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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 18.11.2021
% Judgment delivered on: 16.02.2022

\+ **W.P.(C) 7620/2021 and CM APPL. Nos.23847/2021 & 24944/2021**

M/S MDC PHARMACEUTICALS LIMITED ..... Petitioner

Through: Mr. Abhishek Sethi, Ms. Richa Sethi, Mr. Garvit Kalra and Mr. Jeevesh Mehta, Advocates.

Versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr. Bhagvan Swarup Shukla and Mr. Sarvan Kumar, Advocates for UOI. Mr. Shlok Chandra, ESIC with Mr. Shrey Chakraborty, Advocate. Mr. Vibhor Garg and Mr. Sidhant Bhatia, Advocates for applicant in CM No. 40039/2021

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE JASMEET SINGH

JUDGMENT OF THE COURT

1. The present petition has been filed by the petitioner seeking substantially the following prayers:

"

i. To issue a writ of in the nature of certiorari or any other writ or direction for declaring the e-mail dated 06.07.2021 issued by respondent No. 4, whereby the bid of the petitioner company has been summarily rejected with a malafide intention to award the tender to a *company of their choosing as illegal, arbitrary, unconstitutional, null and void-ab-initio and is liable to be quashed and set aside;*

ii. And a writ in the nature of mandamus or any other appropriate writ, order or direction thereby directing the respondents to consider the financial bid of the petitioner on merits to match the lowest bid as would be made by the successful bidder in the tender under consideration;

iii. Or in alternative pass any Writ Petition Under Article 226 Of Constitution Of India For The Issuance Of Writ Of Mandamus Or Any Other Appropriate Writ, Order Or Direction thereby directing the Respondent to desist from opening the financial bids of other contenders and/or to desist from awarding the tenders under consideration to any of the bidders, during the pendency of the instant writ petition;"

2. The case set up by the petitioner is that the petitioner M/s MDC Pharmaceutical Limited (hereinafter called either "MDC" or "petitioner") is a company registered under the Companies Act, 1956 having its registered office at 213, First Floor, Industrial Area Phase I, Chandigarh – 160002.

3. MDC was conceived of in the year 1994, and was incorporated originally as a private limited company which was duly registered as M/s MDC Pharmaceuticals Private Limited under the provisions of Companies Act, 1956 with the office of the Registrar of Companies, Punjab, Himachal Pradesh and Chandigarh vide Registration No. 53-14820 of 1994 on 14.07.1994. The petitioner was doing business in pharma industry, and was getting medicines manufactured from other pharma manufacturing units within the state of Himachal Pradesh. The petitioner continued selling/marketing its products, which were manufactured by other units, till the year 1999.

4. In the year 1999, the petitioner company acquired a manufacturing facility on rent, and started manufacturing its own products w.e.f. 14.02.2000, obliterating its need to outsource. Subsequently, Petitioner company purchased land at village Gullarwala, Post Office and Tehsil Baddi, District Solan, H.P. to set up its manufacturing facility.

5. On 12.08.2005, the petitioner company acquired the adjoining land also, and obtained necessary permission under Section 118 of the Himachal Pradesh Tenancy & Land Reforms Act, 1972, and started a manufacturing facility for its pharma products on 02.04.2006.

6. On 13.03.2018, the petitioner company converted from a private limited company into a public limited company, and consequently, changed its name from MDC Pharmaceutical Private Limited to MDC Pharmaceuticals Limited with the approval of Registrar of Companies, Chandigarh. A certificate dated 13.03.2018 was issued by the ROC, Chandigarh to that effect, with the approval of the Central Government, accorded vide SRN G79087573 dated 13.03.2018.

7. Although, vide letter dated 27.01.2020, the petitioner company has been granted the necessary permission for change in the revenue record from MDC Pharmaceuticals Private Ltd. to MDC Pharmaceuticals Ltd., however, an unjustified condition of payment of stamp duty and registration fee was thrust on the petitioner company. Therefore, the petitioner company filed a writ petition, being CWP No. 2611/2021 before the Himachal Pradesh High Court at Shimla, to challenge the aforesaid condition of payment in stamp duty and registration fee. The said writ petition was allowed by the Shimla High Court 24.04.2021. However, since compliance was not effected in

respect of the court's order, the petitioner disclosed that it was in the process of filing a contempt petition.

8. The respondent, Employees State Insurance Corporation (hereinafter called ESIC), is a statutory corporation created under an Act of the Parliament, known as the Employees State Insurance Act, 1948, with the object of providing health insurance for industrial workers and for providing certain benefits in the event of sickness, maternity and employment injury to workmen employed in, or in connection with, the work in factories, other than seasonal factories. ESIC maintains a Rate Contract list in respect of drugs/ medicines, etc. for purchase by the ESIC, or its subsidiaries, all over the country. On account of its bulk purchases, the ESIC rate contract list has the lowest of rates with respect to medicines which are, otherwise, available at much higher prices in the open market.

9. The ESIC calls for e-tenders in respect of the medicines/ drugs on its Rate Contract List. ESIC, in the present case, floated 4 e-tenders on 01.01.2021 for populating its rate contract list for supply of drugs enumerated in the schedule annexed to the e-tenders. The last date for submission of bids was 15.02.2021, which was subsequently extended to 06.03.2021. The petitioner company submitted its bids in respect of the 15 items covered in the said 4 e-tenders. In accordance with the terms of the tender, the petitioner also submitted bank guarantee to the tune of Rs. 1,07,59,280. The item-wise breakup for which the petitioner's bid in the 4 e-tenders is as under:-

S. No.	*Tender No.*	*Items Quoted*	*EMD/BG submitted*
1.	*142-C (P-5)*	*3*	*Rs. 18,99,050/-*
2.	*143-C (P-6)*	*6*	*Rs. 39,94,580/-*

3.	*145-C (P-7)*	*3*	*Rs. 28,22,570/-*
4.	*146-C (P-8)*	*3*	*Rs. 20,43,080/-*
5.	*Total*	*15*	*Rs. 1,07,59,280/-*

10. The petitioner, in accordance with the tender conditions also submitted ESIC challans to show that it was regular in making payment of its ESI contributions/ dues.

11. On 06.07.2021, the petitioner was informed by respondent No. 3 that the bids of the petitioner were found ineligible by the respondent corporation for the reason that, the "*Name and code of the firm differ in ESIC Challans*".

12. Against the rejection, the petitioner company submitted its reply on 12.07.2021, explaining its stance, and providing clarification that the petitioner was not in arrears or default of payment of ESI dues of its employees serving at its head office at Chandigarh, and its factory/ works at Baddi, Himachal Pradesh. The petitioner also stated that ESIC challans of past deposits are historical documents which pre-existed at the time of tender opening, and could be examined to establish the fact that the petitioner was not in arrears of ESI dues. Since no response was received to the said letter, and since the Petitioner continued to be treated as ineligible, the petitioner filed the present writ petition.

13. When the matter came up for hearing on 03.08.2021, we issued notice for 09.08.2021 and we were informed that the TEC Review Committee would be considering the representations of the petitioner dated 12.07.2021 and 29.07.2021.

14. On 09.08.2021, we were informed that the TEC Review Committee met, and has decided to uphold the decision to declare the petitioner as non-responsive/ ineligible. It was further informed that in respect of 4 items out

of 15 - for which the petitioner had submitted its bid, the bid quoted by the petitioner was the lowest. Hence, we, on 09.08.2021, directed that till the next date of hearing, the items for which the petitioner's bid was lowest, the contract be not awarded by the respondent.

15. The respondent ESIC filed its counter affidavit on 20.08.2021.

16. On 24.08.2021, after hearing submissions of learned counsels, we passed the following order:-

> *" We have heard the submissions of learned counsels for the petitioner and respondent ESIC for some time. The case of the petitioner is that it was earlier a private limited company with the name MDC Pharmaceuticals Private Limited. It converted itself into a public company and its name was changed to MDC Pharmaceuticals Limited. The Registrar of Companies, Chandigarh issued certificate to this effect on 13.03.2018. On account of the said change it got different registrations – one in the name of the Private Limited Company in respect of its works at Baddi, Himachal Pradesh and another in respect of its registered office at Chandigarh in the name of MDC Pharmaceuticals Limited.* ***While responding to the RFP in question petitioner not only produced the certificate dated 13.03.2018 whereby the name of the petitioner company had changed to MDC Pharmaceuticals Limited, it also provided challans issued by the ESIC to state that it was not in arrears of payment of ESIC dues in respect of its employees both – at its factory at Baddi, Himachal Pradesh, and at its Head Office in Chandigarh.*** *When the petitioner was given an opportunity to explain the position it sent the representation dated 12.07.2021.*
>
> ***On the other hand the submission of Mr. Chandra is that the challans submitted by the petitioner are either in the name of MDC Pharmaceuticals or in the name of MDC Pharmaceuticals Private Limited.***
>
> *We direct the respondent ESIC to file an affidavit with relevant documents showing the name in which the employer code 17140310530010304 is registered, along with the*

application made by the petitioner for registration of the code. The respondents are also directed to place before the Court the original records relating to the evaluation of the petitioner's bid which also should contain the decision regarding the petitioner's disqualification. The consideration of the petitioner's disqualification by the review committee should also be placed on record. These records should be filed in duplicate at least one day before the next date of hearing.

List on 01.09.2021.

Interim orders to continue." (emphasis supplied)

17. Thus, we directed the respondent ESIC to file an affidavit with relevant documents, showing the name in which the employer code 17140310530010304 is registered, along with the application made by the petitioner for registration of the code. We also directed the respondent to place the original records with regard to the evaluation of petitioner's bid, containing the decision regarding the petitioner's disqualification. We also directed the respondent to place on record the consideration of the petitioner's disqualification by the review committee.

18. The respondent ESIC filed an additional affidavit in compliance of the aforesaid order dated 24.08.2021, on or about 06.09.2021. Alongwith the additional affidavit, the respondent produced, *inter alia*, the consideration of the petitioner's case by the review committee. The said consideration reads as follows:

"Recommendations of Review TEC wrt representation received for 142C to 146C & 147B held on 26.07.21 & 27.07.21.

68. MDC Pharmaceuticals Limited : 142C, 143C, 145C & 146C

Reason for Rejection	*Reply of the firm*	*Recommendation of the committee*
Name and code of the firm differ	*Firm stated that they had obtained ESI Registeration in*	*Firm accepts the reason of rejection.*

inESIC Challans.	*2 states* *1) Himachal Pradesh: Employer Code: 14000432970000304 registered vide name MDC Pharmaceuticals Pvt Ltd* *2) Chandigarh: Employer Code: 17140310530010304 registered vie name MDC Pharmaceuticals* *Further, firm stated that their Firm was converted from private limited to a public limited company on 23 March 2018. Copy of Certificate for change in name of company pursuant to conversion provided by the Drug Authority and challans of ESI contribution of both the states is attached. Firm stated that there has been mismatch in the name of the company in the challans as the challans attached were of different employer code of different states. Firm enclosed last six months challans as a historical document and also enclosing specific schedule of the financial statement specifying the ESIC contributions made during the year 2019-20.*	*Explanation reviewed and does not adhere to clause 5(XIII) of TE.* *Reply not found satisfactory.* *Firm not eligible.*

”

19. The petitioner responded to the stand taken by the respondent ESIC by filing short rejoinder affidavit dated 22.08.2021, additional documents

vide index dated 26.08.2021, and a further additional affidavit dated 14.09.2021. The matter was further heard by us on 17.09.2021, when we passed the following order:-

> *"The petitioner has drawn our attention to the additional affidavit filed by it. Mr. Abhishek Sethi, submits that the respondents had not filed the relevant documents with their affidavits and therefore this affidavit was necessary. He also submits that after the filing of this petition, the respondents claim that the petitioner was in arrears for payment of Employee's ESIC contribution for the year 2011 amounting to Rs. 17,450/-. The respondents have claimed interest at the rate of 12% per annum.*
>
> *Mr. Sethi submits that the issuance of the said communication after the petitioner has assailed the actions of the respondent in disqualifying the petitioner with respect to the tender in question, in relation to alleged standing dues pertaining to the year 2011, act as institutional malafides. He submits that the petitioner has searched its records and found that the said amount was in fact, deposited in time on 5th August, 2011. The petitioner has placed on record along with the additional affidavit the Challan no. 01711110366180.*
>
> *In our view, the respondents are obligated to deal with the said affidavit and particularly as to the basis on which the respondents issued the communication dated 13.09.2021 alleging that the petitioner was in arrears of deposit of its contribution towards ESIC of Rs. 17,450/-. We may observe that a bidder who is in default of the payment of the ESIC is disqualified under the terms of the tender and in that light, the submission of Mr. Sethi is that this ground is only being built up so as to justify the disqualification of the petitioner.*
>
> *Let the Medical Commissioner, ESIC, Dr. R.S. Jangpangi file his own affidavit dealing with the additional affidavit of the petitioner and in particular the aspects we have taken note of in this order.*
>
> *List on 25th October, 2021.*
>
> *Interim orders to continue."*

20. In pursuance of the aforesaid order, Dr. R. S. Jangpangi of the respondent ESIC filed Medical Commissioner, ESIC filed his affidavit dated 21.10.2021.

21. The matter was taken up for further hearing on 18.11.2021, when we passed the following order after hearing learned counsels:-

> *"**Mr. Chandra has taken instructions. He states that as of now there are no ESIC outstanding dues of the petitioner except very minor amounts which could be in the range of a couple of hundreds that could be on account of calculation of interest.** He submits that so far as the demand for past dues raised by the respondent is concerned - which is disputed by the petitioner and the petitioner has placed on record documents to show payment of the past demand - Mr. Chandra states that in any event the said demand records of the respondent has not been made the basis of the petitioner's disqualification. **It is the case of Mr. Chandra that it is on account of the petitioner's failure in updating the records within time, in terms with the Regulation 10 (C) of The Employees' State Insurance (General) Regulations, 1950 that the confusion has occurred, leading to the petitioner's disqualification. He submits that the disqualification of the petitioner has to be viewed in the light of the record placed before the evaluation committee and the rejection of the petitioner's technical bid therefore cannot be faulted.***
>
> *Arguments heard. Judgment reserved."*
>
> (emphasis supplied)

22. Thus, it would be seen that though the rejection of the petitioner's Technical Bid was premised upon the reason that the "*name and Code of firm different in ESIC Challans*", upon being repeatedly called upon by the Court to explain its stand, the respondent admitted before us on 18.11.2021 that as of now, there are no ESIC outstanding dues of the petitioner. The

respondent has sought to justify the rejection of the petitioner's Technical Bid on the ground that the petitioner had failed in updating the records within time in terms of Regulation 10(C) of the Employees State Insurance (General) Regulations, 1950 and the same had led to confusion leading to the petitioner' disqualification. The rejection is justified on the ground that the same has to be viewed in the light of the record placed before the Evaluation Committee and the same cannot be faulted.

23. The respondent states that while some of the challans towards payment of ESIC dues, uploaded by the petitioner, reflected the name of the employer as MDC Pharmaceuticals with Employer Code No.17140310530010304, others reflected the name of the employer as M/s MDC Pharmaceuticals Pvt. Ltd. with Employer Code No.14000432970000304. The respondent has provided details of the challans, which were filed by the petitioner along with its bids in respect of the four rate contracts in question, namely, Rate Contract 142C, Rate Contract 143C, Rate Contract 145C & Rate Contract 146C.

24. The respondent also states that there was ambiguity about the true legal entity of the bidder. It was not clear as to what is the composition of the "MDC Pharmaceuticals". The participation in the tender was made by the petitioner MDC Pharmaceuticals Limited, which earlier, was MDC Pharmaceuticals Pvt. Ltd. However, it was not clear as to what was the connection between the petitioner and MDC Pharmaceuticals.

25. In response to the aforesaid defence of the respondent/ ESIC, the submission of the petitioner is that ESIC dues were being deposited in respect of the employees – both at the Chandigarh Office, and the Baddi Factory. Since legal remedies had to be availed of by the petitioner, as

aforesaid, before the Himachal Pradesh High Court, the ESIC dues were being deposited under two Employer Codes taken note of hereinabove. However, there were no outstanding dues pending as already admitted by the respondents before this Court on 18.11.2021.

26. Mr. Sethi, learned counsel for the petitioner has argued that since the ESIC invited the bids, its primary concern was to ensure that the bidders are themselves not in default of depositing ESIC dues in respect of their employees. He submits that both the Employer Codes were reflected in the challans submitted by the petitioner with the bids, and if the respondent had checked its own record in relation to the said two Employer Codes, no confusion or controversy would have arisen at all. He submits that the Tender Evaluation Committee, and the review TEC while evaluating the tender, are not expected to function mechanically, and are obliged to take their decision with due application of mind since their decisions not only have a bearing on the rights of the bidders, but also on the financial interest of the ESIC, as the wrongful rejection of the bid on technical grounds may deprive the respondent ESIC of more competitive rates in respect of the medicines offered by the such bidder.

27. Mr. Sethi has submitted that the claim of arrears amounting to Rs.17,450/- towards ESIC dues is factually incorrect inasmuch, as, the petitioner deposited the said dues as early as on 05.08.2011. The petitioner has placed on record the relevant challan before us.

28. We may take note of some of the relevant terms & conditions of the tender. Clause 5 lays down the eligibility criteria for the bidders to participate in the tenders in question. Sub-Clause XIII stipulates that:

> *"XIII.* ***Company/Authorised Signatory has to submit Employer Code No. & copy of last three contributions towards ESI in case factory is covered under ESI Act****.*
>
> *OR*
>
> *Company /Authorised Signatory has to submit an affidavit giving address of Manufacturing unit with a declaration that this factory / manufacturing unit is outside the implemented area / notified area by ESI Corporation*
>
> *OR*
>
> *Company /Authorised Signatory has to submit a certificate from the Regional Director that the factory is not coverable under ESI Act, in case the factory is within the notified area.*".
>
> (emphasis supplied)

29. The case of the petitioner is covered by the first Sub Clause of Clause XIII, since the petitioner submitted the particulars and documents, purportedly in compliance of the said sub clause.

30. Clause 31 deals with the aspect of evaluation of the tender, and it provides that "*the tender will be evaluated as per terms & conditions given in the tender document and in accordance with the GFR, CVC* ***and other guidelines issued by the Government of India from time to time****"*. (emphasis supplied) So far as evaluation of Technical Bids is concerned, Clause 31(b) reads:

> *"b) Technical Bid evaluation:*
>
> *The technical documents submitted by the bidders shall be examined for compliance with the requirements of the tender document. It is not necessary for a bidder to qualify for all the items for which it has submitted its bid; price bids of only those items shall be opened which would be found as technically complying."*

31. The petitioner has relied – in ground Q of the writ petition, on the **Manual for Procurement of Goods, 2017** issued by the Government of India, Ministry of Finance, Department of Expenditure. By placing reliance on the said manual, the petitioner submits that no tender inquiry condition provides minor infirmities, irregularities or non-conformities during the preliminary examination of the tenders should not prejudice or effect the fate of the tenderers. A copy of the said manual has been placed on record as Annexure P-22.

32. Paragraph 7 of the said manual deals with the aspect of tender evaluation. Paragraphs 7.3.4 and 7.3.5 from this manual are relied upon and are relevant, and they read as follows:

> *"**7.3.4 Minor Infirmity/Irregularity/Non-conformity***
>
> *During the preliminary examination, some minor infirmity and/or irregularity and/or nonconformity may also be found in some tenders. Such minor issues could be a missing pages/ attachment or illegibility in a submitted document; non-submission of requisite number of copies of a document. There have been also cases where the bidder submitted the amendment Bank Guarantee, but omitted to submit the main portion of Bid Document. The court ruled that this is a minor irregularity. **Such minor issues may be waived provided they do not constitute any material deviation (please refer to Para 7.4.1 (iv)) and financial impact and, also, do not prejudice or affect the ranking order of the tenderers. Wherever necessary, observations on such 'minor' issues (as mentioned above) may be conveyed to the tenderer by registered letter/ speed post, and so on, asking him to respond by a specified date also mentioning therein that, if the tenderer does not conform Procuring Entity's view or respond by that specified date, his tender will be liable to be rejected. Depending on the outcome, such tenders are to be ignored or considered further.***
>
> *7.3.5 Clarification of Bids/Shortfall Documents*

During evaluation and comparison of bids, the purchaser may, at his discretion, ask the bidder for clarifications on the bid. The request for clarification shall be given in writing by registered/ speed post, asking the tenderer to respond by a specified date, and also mentioning therein that, if the tenderer does not comply or respond by the date, his tender will be liable to be rejected*. Depending on the outcome, such tenders are to be ignored or considered further. No change in prices or substance of the bid shall be sought, offered or permitted. No postbid clarification at the initiative of the bidder shall be entertained.* ***The shortfall information/ documents should be sought only in case of historical documents which pre-existed at the time of the tender opening and which have not undergone change since then****. These should be called only on basis of the recommendations of the TC. (Example: if the Permanent Account Number, registration with sales tax/VAT has been asked to be submitted and the tenderer has not provided them, these documents may be asked for with a target date as above). So far as the submission of documents is concerned with regard to qualification criteria, after submission of the tender,* ***only related shortfall documents should be asked for and considered****. For example, if the bidder has submitted a supply order without its completion/performance certificate, the certificate can be asked for and considered. However, no new supply order should be asked for so as to qualify the bidder."*

33. We may observe that in their counter-affidavit – in response to Ground Q, the respondents have not stated that the said manual is not attracted, or that the same is in-applicable to the tenders in question. Even during the course of arguments, that has not been the submission of the respondents. In fact, Clause 31 extracted above provides that the evaluation of the tender shall be in accordance with, *inter alia,* guidelines issued by the Government of India from time to time. The said manual is also a guideline

issued by the Government of India, and is, therefore, relevant for evaluation of the tender in question.

34. We may also take note of the fact that the impugned rejection vide e-mail communication dated 06.07.2021, itself provided for right of representation against the technical rejection of the petitioner's bid by stating:

> "*This is to inform you that your firm and/or your item(s) is/are found technically ineligible. The detailed description is enclosed herewith as an attachment.* ***Any representation against the informed reason of rejection should be submitted by the firm on email dmcrc@esic.nic.in by 13.07.2021 upto 5.30 PM positively.***
> ***The representation should only refer to the documents already uploaded against the respective e-tender enquiry at CPP Portal.***
> ***Any representation submitted after due date and time will be summarily rejected***". (emphasis supplied)

35. Thus, the bidders declared technically disqualified were given a chance to represent and explain why their disqualification was not justified. This itself shows that the disqualification communicated to the petitioner on 06.07.2021 was not final, as the respondents were open to look into the representation that the bidder may give. Thus, the respondent purchaser chose – at its discretion, to give an opportunity to the bidder to offer a clarification. The said opportunity – we take it, was not an empty formality, and was a genuine attempt to see if the bidder could clarify and explain the apparent deficiency/ confusion, or lack of clarity, on the relevant aspect. Pertinently, even before us, it was represented by the respondent ESIC on 08.08.2021, that the representation of the petitioner is under consideration by the TEC Review Committee. Having given that opportunity to the

petitioner, the respondent was bound to consider the same within the parameters laid down in clause 7.3.5 of the Manual for Procurement of Goods, 2017 extracted hereinabove. Admittedly, the petitioner responded to the said e-mail communication of the respondent vide its communication dated 12.07.2021. The said communication reads as follows:

"MDC PHARMACEUTICALS LIMITED
AN ISO 9001:2015 CERTIFIED COMPANY
(Formerly known as MDC Pharmaceuticals Private Limited)

Ref no. MDC/2020-21/072021/06 *Date: 12/07/2021*

To

Dy. Medical Commissioner (R.C.),
Room No. 312 & 314, III Floor,
Hqrs. Office, ESI Corporation, Panchdeep Bhawan,
C.I.G. Road,
New Delhi-110002

Sub: e-Tender Enquiry No. 142C to 146C and 147B –reg.

This is with reference to your email dated 06th July, 2021 for representation against the informed reason.

We would like to make the following representations with regards to your above-mentioned email.

TE No.	*Reason for Rejection*	*Submission*	*Remarks*
142C 143C 145C 146C	*Name and code of the firm differ in ESIC Challans*	*Our company has obtained ESI Registration in 2 States i.e.* *a) Himachal Pradesh (Employer Code no. 14000432970000304) registered vide name MDC PHARMACEUTICALS PVT LTD for manufacturing units situated at Sai Road, Baddi, Distt Solan, Himachal Pradesh* *b) Chandigarh (Employer Code no. 17140310530010304) registered vide*	*ESIC challan attached being a historical document which pre-existed at the time of tender opening and which have not undergone change since then (para 7.3.5 p.no. 95-96 Manual for procurement of goods 2017)* *The tender document is in accordance with GFR, CVC and other guidelines issued by*

		name MDC PHARMACEUTICALS for Head Office situated at Plot No. 213, First Floor, Industrial Area, Phase I, Chandigarh. *We further inform you that our company was converted from private limited to a public limited company on 23rd March, 2018. Copy of certificate for change in name of Company pursuant to a conversion provided by the Drug authority (already submitted with the tender documents) and chalans of ESI Contribution of both the States is attached herewith for your kind consideration. Further our company has been a law-abiding entity and we are regular in payment of ESI contribution and the same can be verified from the ESIC portal. However there has been mismatch in the name of the company in the chalans provided as the chalans attached were of the different employer code i.e. of different states. Last six months (i.e. Oct, 2020, Nov. 2020, Dec. 2020, Jan. 2021, Feb 2021 and March, 2021) challan of ESIC are enclosed for your reference as a historical document. We have already deposited ESIC dues on time. Further we are also enclosing herewith specific schedule of the financial statement specifying the ESIC Contributions made during the year 2019-20. For your further reference we have also provided you the undertaking stating that we are regular in payments of al the employees covered in ESIC.*	*Govt. of India from time to time. Our company is covered under ESIC act.*

For your reference, we hereunder provide you the details of our last six months ESIC paid contributions of both the states:

i. Chandigarh

loyer code no.	*Challan period*	*Challan No.*	*Paid date*	*Amount*
40310530010304	*October,2020*	*01720133458176*	*16.11.2020*	*Rs. 12,281/-*
40310530010304	*Novermber,2020*	*01720136496801*	*15.12.2020*	*Rs. 12,199/-*

17140310530010304	*December, 2020*	*01721102127301*	*13.01.2021*	*Rs. 13,655/-*
17140310530010304	*January, 2021*	*01721105980839*	*15.02.2021*	*Rs. 13.677/-*
17140310530010304	*February, 2021*	*01721109412967*	*15.03.2021*	*Rs. 13,688/-*
17140310530010304	*March, 2021*	*01721113165158*	*16.04.2021*	*Rs. 13,637/-*

ii. Himachal Pradesh

Employer code no.	*Challan period*	*Challan No.*	*Paid date*	*Amount*
14000432970000304	*October,2020*	*01420133482136*	*16.11.2020*	*Rs. 72,755/-*
14000432970000304	*Novermber,2020*	*01420135565411*	*16.12.2020*	*Rs. 71,726/-*
14000432970000304	*December, 2020*	*01421101476900*	*13.11.2021*	*Rs. 72,649/-*
14000432970000304	*January, 2021*	*01421105955467*	*15.02.2021*	*Rs. 76,368/-*
14000432970000304	*February, 2021*	*01421108635612*	*15.03.2021*	*Rs. 75,425/-*
14000432970000304	*March, 2021*	*01421113166189*	*16.04.2021*	*Rs. 79,124/-*

TE No.	*Item No.*	*Item Name and Description as per Drug Schedule 143C*	*Reason for rejection*	*Submission*	*Remarks*
143 C	*2203*	*Terbutaline+ Guiaphenesin+ Ambroxol Syp- Each 5ml to contain Terbutaline I.P. 1.25mg+Guiaphenesin I.P. 50mg+ Ambroxol I.P. 15mg Syrup Base QS*	*Specification of item not as per Drug Schedule*	*Specification of item is as per drug schedule in our D/L mention in "in a mentholated flavoured syrup base q.s." is not an active ingredient in composition. So, there is no question for not meeting the specification as per drug schedule. "reference Indian pharmacopoeia 2007)*	*D/L at p. no. 22*

If the tender is considered then the comparison increases and ESIC will be able to get competitive rates and the financial benefit of the ESIC institution also increases as well.

We again humbly request you to accept our tender for your kind perusal and consideration that the information given by me is true and correct to the best of my knowledge and belief.

For MDC PHARMACEUTICALS LIMITED

Parvinder Singh
Chairman cum whole Time Director"

36. The aforesaid response filed by the Petitioner – on the face of it, only relies on pre-existing documents and records i.e. " *historical documents*

which pre-existed at the time of tender opening and which have not undergone a change since then". Thus, the aforesaid representation could not have been ignored or discarded. In the aforesaid background, the question which arise for our consideration is, whether the petitioner's disqualification, even by the Review TEC, is justified in terms of e-tender enquiry, and the Respondents acted in an arbitrary and unreasonable manner while disqualifying the Petitioner on a hyper-technical ground.

37. The answer to the first question emerges from the proceedings which have taken place before us, and which have been taken note of hereinabove. On a scrutiny of those very documents – which the petitioner filed either with its bids, or with the representation dated 12.07.2021, and from the explanation furnished by the petitioner, after repeated nudging and prodding the respondents have admitted that there are no outstanding dues of the petitioner towards ESI contribution. Nothing prevented the respondent-ESIC from reaching the same conclusion without this Court's intervention. In fact, the respondent was bound to apply its mind to all the relevant materials, and come to a rational and informed decision, which it failed to do when it decided to disqualify the petitioner, and to reaffirm the said decision even on a review.

38. The petitioner had provided the following information/documents to give clarity to the Respondents:

a) It has ESI registration in two states i.e., Chandigarh and Himachal Pradesh and therefore, has two employer code numbers. These were in the names of MDC Pharmaceuticals at

Chandigarh Head Office, and MDC Pharmaceuticals Pvt. Ltd at Baddi, Salon, Himachal Pradesh – the manufacturing units.

b) Furthermore, to make things easier, MDC provided all historical documents in form of ESIC challans, to check for arrears and any other details. Challans issued in both names aforesaid were provided.

c) They also stated in their clarificatory letter that their company was converted from private limited to a public limited company on 23rd March, 2018. A copy of certificate incorporating the change in name of Company by the Drug authority was submitted with the tender documents.

39. The historical documents –which were a creation of the Respondent ESIC itself, viz. the ESI deposit challans were provided by the petitioner, but the respondent ESIC has chosen to not examine the same.

40. The consideration of the petitioner's case by the TEC Review Committee unfortunately exhibits complete non-application of mind by it. It, firstly, records that the "*firm accepts the reason of rejection*." The petitioner has nowhere accepted the reason given by the respondents for rejection of its technical bid. In fact, the case of the petitioner is that the reason, namely, "*The name and code of the firm differ in ESIC challans*" is not correct, since the petitioner had, at the outset, informed the respondents while submitting its bid that the petitioner was operating under 2 names, and codes, and the name of the petitioner company, upon the petitioner becoming a limited company had changed from MDC Pharmaceuticals Private Limited to MDC Pharmaceuticals Limited. The fact that the petitioner had preferred the present writ petition itself shows that the

petitioner had not accepted the so called reason of rejection. A perusal of the petitioner's communication dated 12.07.2021 extracted hereinabove also shows that the petitioner never accepted the so called reason for rejection. The TEC Review Committee further states "*explanation reviewed and does not adhere to Clause 5(XIII) of TE. Reply not found satisfactory. Firm not eligible*."

41. The Review Committee of the respondent, however, does not state as to why the explanation furnished by the petitioner in its communication dated 12.07.2021 was held to be as not adhering to Clause 5(XIII) of the TE. Clause 5(XIII) oblige the petitioner to submit employer code number and copy of last three contributions towards ESI in case factory is covered under ESI Act. That was done by the petitioner, not only while submitting the bid, but also while submitting the clarification on 12.07.2021 in terms of the opportunity provided to the petitioner. Even during arguments, learned counsel for the respondent has not been able to state as to why the Review TEC Committee observed – and what it means, when it states that the explanation does not adhere to Clause 5(XIII) of the TE. As noticed hereinabove, the purpose of requiring the bidders to submit their name and employer code number, and copy of last 3 contributions towards ESI, was to ensure that the bidder was in compliance of the provisions of the ESI Act, if it was covered by the said Act.

42. Admittedly, the respondents have found that the petitioner was in compliance, and was not in default in the matter of deposit of ESI dues of its employees either at its head office at Chandigarh, or its factory at Baddi, Himachal Pradesh. This was so admitted before us on 18.01.2021. If the

reason given by the TEC of the respondents for the initial disqualification of the petitioner, namely, that the "*name and code of the firm differ in ESIC Challans*", were to be accepted, the respondent would not have been in a position to state before this Court that there is no ESIC Dues outstanding of the petitioner. The decision taken by the respondents to declare the petitioner technically disqualified, and not eligible, is therefore, not only wrong but irrational and arbitrary.

43. We have held in our decisions in ***Xcellance medical Technologies Private Limited v. HLL Infra Tech Services & Anr.***[1] that '*the tender authority should not have a myopic view. Its objective should be to encourage maximum participation in a fair manner…*'. Therefore, the tendering authority which issues a public tender should ensure that each decision should be made bearing public's interest in mind. The TEC while considering and evaluating bids cannot act in a mechanical manner. It is not a post office, or a mechanical computer, and comprises – as its members, highly intelligent and qualified people, who are experts in their fields. They are expected to sift through information in a reasonable manner, and apply their mind to the same. They are to evaluate tenders to derive maximum benefit and should keep their ultimate goal in mind – which in the present case is welfare of workers. Additionally, it should keep in mind that the purpose of tenders is to get maximum participation, and not stump the bidders on hyper technical grounds, only because the examination of their bids requires some application of mind. Pertinently, the respondent ESIC itself holds the records in relation to the deposit of ESI dues by an employer.

[1] W.P.(C) 6643/2021, High Court of Delhi.

The petitioner had not only provided the employer name and code numbers, but also the ESI Challans by which ESI dues were deposited. All that the respondent was required to do was to check, at its own end, whether the petitioner's claim that it made deposits in respect of its employees – both at the head office and at the factory premises, was correct. Is it to be expected that even this minimal scrutiny and verification would not be undertaken by the TEC while examining the bids? If these aspects had been kept in mind, the petitioner would not have disqualified initially, or at least after the petitioner furnished the clarification. Admittedly, MDC is the lowest bidder for the four items.

44. Furthermore, the manual for Procurement of Goods, 2017 issued by the Govt. of India, Ministry of Finance, Department of Expenditure, provides that minor infirmities, irregularities, or non-conformities during the preliminary examination of the tenders should not prejudice or effect the fate of the tenderers. Therefore, even if, one were to assume that there was any infirmity, irregularity, or non-conformity found by the TEC of the respondents, the same was minor. If it had not been so, the respondent ESIC would not have given an opportunity to the petitioner to represent against the disqualification communicated to the petitioner vide email dated 06.07.2021 in the first place.

45. Keeping in mind the above, the financial bids of the Petitioner have been opened and in respect of four items out of 15 for which the petitioner had submitted its bid, the petitioner was the lowest bidders. The difference between the Petitioner's bid and the next lowest bid is more than double in respect of Tolperisone Hcl. The following chart provides the comparison between the Petitioner's bid and the L1 rates found by the respondents.

Sr No.	Description	Tender No	Item Code	Unit Size	Petitioner's Rate Quoted	L-1 Rate & Company
1.	Tolperisone Hcl Tab / Cap- Each Tab / Cap contain: Tolperisone Hcl 150 mg	142-C	1545A	1Tab/ Cap	Rs. 1.36	Rs. 3.18 Themis
2.	Methylprednisolone Tab / Cap- Each Tab / Cap to contain: Methylprednisolone 4 mg	145-C	466A	1Tab/ Cap	Rs. 1.32	Rs. 1.36 Mesmer Pharma
3.	Hydroxyzine Hydrochloride Syp- Each 5ml to contain: Hydroxyzine Hydrochloride 10mg	143-C	1570	100 ML Bottle	Rs. 24.8	Rs. 39 Relax Pharma
4.	Potassium + Magnesium Syp- Each 5ml to contain: Potassium Citrate IP 1100mg, Magnesium Citrate USP 375mg, Pyridoxine Hcl IP 20mg, (Each ml to contain: Approx 1mEq Magnesium Ion, Patassium Ion, 3mEq Citrate Ion and 4mg Of Pyridoxine Hcl) 1 TAB/CAP	143-C	2075	200 ML Bottle	Rs. 61.4	Rs. 72 Overseas Health Care

46. The Supreme Court has held in ***B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.***,[2] that when huge public money is involved, the tender authority may accept a bid which economically beneficial to it. The relevant extract from the judgment is as under:

> "***69***. *While saying so, however, we would like to observe that having regard to the fact that huge public money is involved, a public sector undertaking in view of the principles of good corporate governance may accept such tenders which are economically beneficial to it. It may be true that essential terms of the contract were required to be fulfilled. If a party failed and/or neglected to comply with the requisite conditions which were essential for consideration of its case by the employer, it cannot supply the details at a later stage or quote*

[2] (2006) 11 SCC 548

a lower rate upon ascertaining the rate quoted by others. Whether an employer has power of relaxation must be found out not only from the terms of the notice inviting tender but also the general practice prevailing in India. For the said purpose, the court may consider the practice prevailing in the past. Keeping in view a particular object, if in effect and substance it is found that the offer made by one of the bidders substantially satisfies the requirements of the conditions of notice inviting tender, the employer may be said to have a general power of relaxation in that behalf. Once such a power is exercised, one of the questions which would arise for consideration by the superior courts would be as to whether exercise of such power was fair, reasonable and bona fide. If the answer thereto is not in the negative, save and except for sufficient and cogent reasons, the writ courts would be well advised to refrain themselves in exercise of their discretionary jurisdiction."

47. The scope of judicial review and scrutiny encompasses arbitrary, unreasonable, and illegal treatment by the Respondent. This has also been held in in the Supreme Court judgment of ***Tata Cellular v. Union of India***[3] that -

"*77. ...*
Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) *Irrationality, namely, Wednesbury unreasonableness.*

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[3] (1994) 6 SCC 651.

(iii) *Procedural impropriety*."

48. In light of the above, the petition is allowed, and the Respondent is directed to consider the Petitioner's bid as technically eligible for the four items quoted below.

Sr No.	Description	Tender No	Item Code	Unit Size
1.	Tolperisone Hcl Tab / Cap- Each Tab / Cap contain: Tolperisone Hcl 150 mg	142-C	1545A	1Tab/Cap
2.	Methylprednisolone Tab / Cap- Each Tab / Cap to contain: Methylprednisolone 4 mg	145-C	466A	1Tab/Cap
3.	Hydroxyzine Hydrochloride Syp-Each 5ml to contain: Hydroxyzine Hydrochloride 10mg	143-C	1570	100 ML Bottle
4.	Potassium + Magnesium Syp- Each 5ml to contain: Potassium Citrate IP 1100mg, Magnesium Citrate USP 375mg, Pyridoxine Hcl IP 20mg, (Each ml to contain: Approx ImEq Magnesium Ion, 2mEq Patassium Ion, 3mEq Citrate Ion and 4mg Of Pyridoxine Hcl) 1 TAB/CAP	143-C	2075	200 ML Bottle

49. Since the petitioner is the lowest bidder in respect of the aforesaid four items, the respondent shall proceed in accordance with the law in the matter of award of the contracts for the said items. The parties are left to bear their own costs.

(VIPIN SANGHI)
JUDGE

(JASMEET SINGH)
JUDGE

FEBRUARY 16, 2022