

CCI'S POWER TO IMPOSE PENALTY:

IMPACT ANALYSIS OF ALUMINIUM PHOSPHIDE TABLETS CASE

Section 27(b) of the Competition Act, 2002 (Act) empowers the Competition Commission of India to pass an order directing those enterprises which engage in anti-competitive conduct to discontinue such practice and restrain from such behavior in future. Furthermore, S. 27 also empowers the Commission to impose:

- a) Penalty upto 10% of the average of the turnover (emphasis added) for last three preceding final years, upon such enterprise who violates the provisions of the act.
- b) Penalty upto three times of its profit upon each participant in cartel for each year of continuance of cartel, or 10% of the turnover (emphasis added) for each year of continuance of cartel, whichever is higher.

With regards to the infringement for anti-competitive conduct (Section 3) and any abuse of the dominant position (Section 4), the CCI can impose the above mentioned penalties respectively.

The provisions mention the word “turnover”, which is not properly defined under the Act. S. 2(y), Competition Act, 2002 and refers it as inclusive of the value of sales of goods or services. This has given rise to ambiguity with regards to the imposition of fine over the vitiating enterprises. Delving deep into the jurisprudence of the word there have been instances where the Competition Commission of India has imposed penalties on the overall turnover of the company.

To overcome such ambiguities, the concept of ‘relevant turnover’ was put forth for the first time in the case of *M/s United Phosphorus Limited & Ors. V, Competition Commission of India and Ors* (Aluminium Phosphide Tablets case). The Competition Commission of India (CCI hereinafter) levied an overall penalty of Rs. 3170 million. But this amount was subsequently reduced by the Competition Appellate Tribunal (COMPAT hereinafter). CCI calculated the penalty amount by considering the overall total turnover of the enterprise. COMPAT in its appeal deciphered that only relevant turnover shall be taken into consideration, because while calculating the penalty it shall also be kept in mind that the infringing enterprises are also multi-product

companies. Furthermore COMPAT also reprimanded the CCI and added that the doctrine of proportionality shall be considered while imposing penalties upon the violating companies. CCI challenged the COMPAT's reasoning on appeal before the Supreme Court of India.

The Supreme Court upheld the order of COMPAT and held that the penalties imposed shall only be upon the turnover relevant to the case in dispute and not the enterprises' overall turnover.

The decision given by the Apex Court will have its impact on the other cases where enterprises have put to scrutiny the penalty imposed upon them. In another case the CCI had imposed a heavy penalty upon the 11 major cement makers, which has now been appealed to COMPAT. Also in the case against leading automobile companies Toyota, Nissan and Ford CCI had imposed a penalty of two percent, for alleged anti-competitive behaviour in dealing with spare parts, upon the average of their three years turnover. COMPAT had to step in again and the penalty was subsequently reduced to two percent of the turnover arising from their dealings in spare parts only. Also from a matter dating back to 2012 penalty of about Rs. 630 crore was imposed upon DLF.

Since a long time CCI has been calculating penalties on the basis of overall turnover instead of 'relevant market turnover.' This practice of the Competition Commission of India had set every enterprise walking for the reduction of penalty amount. COMPAT has rightly held that the doctrine of proportionality should be taken into consideration instead of using the general interpretation of the word 'turnover' as mentioned under S. 27. There have been plethora of cases where the CCI has wrongly interpreted the term. However, the present decision by the Hon'ble Supreme Court has provided clarity on the interpretation and settled the matter once and for all.

Authored by: Pranjali Tiwari

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