtained to meet the cost over runs of the Company’s expansionary project as disclosed in note 8.6 to the accounts, hence, as admitted, the advance was made in order to meet the liquidity needs of the associated BGL, therefore, falls in the ambit of Section 208 of the Ordinance;
- (iii) The amount advanced was unsecured and even terms of the advance were not brought into the knowledge of the members as against the spirit of Section 208 of the Ordinance;
- (iv) The advance amount was recovered from the associated BGL on June 30, 2008 after more than 8 months, and even during these 8 months this transaction was not questioned by the board of directors while approving accounts;
- (v) The claim that the transaction was incorrectly recorded in the books of the Company does not consider merit as making of advance constitutes a proper authority to disburse the funds either through a cheque or thorough online transaction, hence, it can be interpreted that the fund was advanced intentionally from the available funds of the Bank of Punjab loan account, which appears to be against the spirit of section 208 of the Ordinance.



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- (vi) Note 8.11 to the accounts that loans obtained from the directors are either subordinated to the finances availed from a banking company, or the directors could not demand payment before June 30, 2009, therefore, the Company did not have any surplus avenue to make an advance to the associated company otherwise through its own sources, the making of such advance therefore requires prior mandatory authority of the members of the Company, which had been grossly violated in terms of Section 208 of the Ordinance.

8. To sum up, there is no disagreement on the charges levied in the show cause notice dated June 9, 2009. However, keeping in view the fact that funds of the Company had been recovered along with return, I impose total fine of Rs. 510,000/ (Five hundred and ten thousands only) on the directors in the following scale:

S#	Names of the directors	Violation of Section 196	Violation of Section 208
01.	Mr. Mohammad Tousif Peracha, Chairman & CEO;	50,000/	300,000/
02.	Mr. A. Rafique Khan, Director;	10,000/	100,000/
03.	Mr. Tabassum Tousif Peracha, Director;	10,000/	-
04.	Ms. Asma Khan, Director;	10,000/	-
05.	Mr. Asif M. Ali, Director	10,000/	-
06.	Mr. M. Saleem Peracha, Director	10,000/	-
07.	Mr. Ali Rashid Khan, Director.	10,000/	-
<b>Total</b>		<b>110,000/</b>	<b>400,000/</b>
		<b>510,000/-</b>	

9. The chief executive of the Company needs to make sure that the penalties levied had been deposited by the directors from their personal sources in the designated bank account of the Commission with MCB Bank Limited. In the end, I warn all the directors to be careful in future.

**Tahir Mahmood**

Executive Director (Enforcement)

Announced on:

September 3, 2009