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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 09.07.2021

Dated: 27.10.2021

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THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P.No.15527 of 2020

and

WMP.Nos.19385 of 2020 & 7418 of 2021

M/s.Theco India Pvt. Ltd.,
Represented by Authorised Signatory,
Shroff Orchards
Office No.D.old No.78, New No.44,
New Avadi Road, Kilpauk,
Chennai 600 010.

.... Petitioner

Vs.

1. The Secretary,
The National Anti-profiteering Authority,
6th Floor, Tower-I, Jeevan Bharti Building,
Connaught Place, New Delhi.
2. The Director General of Anti-profiteering,
Central Board of Indirect Taxes and Customs,
II Floor, Bhai Vir Singh Sahitya Sadan,
Bhai Vir Singh Marg, Gole Market,
New Delhi 110 001.

.... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of certiorari to call for the records in the impugned notice File No.22011/NAA/170/Theco/2020/3752 dated 10.07.2020 issued by the First Respondent, quash the same as the entire proceeding have been initiated without authority of law, as the Suo moto power to investigate with regard to other goods or services by the First Respondent in terms of Rule 133(5) (a) of CGST Rules, 2017 is available only with effect from 28.06.2019 and cannot be made applicable for the prior period; the report of the Second Respondent dated 01.07.2020 is barred by limitation in terms of Rule 129(1) of the Central Goods and Service Tax Rules 2017 and



being contrary to Section 171, Section 2(63) of the CGST Act; Rules made under Section 171 in relation to Anti-Profiteering.

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For Petitioner : Mr.V.S.Manoj
For Respondents : Mr.Zoheb Hussain
Assisted by
Mr.M.Santhanaraman,
Senior Standing Counsel

O R D E R

This writ petition raises a challenge to a notice issued by the National Anti-Profiteering Authority (Authority)/R1 dated 10.07.2020 in consequence of a Report of the Director General of Anti-Profiteering (DGAP)/R2 dated 01.07.2020. The petitioner, a trader in goods viz., dental equipments and accessories, challenges the aforesaid order on various ground, specifically, that the power of suo moto investigation in terms of Rule 133 of the Central Goods and Service Tax Rules, 2017 ('CGST Rules') was available to the Authority only with effect from 28.06.2019.

2. The sequence of events as relevant to decide this issue are set out below upon hearing Mr.Manoj, for the petitioner and Mr.Zoheb Hussain, representing Mr.M.Santhanaraman, for the respondents.

(i) The petitioner trades in dental equipment and accessories both locally purchased as well as imported.

(ii) A complaint was filed by a customer, one Crown Express Dental Labs, alleging that the petitioner had not passed on the benefit of Input Tax Credit (ITC) to it, in regard to purchases made by it from the petitioner. The complaint, dated 06.12.2018 was investigated by R2, who submitted a report on 30.08.2018 to R1/Authority. Based on the report, the Authority vide order dated 28.11.2018 directed the petitioner to remit an amount of Rs.4,78,085/- to the complainant, along with interest at 18%. This order has been complied with by the petitioner.

(iii) In order dated 28.11.2018, the Authority also opined that the petitioner might well have profited from transactions of supplies effected by it to other customers, and a direction was thus issued to the DGAP to conduct investigation afresh to unearth further instances of unjust enrichment, if any, that the respondent had engaged in.

(iv) The suo moto investigation ordered by the Authority resulted in a report from the DGAP dated 12.04.2019 expressing apprehension that the directions issued may not be feasible of compliance, either practically or statutorily. The DGAP was of



the view that the power of expanding the scope of enquiry was unavailable to the respondents. Moreover, the petitioner was engaged in the supply of goods and services of which the prices were not fixed but negotiated. The prices thus varied from one customer to another and one product to another, fluctuating from transaction to transaction. In such circumstances, it would, in their view, be difficult to work out the exact component of GST and consequently the enrichment, if at all. Several other apprehensions were also raised by the DGAP in its report dated 12.04.2019.

(v) Having received the above report, the Authority, after nearly four months, reiterated its direction by order dated 01.08.2019 to conduct an investigation in respect of probable unjust enrichment, referring to Rule 128 of the CGST Rules relating to the conduct of suo moto investigation. The period to be covered spanned 01.07.2017 to 30.08.2019. The apprehension expressed by the DGAP on the aspect of assumption of jurisdiction were sought to be allayed as follows:

"....

7.Regarding the claim of the DGAP that the trigger for initiating investigation starts after filing application under Rule 128 of the CGST Rules, 2017 after satisfaction of the Standing Committee, it is clarified that the power of expanding the scope of investigation was already available to the Authority as per Para 12 of the "Methodology and Procedure" notified by the Authority on 28.03.2018 under the powers given to it vide Rule 126 of the CGST Rules, 2017. The above power of expanding the scope of investigation has been duly incorporated in Rule 133 (5)(a) & (b) of the CGST Rules, 2017 which clearly states that:-

"Notwithstanding anything contained in sub-rule (4), where upon receipt of the report of the Director General of Anti-profiteering referred to in sub-rule (6) of rule 129, the Authority has reasons to believe that there has been contravention of the provisions of section 171 in respect of goods or services or both other than those covered in the said report, it may, for reasons to be recorded in writing, within the time limit specified in sub-rule (1), direct the Director General of Anti-profiteering to cause investigation or inquiry with regard to such other goods or services or both, in accordance with the provisions of the Act and these rules.

(b) The investigation or enquiry under clause (a) shall be deemed to be a new investigation or enquiry



8. It is clear from the order dated 28.11.2018 passed by the Authority that it had reasons to believe that there had apparently been contravention of the provisions of Section 171(1) of the CGST Act, 2017, in respect of the goods or services or both supplied by the Respondent other than those covered in the report dated 30.08.2018, and hence the DGAP was directed to investigate the same notwithstanding the absence of any recommendation of the Screening / Standing Committee.

....."

3. The petitioner has hence approached this Court challenging the aforesaid notice, mainly on the ground that Rules 133(4) and (5) (a) (b), by virtue of which the Authority is vested with the powers to refer the matter to the DGAP for further investigation or enquiry, has been inserted with effect from 28.06.2019, and would operate prospectively only. The complaint in this case was filed on 06.02.2018, prior to 28.06.2019 and the impugned notice is thus bereft of jurisdiction and bad in law.

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be available only with effect from 28.06.2019 and not in respect of any complaint filed prior thereto.

5. Rule 126 of the CGST Rules provides for the power to determine the methodology as well as the procedure for the determination of whether the registered person has passed on the benefit of reduction in rate of taxes or ITC to the recipient by way of commensurate reduction in prices. As Rules 133 (4) and (5) (a) & (b) provide for the power of suo moto review, and enable an event that is not covered in the existing provisions, such power cannot be read into provisions that existed prior thereto.

6. The petitioner has filed a compilation of case law comprising sixteen cases, of which, twelve touch upon the aspect of alternate remedy and maintainability of the writ petition. According to the petitioner, the jurisdiction assumed by the respondents is bad in law and this amounts to a fundamental flaw in the order impugned. The cases are (i) Mahindra & Mahindra Vs. Joint Commissioner - CT (Appeals) (Order No.493 of 2021 dated 18.02.2021), (ii) Rane NSK Steering Systems (P) Ltd Vs. Asstt. (C.C.E (2019) 369 ELT 307), (iii) Huawei Telecommunications (India) Company (P) Ltd Vs. Principle Vs. Principal Commissioner of Customs, Chennai - VII (2017 (356) E.L.T. 506 (Mad) (iv) Kothari Petrochemicals Ltd Vs. Union of India (2015 (316) E.L.T. 17 (Mad) (v) State of Punjab Vs. Bhatinda District Co-Op Milk P.Union Ltd (2007) 217 ELT 325 (S.C.), (vi) Rajhans Impex Pvt. Ltd. Vs. Union of India ((2020) 372 ELT 346), (vii) N.V.K.Mohammed Sultan Rowther & Sons Vs. Additional C.C.E., Madurai ((2019) 365 ELT 516), (viii) Srei Equipment Finance Ltd Vs. Union of India ((2018) 17 GSTL 598), (ix) Webel Technology Ltd Vs. Commissioner of Service Tax, Kolkata ((2018) 19 GSTL 467), (x) Oryx fisheries private limited Vs. Union of India and others ((2010) 13 SCC 427), (xi) Siemens Ltd Vs. State of Maharashtra and others ((2006) 12 SCC 33) and (xii) Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai ((1998) 8 SCC 1).

7. The following cases have been cited for the proposition that an amendment is, as a general Rule, expected to operate only prospectively, unless it explicitly states that it applies retroactively or retrospectively. In the present case, the amendment has been inserted with effect from 28.06.2019 and there is nothing to indicate that it was intended to operate retrospectively. Such an interpretation would thus, be contrary to the settled principles governing the interpretation of statutes.

8. Reliance is placed on the judgments in (i) Popcorn Entertainment and another Vs. City Industrial Developments



Corporation and another ((2007) 9 SCC 593) (ii) Secretary, Ministry of defense and others Vs. Prabhash Chandra Mirdha ((2012) 11 SCC 565), (iii) Wabco India Limited Vs. Deputy Commissioner of Income Tax (W.A.No.884 of 2018) and (iv) Commissioner of Income Tax Vs. Vatika Township P Ltd ((2014) 367 ITR 466). The petitioner also refers to interim orders passed by four High Courts granting interim protection in regard to this very issue, as to whether the provisions of Rule 133(5) would be attracted in case of proceedings/complaints that were initiated/pending even prior to the date of insertion of the Rule.

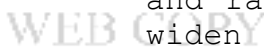
9. In addition, the petitioner points to certain lacunae in the methodology of computation of profiteering under the Act and Rules. The measure of profiteering as set out under the Rules is not capable of precise determination and hence the computation as set out in the impugned show cause notice is questioned. Though various grounds are raised in this regard, the relevant provisions in the Act and Rules have not been challenged and I am not, in the absence of such challenge, inclined to advert to this submission.

10. The sole point to be decided is a legal issue, premised on admitted facts, as to whether the operation of Rule 133 (5) (a) & (b), is prospective, in relation to complaints or proceedings initiated post 28.06.2019 or clarificatory, covering complaints/proceedings that have been initiated even prior to the date of its insertion.

11. The respondents argue that the provisions of Rule 133 (4) and (5) (a) & (b), though inserted with effect from 28.06.2019, must be taken to be clarificatory and hence retrospective seen in the context of the purpose for which the Rule has been inserted and to advance such purpose rather than frustrate it.

12. The preliminary objection is that the petitioner has an effective and efficacious remedy in terms of Rule 133 (2) to file an appeal as against the DGAP's report dated 01.07.2020, before the Authority. He relies, in this regard upon the judgements in Union of India & Anr. Vs. Kunisetty Satyanarayana, ((2006) 12 SCC 28) (ii) State Bank of Travancore Vs. Mathew K.C., ((2018) 3 SCC 85), (iii) CIT Vs. Chhabil Dass Agarwal, ((2014) 1 SCC 603) and Ujjam Bhai Vs. The State of UP (AIR 1962 SC 1621).

13. On merits, learned counsel would urge that the objective of the Anti-profiteering measure is to provide an institutional mechanism to ensure that full benefit of ITC and reduction in rates of GST are passed on to customers. The interpretation of



14. The main object behind the levy of GST is to streamline and rationalize tax levies, both procedurally and substantively, widen the tax base, mitigate cascading and double taxation and to enable better compliance by lowering the overall burden cast upon the customers as well as by ensuring ease of compliance. This was to be one of the steps to pave way for a common national market for goods and services. It is in pursuance of these avowed objects that anti-profiteering measures were introduced, and they must thus be given full play and not be read in a truncated fashion so as to frustrate their purpose.

16. Learned counsel for the respondent relies on the following judgments, some rendered in the context of Competition Law, to buttress his submissions on merits:

17. As regards the aspect of retrospectivity, he would argue that Rules 133 (4) and (5) only prescribe procedure and must apply retrospectively in order to ensure uniformity in procedure at all times. Sub-rule 5 (a) of Rule 133, starts with a non-obstante clause to state that 'notwithstanding anything contained in sub-rule 4' where the Authority has reasons to



believe that there has been contravention of the provisions of Section 171 of the Act dealing with Anti-profiteering measures, it may, after recording reasons in writing, direct the DGAP to cause investigation or enquiry in regard to such other goods or service or both in accordance with the provisions of the Act and the Rules. The usage of the non-obstante clause supports the proposition that the power of suo moto, expanded enquiry was always available with the Authority.

18. Having heard learned counsel in detail, my decision is as follows. The petitioner has accepted the decision of the Authority dated 28.11.2018 to the effect that it has profiteered and has made good the unjust enrichment as determined by it. The challenge now, is to the widening of the scope of enquiry to include suo moto review from 01.07.2017 with the inception of GST, till date of the complaint. A bird's-eye view of the relevant provisions under the Act and Rules would be useful in this context.

19. Goods and Service Tax has been brought in with effect from 01.07.2017 to pave way for an integrated system of doing business pan India with common protocols and procedures in place for filing of returns and remittance of taxes. Since one of the objectives of the GST law is to aid transparency and the building of a robust economy, Section 171 of the CGST Act provides for a protection against measures for profiteering that may be designed by a supplier of goods and services. Section 171 reads as follows:

"171. Anti-profiteering measure – (1) Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.

(2) The Central Government may, on recommendations of the Council, by notification, constitute an Authority, or empower an existing Authority constituted under any law for the time being in force, to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him.

(3) The Authority referred to in sub-section (2) shall exercise such powers and discharge such functions as may be prescribed.



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[(3A) Where the Authority referred to in sub-section (2), after holding examination as required under the said sub-section comes to the conclusion that any registered person has profiteered under sub-section (1), such person shall be liable to pay penalty equivalent to ten per cent. of the amount so profiteered:

Provided that no penalty shall be leviable if the profiteered amount is deposited within thirty days of the date of passing of the order by the Authority."

20. In line with Section 171, the Rules provide for the methodology by which, profiteering may be addressed, in Chapter XV spanning Rules 122 to 137. Rule 126 vests power to put in place methodology and procedure to determine instances of profiteering in the Authority. One of the points raised by the petitioner is that no Rules have been prescribed for determination of such methodology and in the absence of such a prescription, the Rule, by itself, fails. Be that as it may, as stated earlier, there is no challenge to the Rule in this matter and the question raised before me is something else altogether.

21. Rule 128 provides for the examination of an application alleging profiteering by a Standing Committee. Rule 129 provides that where the Standing Committee is satisfied that there is prima facie evidence to indicate profiteering, than the matter shall be referred to the DGAP for investigation. The procedure for such determination is set out in Rule 129. Section 133 deals with the order of the Authority and is extracted below:

133. Order of the Authority.-(1) The Authority shall, within a period of [six]219 months from the date of the receipt of the report from the Director General of [Antiprofitteering] determine whether a registered person has passed on the benefit of the reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices.

(2) An opportunity of hearing shall be granted to the interested parties by the Authority where any request is received in writing from such interested parties.

[(2A) The Authority may seek the clarification, if any, from the Director General of Anti Profiteering on the report submitted under sub-rule (6) of rule 129 during the process of determination under sub-rule (1).]



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[(3) Where the Authority determines that a registered person has not passed on the benefit of the reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices, the Authority may order-

(a) reduction in prices;

(b) return to the recipient, an amount equivalent to the amount not passed on by way of commensurate reduction in prices along with interest at the rate of eighteen per cent. from the date of collection of the higher amount till the date of the return of such amount or recovery of the amount including interest not returned, as the case may be;

(c) the deposit of an amount equivalent to fifty per cent. of the amount determined under the above clause [along with interest at the rate of eighteen per cent. from the date of collection of the higher amount till the date of deposit of such amount] in the Fund constituted under section 57 and the remaining fifty per cent. of the amount in the Fund constituted under section 57 of the Goods and Services Tax Act, 2017 of the concerned State, where the eligible person does not claim return of the amount or is not identifiable;

(d) imposition of penalty as specified under the Act; and

(e) cancellation of registration under the Act.

Explanation: For the purpose of this sub-rule, the expression, -concerned State? means the State [or Union Territory] in respect of which the Authority passes an order.]

(4) If the report of the Director General of [Anti-profiteering] referred to in sub-rule (6) of rule 129 recommends that there is contravention or even non-contravention of the provisions of section 171 or these rules, but the Authority is of the opinion that further investigation or inquiry is



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called for in the matter, it may, for reasons to be recorded in writing, refer the matter to the Director General of [Anti-profiteering] to cause further investigation or inquiry in accordance with the provisions of the Act and these rules.]

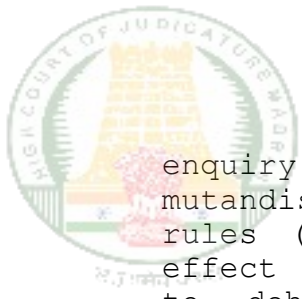
[(5) (a) Notwithstanding anything contained in sub-rule (4), where upon receipt of the report of the Director General of Anti-profiteering referred to in sub-rule (6) of rule 129, the Authority has reasons to believe that there has been contravention of the provisions of section 171 in respect of goods or services or both other than those covered in the said report, it may, for reasons to be recorded in writing, within the time limit specified in subrule (1), direct the Director General of Anti-profiteering to cause investigation or inquiry with regard to such other goods or services or both, in accordance with the provisions of the Act and these rules.

(b) The investigation or enquiry under clause (a) shall be deemed to be a new investigation or enquiry and all the provisions of rule 129 shall mutatis mutandis apply to such investigation or enquiry."

22. Rule 133 states that the Authority shall, within a period of six months from date of receipt of the report of the DGAP, determine whether an assessee has profited, after hearing an assessee, if such hearing is sought. Sub-Rule 3 states that where the Authority determines that there has been profiteering, he may either order reduction in prices, a refund of the amount profited or the deposit of an amount equal to 50% of the amount profited in certain designated funds. He may also contemplate the imposition of the penalty or, as a drastic measure, the cancellation of registration under the CGST Act.

23. Sub-rule (4) says that, notwithstanding that the DGAP may either recommend action or dropping of the investigation, the Authority may, if it is of the opinion that further investigation is called for, refer the matter back to the DGAP to cause such further investigation. Rule 5 (a), further expands the powers of the Authority stating that notwithstanding anything contained in sub-rule (4), if, upon receipt of the report of the DGAP, the Authority has reasons to believe that the assessee has profited, it may direct the DGAP to cause investigation or enquiry in that regard.

24. Sub-rule 5 (b) states that the investigation or enquiry under Rule 5 (a) shall be deemed to be a new investigation or



enquiry and all the provisions of Rule 129 shall mutatis mutandis apply to such enquiry. There is a difference in sub-rules (4) & (5) (a), both of which have been inserted with effect from 28.06.2019. Sub-rule (4) provides for the Authority to, de hors the report of the DGAP not recommending action for profiteering, plough on and refer the matter back to the DGAP, at its own instance, to cause further investigation.

25. Rule (5) (a), notwithstanding the power available under sub-rule (4) to review the matter again, endows the Authority with the power to direct the DGAP to cause investigation or enquiry with regard to such other goods or services in accordance with the provisions of the Acts and Rules. The phrase 'such other goods or services or both' figures only in Rule (5) (a). Thus, the distinction, in my view is that while Rule (4) contemplates review of only the specific subject matter under the complaint, Rule (5) (a) empowers the Authority to cause enquiry even with regard to other goods or services.

26. In this case, the power invoked is in terms of Rule (5) (a) insofar as, the Authority has expanded the scope of enquiry to all business transactions of the petitioner between the period 01.07.2017 to 2019. For an investigation as contemplated under Rule (5) (a), the procedure for enquiry shall be as set out under Rule 129.

27. This procedure commences with the prima facie satisfaction of the Standing Committee, reference of the matter to the DGAP for investigation, conduct of a detailed investigation by the DGAP in compliance with the principles of natural justice including the issue of notices to the assessee as well as any other parties thought necessary and thereafter, the finalization of a report.

28. The DGAP has heard the petitioner prior to formulating its report dated 01.07.2020, and there no violation of the procedure as contemplated. Based upon this report, the Authority has issued impugned notice dated 10.07.2020 to the petitioner calling for an explanation as to why the report not be accepted and liability towards profiteering determined.

29. On the question of retrospectivity, reliance is placed on the judgements in (i) Union of India Vs. Sukumar Pyne ((1996) 2 SCR 34) and (ii) Memon Abdul Karim Vs. Deputy Custodian General, New Delhi and Ors. ((1964) 6 SCR 837). Both judgments are cited in support of the position that the insertion of Rules 133 (4) & (5) (a) is only in aid of procedure and hence are applicable retrospectively.



30. The Constitution Bench in the case of Memon Abdul Karim (supra) considered whether Section 48 of the Administration of the Evacuee Property Act, 1950 would be applicable to the facts and circumstances of that case. The Bench noted that Section 48 prescribed procedure and thus, even amended, would apply retrospectively in the sense that a procedural provision would, normally apply to all actions after the date it had come into force even though the actions may have begun earlier or the claim upon which the action may be based may be of an anterior date.

31. The relevant paragraphs state thus:

"4. The amended Section.48 came into the Act by Act No. 91 of 1956 from October 22, 1956 and runs as follows: -

"48. Recovery of certain sums as arrears of land revenue:-(1) Any sum payable to the Government or to the Custodian in respect of any evacuee property, under any agreement, express or implied, lease or other document or otherwise howsoever, may be recovered in the same manner as an arrear of land revenue. (2) If any question arises whether the sum is payable to the Government or to the Custodian within the meaning of sub-section (1), the Custodian shall, after making such inquiry as he may deem fit, and giving to the person by whom the sum is alleged to be payable an opportunity of being heard, decide the question; and the decision of the Custodian shall, subject to any appeal or revision under this Act, be final and shall not be called in question by any court or other authority (3) For the purpose of this section, a sum shall be deemed to be payable to the Custodian notwithstanding that its recovery is barred by the Indian Limitation Act, 1908 (9 of 1908), or any other law for the time being in force relating to limitation of action."

It will be seen that this is mainly a procedural section replacing the earlier s. 48 and lays down that sums payable to the Government or to the Custodian can be recovered thereunder as arrears of land revenue. The section also provides that where there is any dispute as to whether any sum is payable or not to the Custodian or to the Government, the Custodian has to make an inquiry into the matter and



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give the person raising the dispute an opportunity of being heard and thereafter decide the question. Further, the section makes the decision of the Custodian final subject to any appeal or revision under the Act and not open to question by any court or any other authority. Lastly the section provides that the sum shall be deemed to be payable to the Custodian notwithstanding that its recovery is barred by the Indian Limitation Act or any other law for the time being in force relating to limitation of action. Sub- sections (1) and (2) are clearly procedural and would apply to all cases which have to be investigated in accordance therewith after October 22, 1956, even though the claim may have arisen before the amended section was inserted in the Act. It is well settled that procedural amendments to a law apply, in the absence of anything to the contrary, retrospectively in the sense that they apply to all actions after the date they come into force even though the actions may have begun earlier or the claim on which the action may be based may be of an anterior date."

32. Rules 133 (4) & (5)(a), no doubt, expand the scope of power vesting in the Authority to enquire, adding the dimension of suo-moto review, thereto. However, and bearing in mind the object of anti-profiteering measures, I am not inclined to accept the submission of the petitioner to the effect that the Rules are prospective in operation and will not be applicable in respect of complaints filed and enquiry commenced prior to the date of insertion of the rules. In my considered view, with the coming into force of GST on 01.07.2017 and with it Section 171, every conceivable effort to contain profiteering must be made be available to the Authorities and the Rules merely arm and equip the officers with the necessary ammunition to address the issue effectively.

33. In Excel Crop Care Limited (supra), the Hon'ble Supreme Court had occasion to interpret the provisions of the Competition Act, 2002. The challenge was to the applicability of the Section 3 of that Act to a notice inviting tenders. Section 3, coming under Chapter II, entitled 'Prohibition of certain agreements, abuse of dominant position and regulation of combinations' specifies the agreements that are prohibited under that chapter.

34. The Competition Act was passed on 13.01.2003, notifying only certain provisions of the Act and Section 3 was notified on 20.05.2009, subsequent to the date of the notice inviting tender, dated 28.03.2009. The petitioner thus argued that



35. The respondents/authorities referred to Section 18 that cast a duty upon the Competition Commission of India (CCI) to examine the adverse effects of competition. Thus, and notwithstanding that Section 3 had been notified only with effect from 20.05.2009, the principles governing the application of the Competition Act were clear and categoric. Section 3, it was urged, should also be held to be operational and active at the time when the impugned notice was issued.

"45. If the contention of the appellants is accepted, it would render the entire purpose of investigation nugatory. The entire purpose of such an investigation is to cover all necessary facts and evidence in order to see as to whether there are any anti-competitive practices adopted by the persons complained against. For this purpose, no doubt, the starting point of inquiry would be the allegations contained in the complaint. However, while carrying out this investigation, if other facts also get revealed and are brought to light, revealing that the 'persons' or 'enterprises' had entered into an agreement that is prohibited by Section 3 which had appreciable adverse effect on the competition, the DG would be well within his powers to include those as well in his report. Even when the CCI forms prima facie opinion on receipt of a complaint which is recorded in the order passed under Section 26(1) of the Act and directs the DG to conduct the investigation, at the said initial stage, it cannot foresee and predict whether any violation of the Act would be found upon investigation and what would be the nature of the violation revealed through investigation. If the investigation process is to be restricted in the manner projected by the appellants, it would defeat the very purpose of the Act which is to prevent practices having appreciable adverse effect on the competition. We,



therefore, reject this argument of the appellants as well touching upon the jurisdiction of the DG.”

37. The petitioner brushes away reference to this judgment stating that there is no provision comparable to Section 171 of the CGST Act in the Competition Act and thus the ratio of that judgment is not applicable to the present case. I disagree. What has weighed with the Hon'ble Bench are the provisions of Section 18, which crystallizes into itself the object of the Act. Section 18 reads as follows:

‘18. Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India: Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country.

38. The provisions of Section 171 of the CGST Act compare well with the spirit and intention of Section 18, though perhaps not the language. The Competition Act addresses anti-competitive agreements and has a laudable purpose behind it. The object is to ensure healthy competition in the market as it is expected to bring about various benefits for the public as well as the economy. This is similar to the Anti-profiteering provision and the spirit and object behind its insertion. The distinction sought to be made by the petitioner is thus rejected. The cases relied upon by the petitioner are distinguishable for this reason.

39. That apart, this judgment, in the case of Excel Crop Care also reiterates the position that in determining the effective date of a provision what is to be taken into account is the object and spirit behind the legislation and the purpose for which the new provision is sought to be introduced.

40. In the case of Cadila healthcare Ltd (supra), the judgment in the case of Excel Crop Care was explained. Paragraph 43 of the judgment would throw light on the understanding of Rules 133 (4) and (5) (a) & (b), and their interplay.

“43. Cadila's argument, that in Excel Crop Care the issue was inclusion of more than one instance or



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incident within the ambit of investigation (given that the complaint was in respect of one tender only) is distinguishable, is in this court's opinion, insubstantial and needs to be rejected. Its reliance on Grasim Industries, is no longer apt. At the stage when the CCI takes cognizance of information, based on a complaint, and requires investigation, it does not necessarily have complete information or facts relating to the pattern of behaviour that infects the marketplace. Its only window is the information given to it. Based on it, the DG is asked to look into the matter. During the course of that inquiry, based on that solitary complaint or information, facts leading to pervasive practises that amount to abuse of dominant position on the part of one or more individuals or entities might unfold. At this stage, the investigation is quasi inquisitorial, to the extent that the report given is inconclusive of the rights of the parties; however, to the extent that evidence is gathered, the material can be final. Neither is the DG's power limited by a remand or restricted to the matters that fall within the complaint and nothing else. Or else, the Excel Crop Care would not have explained the DG's powers in broad terms: (-if other facts also get revealed and are brought to light, revealing that the 'persons' or 'enterprises' had entered into an agreement that is prohibited by Section 3 which had appreciable adverse effect on the competition, the DG would be well within his powers to include those as well in his report....If the investigation process is to be restricted in the manner projected by the Appellants, it would defeat the very purpose of the Act which is to prevent practices having appreciable adverse effect on the competition?). The trigger for assumption of jurisdiction of the CCI is receipt of complaint or information, when the -Commission is of the opinion that there exists a prima facie case? exists (per Section 26 (1)). The succeeding order is administrative (per SAIL); however that order should disclose application of mind and should be reasoned (per SAIL). Upto this stage, with that enunciation of law, no doubt arguably Cadila could have said that absent a specific order as regards its role, by CCI, the DG could not have inquired into its conduct. However, with Excel Crop Care specifically dealing with the question of alleged "subject matter" expansion (in the absence of any specific order under Section 26 (1)) and the Supreme Court clarifying that the subject matter included not only the one alleged,

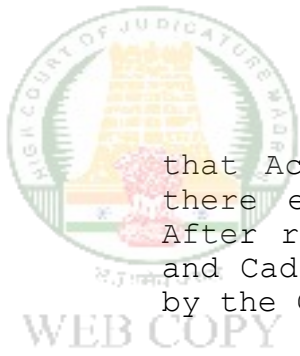


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but other allied and unenumerated ones, involving others (i.e. third parties), the issue is no longer untouched; Cadila, in the opinion of this court, is precluded from stating that a specific order authorizing transactions by it, was a necessary condition for DG's inquiry into its conduct. This court is further reinforced in its conclusion in this regard by the express terms of the statute: Section 26 (1) talks of action by CCI directing the DG to inquire into "the matter". At this stage, there is no individual; the scope of inquiry is the tendency of market behaviour, of the kind frowned upon in Sections 3 and 4. The stage at which it CCI can call upon parties to react is when it receives a report from DG stating there is no material calling for action, it has to issue notice to the concerned parties (i.e. the complainant) before it proceeds to close the case (Sections 26 (5) and (6)). On the other hand, if the DG's report recommends otherwise, it is obliged to proceed and investigate further (Sections 26 (7) and (8)). Again Section 27 talks of different "parties" [-enterprise or association of enterprises or person or association of persons?- per Section 27 (a)]. Likewise, the steps outlined in Section 26 are amplified in the procedure mandated by Regulation 20 and 21, which requires participation by "the parties" in the event a report after DG's inquiry, which is likely to result in an adverse order, under Sections 27-34 of the Act. Consequently Cadila's argument that a specific order by CCI applying its mind into the role played by it was essential before the DG could have proceeded with the inquiry, is rejected."

41. The facts in the case of Cadila Healthcare are aligned to the present matter. The directions of the CCI in that case were to the effect that, if involvement of any other party was found in the course of investigation, the D.G. shall investigate such other parties as well, who had indulged in probable contravention. The company sought a recall of the aforesaid order which request was rejected by the CCI. The Hon'ble Supreme Court confirmed the rejection of the recall application, intervening on the aspect of cross-examination for which no opportunity had been granted to the company.

42. In the case of Competition Commission of India (supra), the report of the CCI was to the effect that Grasim had abused its dominant position. The challenge before the Supreme Court was on the ground that the CCI was entitled to treat the report of the Director General as 'information' under Section 19 of



that Act and proceed accordingly, if it were of the view that there existed a prima facie case of contravention by Grasim. After referring to the judgments in the case of Excel Crop Care and Cadila Health Care, the Court upheld the exercise of powers by the CCI.

43. I am thus of the considered view that the ratio of the judgements discussed in the proceeding paragraphs are applicable in the context of Section 171 of the GST Act as well. In light of the discussion as above, as well as for the reason that the issue to be decided is a legal issue untrammelled by any dispute on facts, the preliminary objection on maintainability is rejected. The assumption of jurisdiction by the respondents is upheld.

44. Coming to impugned notice dated 10.07.2020, the Authority has called upon the petitioner, based upon report of the DGAP dated 01.07.2020 to show cause why the aforesaid report not be accepted and the petitioner's liability for profiteering determined. The petitioner is thus at liberty to comply with the directive under the impugned notice, put forth its explanation in writing within a period of three (3) weeks from date of uploading of this order in the official website of this Court, appear before the Authority on a date to be fixed by the authority per mutual convenience of the parties and contest the findings and conclusion in the report of the DGAP dated 01.07.2020. After hearing the petitioner, the Authority shall pass a speaking order in accordance with law, as expeditiously as possible.

45. Barring the aspect of assumption of jurisdiction that has been held adverse to the petitioner, both parties are at liberty to pursue all lines of argument as they believe are available to them and nothing contained in this order shall stand in the way of a de novo hearing on the merits of the matter, with all issues left open, for decision afresh.

46. This Writ Petition is dismissed. Connected Miscellaneous Petitions are also dismissed. No costs.

Sd/-
Assistant Registrar (CS-)

//True Copy//

Sub Assistant Registrar

rkp/kbs



To

1. The Secretary,
The National Anti-profiteering Authority,
6th Floor, Tower-I, Jeevan Bharti Building,
Connaught Place, New Delhi.
2. The Director General of Anti-profiteering,
Central Board of Indirect Taxes and Customs,
II Floor, Bhai Vir Singh Sahitya Sadan,
Bhai Vir Singh Marg, Gole Market, New Delhi 110 001.

+1cc to Mr.M.Santhanaraman, Advocate, S.R.No.55461

W.P.No.15527 of 2020
and
WMP.Nos.19385 of 2020 & 7418 of 2021

RSV(CO)
SU(31/01/2022)