

BY SPECIAL MESSENGER
THROUGH REGISTERED POST/ AD

IN THE COMPETITION APPELLATE TRIBUNAL
2nd Floor, Federal Courts Complex, G-11/1, Islamabad.
Email Address: registrartribunal@gmail.com
Tel No: 051-9320208 Fax No: 051-9320209

No. 618
Dated: 23-12-2016

From:-

The Registrar
Competition Appellate Tribunal,
Islamabad.

To:-

1. Hascol Petroleum Limited,
The Forum Suite No.105, 106,
First Floor Khayaban-e-Jami, Clifton,
Karachi.
2. Competition Commission of Pakistan,
Government of Pakistan, 7th Floor,
ISE Towers, 55-B Jinnah Avenue,
Islamabad
3. Pakistan State Oil Company Limited,
PSO House, Khayaban-e-Iqbal, Clifton,
Karachi.
4. Pakistan Refinery Limited, P.O.Box 75190,
Karachi.
5. Shell Petroleum Company Limited
through its Affiliate Shell Pakistan Limited,
Shell House, 6 Ch.Khaliquzzaman Road,
Karachi.

Subject:

APPEAL NO. 07/2016 JUDGMENT

Hascol Petroleum Limited VS. Competition Commission of Pakistan
and etc.

Take notice that under rule 51 of The Competition Appellate Tribunal Rules, 2015, attested copy of the Judgment dated 21-12-2016 is attached herewith for information and record.

2. Given under my hand and stamp of the Tribunal, this 23rd day of
December, 2016.



Khair
REGISTRAR

REGISTRAR
Competition Appellate Tribunal
Government of Pakistan
Islamabad

A.No. 07/2016

BEFORE THE COMPETITION APPELLATE TRIBUNAL

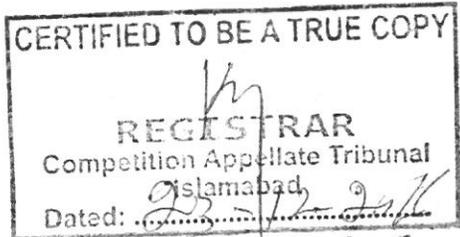
ISLAMABAD

Hascol Petroleum Limited
The Forum Suite No. 105
106, 1st Floor
Khayaban-e-Jami, Clifton
Karachi

Appellant

Versus

1. Competition Commission of Pakistan
Islamabad Stock Exchange Tower
7, 8 & 9 Floor, 55-B, Jinnah Avenue
Islamabad
2. Pakistan State Oil Company Limited
PSO House
Khayaban-e-Iqbal, Clifton
Karachi
3. Pakistan Refinery Limited
P.O.Box 75190
Karachi
4. Shell Petroleum Company Limited
Through its Affiliate
Shell Pakistan Limited
Shell House
6 Ch. Khaliqzaman Road
Karachi



Respondents

Appeal under S. 42 of the Competition Act, 2010 (XIX of 2010) (the
"Competition Act") against the Order issued under the Competition
Act read with the Competition (Merger Control) Regulations 2007

Respectfully submitted:

[Handwritten signature]

**BEFORE THE
COMPETITION APPELLATE TRIBUNAL, ISLAMABAD**

HASCOL PETROLEUM LIMITED

... APPELLANT

VERSUS

- 1) COMPETITION COMMISSION OF PAKISTAN
- 2) PAKISTAN STATE OIL COMPANY LIMITED
- 3) PAKISTAN REFINERY LIMITED
- 4) SHELL PETROLEUM COMPANY LIMITED

...RESPONDENTS

Appeal No.07/2016

Present: Justice (R) MianFasihUIMulk, Chairperson.
Ahmed OwaisPirzada, Member Technical.
Justice (R) MiftahUd Din, Member Technical.

For the Appellant: Ms. RahatKaunain Hussain, Advocate

For the Respondent No-1: Mr. Noaman Amin Farooqi, Advocate

For the Respondent No-2: Mr. Ijaz Ahmed, Advocate

For the Respondent No-3: Mr. Maudood Ahmad Khan, Advocate

For the Respondent No-4: Mr. Abdul Rehman Khan, Advocate

Date of hearing: 11.05.2016, 19.10.2016, 23.11.2016 &
30.11.2016

JUDGMENT

Ahmed OwaisPirzada, Member Technical.

This Judgment shall dispose off the appeal, filed by Hascol Petroleum Limited ("appellant") against the order dated 01.03.2016 of the Competition Commission of Pakistan ("respondent No-1"). The order disposed off the complaint of the appellant with the direction that the

16

CERTIFIED TO BE A TRUE COPY
REGISTRAR
Competition Appellate Tribunal
Islamabad
Dated: 23/11/2016

merging parties shall not engage themselves in any anti-competition behavior to harm the business interest of the other undertakings concerned.

BACKGROUND:

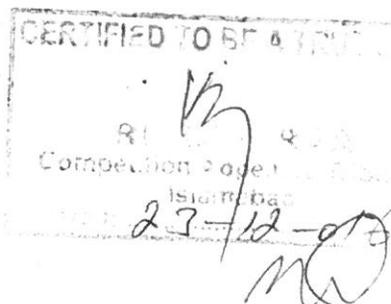
2. Pakistan State Oil Company Limited submitted a pre-merger application dated 13th June, 2015, notifying and seeking approval of the Competition Commission of Pakistan for the acquisition of 63 Millions (out of 84 Millions), right shares of Pakistan Refinery Limited, renounced by Shell Petroleum Company Ltd. On 11th June, 2015, Hascol Petroleum Limited filed a complaint against the intended acquisition of shares of PRL by PSO. On 23rd November 2015, PSO communicated its intention to acquire an additional 21 Million, right shares of PRL and sought a conditional approval of the sale as the matter was subjudice before the Hon'ble High Court of Sindh at Karachi. The Commission, however, advised PSO to submit a revised application, representing the entirety of right shares, it intended to acquire. On 23rd December 2015, PSO submitted a revised premerger application, notifying and seeking approval of the Commission for acquisition of total of 84 Million right share of PRL, renounce by Shell. After hearing all the parties and examining the record, the Commission has granted unconditional approval of the acquisition by PSO up to 63 Million, right shares in PRL and conditional approval of up to 21 Million right shares in PRL, subject to the final decision of the Hon'ble High Court of Sindh. The PRL has been directed not to engage itself in any form of exclusionary conduct and to continue to offer the residual Refined Petroleum Products, supplied to Oil Marketing Companies (OMCs), including Hascol on commercially viable and competitive terms, after the demand requirements of its Class "B" share holders have been met. The complaint of the Hascol was accordingly disposed off.

CERTIFIED TO BE A TRUE COPY
REG. NO. 12345
Competition Appellate Tribunal
Islamabad
Dated: 27-12-2016

THE APPEAL:

3. Being aggrieved, the appellant has filed an appeal on the following grounds:-

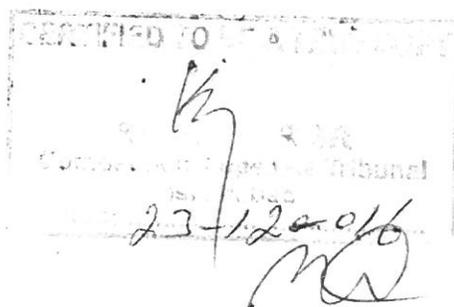
- (i) The subject acquisition of shares would result in substantial lessening of Competition in the relevant market in contravention of section 11 (1) of the Competition Act.
- (ii) The Commission has failed to acknowledge that approving the subject vertical acquisition/integration can impair competition to a great extent when coupled with respondent No-2 / PSOs, already existing horizontal powers in the OMC market, where it occupies 59.9 % share, which is likely to lead to anticompetitive foreclosure.
- (iii) The PSO upon acquisition would not only have the ability to foreclose input but that foreclosure would likely not to allow competitors to achieve a reasonable operational scale.
- (iv) The Commission while deliberating that the acquisition would not lead to anticompetitive foreclosure has ignored the Appellant's submission before the Commission, that respondent No-3 has infact acted in a discriminatory manner towards the appellant on several instances, details of which have been provided.
- (v) The pricing of the industry is dependent upon that of imports, and PSO bringing in the highest volume of imports, the price of which is not regulated, has a role in impacting the prices.
- (vi) The Commission erroneously observed that the appellant is either not ready to invest in PRL or do not have capacity to do so, whereas the appellant has expressly intimated its intention to invest in PRL, during the proceedings.
- (vii) The minutes of the 566th meeting of the Board of Directors of PRL held on 26th January, 2016 confirm the minutes of



565th meeting of Board, held on 21st October, 2015, wherein it has been mentioned that "it is just the three OMCs to which the off-take rights are restricted", such a confirmation proves the ability of PSO to exert greater control over respondent No-4.

- (viii) Certain findings of the Commission as given in the impugned order are based on misreading or non-reading of record and are a result of any misinformation provided on behalf of the respondent, which the appellant was not confronted with.
- (ix) The Proviso to paragraph 79 of the impugned order which states that respondent No-3 will supply Petroleum products to the appellant and other OMCs, after the demand requirement of its Class "B" share holder has been met, needs reconsideration as the same would result in leaving no surplus to be supplied to the remaining OMCs.
- (x) The Commission has itself in its impugned order stated that as per the information provided by the parties, the Security and Exchange Commission of Pakistan has disallowed this amendment as not being inconsonance with law.

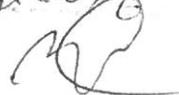
4. The learned counsel for the appellant while arguing the matter during the proceedings has stated that the subject matter required a detailed scrutiny/inquiry, which has not been done in the matter by the Commission. It has further stated that there is an amendment on record, whereby article 6 of the Articles of Association of PRL has been amended to provide: that the holder of the Class "A" shall not, directly or indirectly, subscribe to, purchase or hold Class "B" shares and vice versa. Such amendment is discriminatory and in violation of Companies Ordinance, 1984 as acknowledged by Security and Exchange Commission of Pakistan vide its letter dated 10th June, 2015. The learned counsel has stated that as a result of acquisition of shares, respondent No-2 / PSO (i.e OMC) would have much greater share



holding in respondent No-3 / PRL (i.e Refinery), which is a supplier for respondent No-2 / PSO, which amounts to backward vertical integration with detrimental effects on the market in the form of substantial lessening of Competition in contravention of Section 11 (1) of the Competition Act. It has been argued that the impugned order has failed to even assess and determine the dominant position of respondent No-2 / PSO and have also selectively ignored the Oil Companies Advisory Council Data submitted by the appellant. It has been observed that respondent No-2 / PSO's 55.9 % share is evidence of its horizontal power in the market of OMCs thus allowing the vertical integration to impair competition to a great extent. Learned counsel has further argued that the Ex-Refinery price to be paid is always dependent on PSO's import. Furthermore, since the Ex-refinery price also goes into calculating the final retail price, this thereby allows PSO to eventually affect the retail price to be paid by consumers. It has been stated that from the figures provided by respondent No-1 it is inferred that the production capacity of respondent No-3 / PRL is higher than its actual supply. From this it can be inferred, that PRL being the only independent refinery and being situated in Sindh has strategic relevance for the relevant market and the players operating therein. Learned counsel has argued that due to PSO size, it is able to attain economies of scale, which cannot be overlooked. Finally, the learned counsel by referring the grounds of the appeal as well as her arguments has prayed that the matter may be remanded to the Commission to decide the case in light of the submissions made and taking into account contentions raised by the appellant.

5. Contrary to it, the learned counsel for respondent No-1 while appearing before this Tribunal has stated that the intended acquisition by the PSO does not involve significant horizontal overlaps. He has further stated that given the fragmented and considerable supply side, substitutability of refined Petroleum Products, PRL ability to indulge in Anti-competitive foreclosure of its outputs to OMCs is limited, rather unlikely to arise. The Hascol has failed to provide any cogent evidence

CERTIFIED TO
13
23-12-016



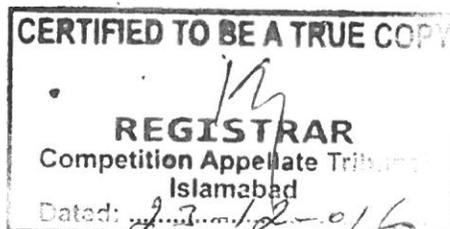
from the past conduct of PRL to draw any inference regarding anti-competitive foreclosure. Learned counsel further argued that the appellant could not meet the criteria, provided under the law, which could have enable the Commission to initiate inquiry with reference to the complaint, filed by the appellant.

6. Learned counsel for the respondent No-2/ PSO has stated that the transaction which is the subject matter of this appeal would not adversely affect the competition in the market or lead to anti-competitive foreclosure. It has been stated that since the appellant has filed a Civil suit on the same subject matter, which is pending adjudication before the Hon'ble High Court of Sindh at Karachi, therefore, the appellant is not entitled to any relief and the appeal is liable to be dismissed. The learned counsel has observed that the appellant has failed to provide any cogent reason to strengthen its case, that the acquisition of shares by the PSO would result in substantial lessening of competition. Further, the appellant has miserably failed to substantiate its allegation before the Commission nor it has been able to produce evidence of any abuse of the market position by the respondent No-2 / PSO. The Learned counsel has argued that since the provisions of 1970's agreement are not the result of merger, therefore, the appellant statement that these are events of discriminatory behavior is untenable. It has been explained that the rates of Petroleum Products are fixed by OGRA, and the PSO only provides the information that the regulators require from time to time and if the appellant has any grievance in this regard, the same could be raised with OGRA. It has been stated that the appellant was unable to establish even a single incidence whereby the respondent No-2 / PSO has attempted to foreclose despite existence of possibility as is submitted by the appellant. Learned counsel further stated that the respondent No-3 being an independent entity is free to negotiate its contracts with its customers and the respondent No-2 / PSO has no role to play in such matters. It has further been argued that it is apparent from the information, submitted by the appellant itself that it has been doing

23-12-2016
MQ

business, in selective locations, as compared to other OMCs, whereas the PSO supplies Petroleum Products in every nook and corner of the country. Learned counsel has stated that the off-take rights have been conferred upon the parties to the participation agreement as per their market shares and the parties to the participation agreement are the main sponsors of respondent No-3. Further, PSO has never operated in an exclusionary manner as alleged by the appellant and the appellant has miserably failed to provide any proof of such allegations.

7. Learned counsel for respondent No-3 / Pakistan Refinery Limited has stated that Pakistan Refinery Limited is a public limited company, established pursuant to refinery agreement dated 28th November 1959, which presently subsist between the President of Pakistan and Shell Petroleum Company Ltd (SPCO), Pakistan State Oil (PSO), Chevron Global Energy Inc (Chevron). Pursuant to the terms of refinery agreement, 40% of issue share capital of PRL is reserved for the general public in Pakistan, and the remaining 60% is reserved for private entities who were party to the refinery and their successors. The share capital of PRL is divided into two classes namely Class-"A" and Class "B" shares. Class "A" shares which constitute 40% of the total issue and paid up share capital of PRL are listed on Pakistan Stock Exchange while the class "B" shares, which constitutes 60% of the total issued and paid up share capital of PRL are not listed. As regard the Class "B" shares SPCO, PSO and Chevron hold 30 %, 22.5 % and 7.5 % respectively. The downstream Petroleum Industry in Pakistan comprises of 05 refineries and 11 OMCs. The sources of supply for OMCs for products in Pakistan are both refineries and imports, as such PRL share of supply is less than 10% for each of the products, including local production and imports: and less than 20 % of local Refinery Production. The aforementioned analysis of downstream Petroleum industry in Pakistan clearly illustrate that it is incorrect to imply that OMCs lead access to PRL production in order to successfully compete downstream. The learned counsel has stated that keeping in view the aforesaid position, the procurement of shares by the PSO would not adversely affect competition in the market.



8. Learned counsel for respondent No-4 / Shell Petroleum Company Limited, has submitted a reply statement with reference to the issues raised in the appeal. The learned counsel has stated that the proposed acquisition would neither result in a substantial lessening of competition nor lead to input foreclosure as contended by appellant / Hascol. He has further stated that no compelling evidence has been submitted by Hascol to suggest that the merging entities in particular PSO would be in a position to foreclosure its retail or non retail sale of refined Petroleum Products to its customers. It has been stated that the PRL's shares in the local refined Petroleum Product market is around 10 % of and that the local refineries including PRL collectively supply less than 50 % of the total demand of refined Petroleum Products in Pakistan, whereas the remainder is fulfilled through importation by OMCs themselves. As imports are viable substitute, PSO would have no incentive to foreclosure the supply of refined Petroleum Products from PRL to its competitors such as Hascol. The concerns of Hascol are, therefore, not acquisition specific but related to market concerns at large.

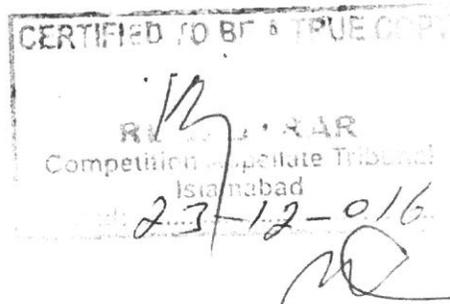
ANALYSIS

9. Taking up the issues one by one, raised by the appellant after taking into consideration the position explained in this regard by the respondents, it is observed that the total PRL shares in the Local Refine Market is around 10%, while the remaining demand is met through the supply from the other local players in the Refinery business as well as through importation by the OMCs. The position taken in this behalf by the appellant with regard to its various concerns is, therefore, not understandable. Again it is difficult to understand that PSO has the ability to act independently of its competitors, suppliers and customers. In these circumstances the fear of the appellant that the acquisition of share, involved in the matter would lead to lessening of competition and anti-competitive foreclosure is unjustified. So far as the quantity of petroleum products being imported by PSO, there is no bar on OMCs to go in a same way and the petroleum products right now are already being imported by the other OMCs as well. Being a big player in the



market, the PSO could have certain advantages because of its size and the size of its demand, which is a natural phenomena. However, such a status of PSO which it has been enjoying since long does not have that kind of impact in the market, which could be considered as alarming by the other players in the same area especially in presence of the institutions like CCP etc., which are eyeing on the situation to take action if situation so demands.

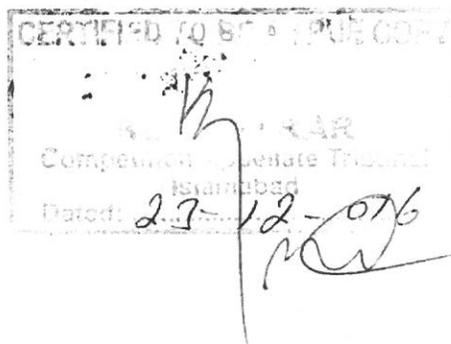
10. The claim of the appellant that while carrying out an assessment of the anticompetitive foreclosure, the Commission has not appreciated taking into account certain material factors, does not appeal much. The Commission in its detailed order has analyzed the trend in the sale and purchase of Hascol and PRL, which reveals no discriminatory treatment directed towards Hascol. The Commission has further examined the percentage of product imported by Hascol and observed that Hascol would not be affected in the post-acquisition scenario as it does not solely depend upon PRL and its petroleum products supplies. Since Hascol regularly imports and purchases from refineries other than PRL and prices are regulated by OGRA, therefore, the possibility to influence prices in the downstream market does not arise. Even otherwise keeping in view the financial crises being faced by PRL, the PRL cannot afford to engage itself in anticompetitive foreclosure. The appellant could not produce any evidence in support of its allegation of receiving discriminatory treatment from PRL. Thus it seems that so far the PRL has not acted in a discriminatory manner towards Hascol. Even the share holder agreement provides for a first right of refusal to Class "B" shareholders in the case where Class "B" shareholders wish to sell their PRL shares, however, if shares offered by Class "B" shareholders are not taken by other Class "B" shareholders, then such shares could be offered to third party purchaser. In such kind of situation, there is no restriction against Class "B" shareholders selling their shares to third party as well. So far as products supplies, the acquisition will not have



an impact on competition as the increase in number of shares bears no connection to off-take rights which are dependent upon PSO's market share downstream as per the terms of products supply agreement.

11. While signing agreement, the government of Pakistan at the time of setting of PRL, impose restriction on PRL that 40% of the total issued share capital of PRL should be held by general public in Pakistan. Similarly to ensure comfort level of the investors, it has been agreed that first right of refusal shall be for Class "B" shareholders in the case where Class "B" shareholders wish to sell their PRL shares. The agreement, therefore, has been signed to ensure win-win position for both the parties. 50% of the demand of Petroleum products is being met through imports and the marketing advantage enjoyed by PSO over the OMCs does not have any relevance to the acquisition. The PRL's total market share for various products is merely 4.2% of the total MOGAS market, 8.54% of the total HSD market, 5.56% of the total Fuel Oil Market and approximately 13.33 % of the totals Jet A-1 market. Such a position of PRL in the market cannot create much impact on competition. The PRL does not have a market share enough to be considered as a primary source of supply for the OMCs. The quantum of Class "B" shares held by PSO in PRL does not seem having nexus to PSO's market shares or to its off-take rights under its product agreement with PRL.

12. The appellant's observation that the findings of the Commission are based on misreading or non reading of record or result of any misinformation, provided by the respondents is based on some misunderstanding. The Commission seems thorough in its investigation of facts and analysis thereon. The entire process, spanning around 08 months, has provided an opportunity to the Commission to form a complete understanding of the matter at hand to finally reach to a conclusion. The representatives of various OMCs and other stake holders have also been there before the Commission during the two hearings during which the matter has been discussed quite at length, which has



enabled the Commission to have all kind of details pertaining to the matter. In such kind of proceedings, the stake holders position has been considered before making the decision. As regard the pendency of the matter in the Hon'ble High Court of Sindh at Karachi the Commission has granted conditional approval for the acquisition of the shares involved in this behalf, subject to the decision of the Hon'ble Court. The proviso referred by the Appellant, which reveals that PRL will supply Petroleum Products to the Appellant and other OMCs after the demand requirements of Class "B" shareholders has been met is somehow disturbing for the Appellant. However, this provision has been staying in the agreement since long without effecting adversely the Appellant's position.

13. The issue which is to be looked into is post-acquisition scenario and as examined above, such a scenario has no significant impact which could be taken as damaging for the Appellant. However, in the case of any such kind of situation, which could be taken as harmful for the Appellant, the appellant can agitate it before the competent forum at that stage. The Appellant has taken the plea in its rebuttal filed in this regard, that the Commission has not conducted a detailed inquiry, which has been required to be carried out under section 37 of the Competition Act. The Appellant has pleaded that once such inquiry has been completed, the Commission can initiate its proceedings under section 30 of the same Act. However, if the findings of the inquiry do not require such proceedings, the same shall be disposed off. The Appellant has referred fourteen orders regarding the abuse of dominant position by one or more undertakings, wherein the Commission has passed each order after first conducting a fact finding inquiry process.

14. To further look into the matter Section 37 (2) of the Competition Act, 2010 is reproduced as under:-

"Section 37 (2) where the Commission receives from an undertaking or registered association of consumers, a complaint in writing of such facts as appear to constitute a contravention of the provisions of chapter-II, it shall, unless it is of opinion that the application is frivolous or



vexatious or based on insufficient facts, or is not substantiated by prima-facie evidence, conduct an inquiry into the matter to which the complaint relates”.

Plain reading of the aforesaid provision of the Act reveals that it is obligatory on the part of complainant to provide sufficient facts and evidence in support of the complaint. The Appellant, however, neither before the Commission nor before this Tribunal could provide any evidence, which could be considered as a proof of the allegations, leveled in the appeal against the proposed acquisition. As stated above the smaller share of PRL in the market and the proposed acquisition have not that kind of impact which could in any case be considered as a threat to the interest of the appellant.

CONCLUSION

15. After going through the memo of appeal, comments filed by the respondents, hearing the learned counsel for the parties and perusal of the original record of the case, it is observed that the issues raised by the appellant in its appeal before this Tribunal do not warrant any interference in the detailed order dated 01.03.2016, passed by the Competition Commission of Pakistan. The apprehensions expressed by the learned counsel for appellant appears to be recurring in nature, therefore, in future if there is any such evidence of negative impact on the business of appellant, the appellant would be at liberty to approach the competent forum.

ORDER:

16. The Appeal of the Appellant being devoid of merits is dismissed, leaving the parties to bear their own costs.

Announced in open court
21.12.2016


Justice (R) Miftah-Ud-Din
Member Technical


Justice (R)
MianFasihUIMulk,
Chairperson


Ahmed Owais Pirzada
Member Technical

CERTIFICATE:

This judgment consists of (12) pages, each dictated, read over, corrected and signed by me.


Ahmed Owais Pirzada
Member Technical

CERTIFIED TO BE A TRUE COPY

REGISTRAR
Competition Appellate Tribunal
Islamabad
Dated: 23-12-2016

| | |
|-----------------------------|---------------|
| Application No. | 95 |
| Dated | 23-12-2016 |
| Applicant | CCP |
| No. of Pages | 13 |
| Copy Fee | / |
| Search Fee | / |
| Urgent Fee | / |
| Total Fee | FOC |
| Date of Preparation of Copy | 23-12-16 |
| Date of Delivery | 23-12-16 |
| Prepared By | M. Noman 8/16 |