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INDIAN ANTITRUST APPELLATE AUTHORITY REMANDS TYRE CARTEL DECISION BACK TO CCI

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On 1 December 2022, the National Company Law Appellate Tribunal (NCLAT) disposed of appeals filed against the Competition Commission of India's (CCI) order¹ which found a few tyre manufacturers guilty of cartelisation (Order) and remanded the matter back to the CCI for review.²

Background

The Ministry of Corporate Affairs (MCA), through a reference dated 16 December 2013, informed the CCI that tyre manufacturers may have engaged in anti-competitive practices. The CCI formed a *prima facie* view on 24 June 2014 after considering the reference and directed the office of the Director General (DG) to investigate the allegations. Besides the tyre manufacturers, the CCI's *prima facie* order directed investigation against the Automotive Tyre Manufacturers' Association (ATMA).

(The tyre manufacturers and ATMA are collectively referred to as Parties)

DG's Investigation

The DG submitted its investigation report in late 2015 concluding that the Parties have indulged in cartel conduct by indirectly determining the sale prices of tyres from 2011-12 to 2013-14 in the domestic tyre market. The DG's conclusions relied primarily on factors like identical percentage increase in the tyre prices of different tyre manufacturers, communication evidence (e-mails and meetings) and a disproportionate increase in profit margins.

CCI's Observations and Analysis

Economic evidence

The CCI observed that the tyre prices of different tyre manufacturers moved in tandem exhibiting price parallelism, varying within a small range of 10-11%. It noted that despite a decrease in raw material costs, tyre prices increased and market shares remained stable. The CCI additionally highlighted the improving financial performance and increasing profit margins of the tyre manufacturers during the alleged cartel period.

¹ Ministry of Corporate Affairs v. Apollo Tyres Limited and Others, Order dated 31 August 2018 in Reference Case No. 08 of 2013.

² Apollo Tyres Limited v. Competition Commission of India and Others, Judgement dated 1 December 2022 in Competition Appeal (AT) No. 10 of 2022 and other connected matters.

Communication evidence

The CCI heavily relied on an e-mail which specifically mentioned a price increase of 10.5% which was, as per the DG's findings, in line with the actual percentage increase in the tyre prices of each tyre manufacturer. The CCI also considered other e-mails and meetings conducted by ATMA among the tyre manufacturers.

Findings

After analysing the aforementioned factors, the CCI, *vide* its Order dated 31 August 2018, concluded that the Parties (i) acted in concert and increased the prices of, and (ii) limited and controlled the production and supply of, truck-bus bias tyre variants sold in the replacement market (TBB Replacement Market). This conduct was in contravention of Sections 3(3)(a) and 3(3)(b) of the Competition Act, 2002 (Act). The CCI also held certain office bearers of the Parties liable under Section 48 of the Act. The CCI, however, limited its finding of cartelisation to a period of one year, i.e., 2011-12.

While the CCI's Order was passed in August 2018, due to certain pending litigations before the Madras High Court and later before the Supreme Court of India challenging the validity of the reference and investigation, the order was sealed until such proceedings concluded. Hence, the order was communicated to the Parties in February 2022.

NCLAT's Judgement

Initial Analysis

Before scrutinising the challenges to the CCI's Order, the NCLAT was mindful of analysing the CCI's decision in the previous tyre cartel matter³, wherein the CCI had not found sufficient evidence of cartelisation against the Parties. This decision was also confirmed by the erstwhile Competition Appellate Tribunal.

Parties' Submissions

The Parties argued on multiple grounds, including challenges to the validity of the reference as well as the constitutionality of the CCI's Order. The Parties highlighted the repeated complaints filed by the All India Tyre Dealers' Federation before different forums in an attempt to adversely affect the business of domestic tyre manufacturers.

On merits, the Parties contended that both the DG and the CCI had made gross arithmetical errors in calculating the percentage increases in tyre prices of the involved tyre manufacturers. As per the Parties, the correct percentages did not indicate any kind of price parallelism. Further, the Parties highlighted that the price increases had not kept up with the significant increase in raw material costs during the same period.

The Parties also *inter alia* made submissions regarding (i) use of the incorrect basis for calculating correlation coefficient, (ii) wrong consideration of the net dealer price which did not include certain discounts and rebates, (iii) restriction of the investigation to the TBB Replacement Market, (iv) failure to consider internal e-mail communications, (v) cherry-picking of certain tyre manufacturers, (vi) incorrect market share analysis, (vii) incorrect analysis of profit margins, (viii) lack of any nexus between any e-mail and the actual percentage increases in tyre prices, (ix) failure to consider the oligopolistic nature of the tyre industry, (x) incorrect findings against individuals under Section 48 of the Act, and (xi) imposition of disproportionate penalty against the principles

³ *All India Tyre Dealers' Federation v. Tyre Manufacturers*, Order dated 30 October 2012 in MRTP Case RTPE No. 20 of 2008.

established by the Supreme Court of India in *Excel Crop Care Limited v. Competition Commission of India and Another*⁴ .

The Parties highlighted that despite an absence of any investigation or analysis by the DG or the CCI on the restriction of production and supply of tyres, the CCI had erroneously held the Parties liable under the corresponding Section 3(3)(b) of the Act.

Observations

Based on the calculation errors and other flaws highlighted by the Parties, the NCLAT observed a possible non-existence of price parallelism and insufficiency of evidence to prove any agreement among the Parties. The NCLAT noted that this could indicate a lack of violation of the Act. As a result, the NCLAT opined that the case should be remitted back to the CCI to re-examine the arithmetical errors and review the penalty imposed. Hence, the NCLAT remanded the matter back to the CCI for review.

While the NCLAT has remanded the matter back to the CCI, it has also made certain conclusive determinations. Based on the CCI's admission that the inclusion of Section 3(3)(b) in the Order was a typographical error, the NCLAT has concluded that the question of contravention of Section 3(3)(b) by the Parties does not arise.

Notably, the NCLAT has concluded that the mere forwarding of a letter by the MCA does not amount to a reference under Section 19(1)(b) of the Act. It has opined that non-compliance of the Competition Commission of India (General) Regulations, 2009 (Regulations) can cause a reference to be invalid in law.

The Khaitan Competition / Antitrust Team represented Apollo Tyres Limited and its officials in their appeals before the NCLAT. The team comprised of Manas Kumar Chaudhuri (Partner), Sagardeep Rathi (Partner), Aman Singh Baroka (Senior Associate), Alisha Mehra (Senior Associate), and Armaan Gupta (Associate).

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⁴ Judgement dated 8 May 2017 in Civil Appeal No. 2480 of 2014.