सत्यमेव जयते

Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

7th May, 2018

Penalty proceedings under Section 43A of the Competition Act, 2002 against against Intellect Design Arena Limited

CORAM:

Mr. Devender Kumar Sikri
Chairperson

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U.C. Nahta
Member

Legal representative: J. Sagar Associates

Order under Section 43A of the Competition Act, 2002

1. While assessing the combination notice bearing Combination Registration No. C-2015/12/348, it was revealed that through a "Scheme of Arrangement cum Demerger" ("**Scheme**"), approved by a board resolution dated 18th March, 2014, Polaris Financial Technology Limited ("**PFTL**") had demerged its "products business" on a going concern basis. The demerged business was, subsequently, acquired by Intellect Design Arena Limited (a company incorporated under the Companies Act, 1956) ("**IDAL**") ("**Transaction**"). The Commission also observed that *prima facie*, the jurisdictional thresholds under Section 5 of the Competition Act, 2002 ("**Act**") seems to have been met in the said Transaction and that no notice, under sub-section (2) of Section 6 of the Act, was given to the Commission. (Hereinafter, IDAL and PFTL are collectively referred to as "**Parties**").

Background

2. Based on the said information, the Commission, in its meeting held on 4th February, 2016, decided to initiate penalty proceedings under Section 43A of the Act against IDAL for failing to give notice to the Commission under Sub-section (2) of Section 6 of the Act. Accordingly, a Show Cause Notice dated 23rd February, 2016 ("**SCN**") was issued to IDAL, directing it to show cause in writing, within 15 days of the receipt of the SCN, as to why IDAL had not contravened the provisions of Sub-section (2) of Section 6 of the Act and why penalty, in terms of Section 43A of the Act, should not be imposed on IDAL.

3. *Vide* its letter dated 29th March, 2016, IDAL responded to the SCN, after seeking extension of time. The Commission, in its meeting held on 27th July, 2016, considered the matter and directed IDAL to appear for oral hearing on 1st November, 2016

4. On 1st November, 2016, Commission heard IDAL. In the said meeting, the Commission directed to seek certain information from IDAL: (i) consolidated balance sheet of PFTL and its subsidiaries for FY 2012-13 along with all relevant documents; (ii) certificate from a chartered accountant in relation to assets and turnover of PFTL group in India for FY 2012-13; and (iii) information in relation to effective date of the Scheme. Accordingly, *vide* letter dated 10thNovember, 2016, IDAL was asked to furnish requisite information, to which IDAL responded on 22nd November, 2016.

5. Subsequently, IDAL requested for inspection of documents on records, under Regulation 50 of the Competition Commission of India (General) Regulations, 2009 ("**General Regulations**"), and under Regulation 37(1) of the General Regulations, IDAL was allowed to inspect the requisite documents.

6. Further, the Commission again heard the authorized legal representatives of IDAL on 23rd August, 2017.

Proceedings under Section 43A of the Act

7. In terms of Sub-section (2) of Section 6 of the Act, any person or an enterprise, who or which proposes to enter into a combination, is required to give notice to the Commission,

disclosing the details of the combination, within thirty days of execution of any agreement or other document for acquisition. Sub-section (2) of Section 6 of the Act reads as under:

"*…… any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission……. disclosing the details of the proposed combination, within thirty days of……. execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section*" (emphasis added)

8. The Commission observed that *prima facie* the Transaction does not fall under *de minimis exemption* and the Parties satisfy jurisdictional threshold, in terms of combined assets and turnover of the Parties, as provided in Section 5 of the Act, for the reasons set forth in subsequent paragraphs. Accordingly, in terms of Sub-section (2) of Section 6 of the Act, IDAL ought to have filed the notice regarding the combination with the Commission within thirty days of the execution of the binding agreement. However, IDAL consummated the transaction and did not notify the Commission of the Transaction. In view of the above, the Commission was of the *prima facie* opinion that IDAL failed to give notice of the combination under sub-section (2) of Section 6 of the Act and consummated the same. The Commission observed that failure to give notice in accordance with sub-section (2) of Section 6 of the Act attracts penalty under Section 43A of the Act.

Submissions of IDAL and observation of the Commission in relation to the 43A proceedings

9. *Aspect 1: Turnover of PFTL is less than INR 750 crore for financial year ending 31st March, 2013 and hence, the Transaction is exempt under De Minimis exemption.*

9.1 *Submission of IDAL*

a) It has been submitted that acquisition of 'products business' of IDAL by PFTL ("**Transaction**") was exempt from the provisions of Section 5 of the Act. In support of claiming such exemption, IDAL has referred to notification S.O. No. 482(E) dated 04.03.2011 read with corrigendum notification S.O. No. 1218(E) dated 27.05.2011 issued by Ministry of Corporate Affairs, Government of India (hereinafter referred to as **"Target Exemption Notifications"**). The said notification, as amended by

corrigendum notification, reads, "*In exercise of the powers conferred by clause (a) of Section 54 of the Competition Act, 2002 (12 of 2003), the Central Government, in public interest, hereby exempts an enterprise, whose control, shares, voting rights or assets are being acquired has either assets of the value of not more than Rs. 250 crore in India or turnover of not more than Rs. 750 crore in India from the provisions of Section 5 of the said Act for a period of five years*".

b) For the purposes of claiming exemption, IDAL has submitted that "*the assets in India would be the value of assets situated in India and the turnover (income from sale of goods and services) in India would be the value of the services rendered or goods sold in India i.e. to customers located in India*". IDAL has further submitted that PFTL's total revenue attributable to India and Middle-East is Rs. 576.94 crores (financial year 2012-13) out of its total revenue of Rs. 1,853.99 crore. As per annual report of PFTL for 2012-13, geographical segmentation (revenues by geographic area based on the geographic location of the customer) has been done in accordance with the provisions of Accounting Standard 17 (**"AS-17"**). Further, total standalone assets of PFTL for financial year 2012-13 is Rs 1,670.81 crore out of which Rs 301.25 crore accounted for India and Middle East (after making adjustments).

c) IDAL has argued that turnover generated in India should be considered for the purposes of Section 5 of the Act. In this regard, IDAL has argued that Section 5 of the Act (particularly Section 5 (a) of the Act) provides two distinct and separate thresholds, one for turnover of the parties to the acquisition in India, and one for turnover of the parties to the acquisition in India or outside India. This implies that the turnover of a party in India would be the turnover generated by the party in India, and turnover of party worldwide would include the turnover generated by a party worldwide, including India.

d) Further, Target Exemption Notification was amended in May 2011 by the corrigendum which specifically added the reference 'to India' in relation to both assets and turnover. Therefore, a clear distinction has been made between turnover in India and turnover outside India by the legislature under the Act.

e) Further, IDAL has stated that in case the Commission takes any contrary interpretation this would result in the unintended and irrational consequence that a company which has a minute turnover in the Indian market (the market with which the Commission is essentially concerned) but earns most of its revenue from exports into overseas markets (which have their own regulators) would be susceptible to inquiry under the Act.

f) Thus, IDAL concluded that as the turnover attributable to the Middle East and India was cumulatively Rs. 576.94 crores for the relevant financial year, it stands to reason that the total revenue attributable to only India would be lesser than this. This was below the turnover threshold of Rs. 750 crores set out under the Target Exemption Notification. Thus, the benefit of *de minimis* exemption was available to IDAL and thus, there was no requirement to notify the Transaction to the Commission under Sub-section (2) of Section 6 of the Act. Accordingly, there was no contravention of the provisions of the Act. In the absence of a contravention, the provisions of Section 43A of the Act are not attracted and therefore, no penalty should be imposed on IDAL under Section 43A of the Act for the same.

9.2 *Observations of the Commission*

a) The Commission noted that IDAL has emphasised that *"total revenue attributable to India and the Middle East is Rs. 576.94 crores on the basis of geographical segmentation in accordance with the provisions of AS 17".*

b) *Interpretation of Turnover in India*

i. The Commission noted that Section 5 of the Act prescribes considering assets and turnover of the parties to the combination in India. The issue in the instant case is interpretation of words 'in India' for turnover as they appear in Section 5 of the Act. In this context, the Commission observed that its decisional practice has been to consider that value of turnover, which has been provided in the books of accounts of the enterprise concerned.

ii. In this regard, the Commission noted that in terms of Section 2(y) of the Act, "turnover" includes "value of sale of goods or services". Thus, the statutory definition of turnover under the Act does not provide that turnover as reported for a particular geographic segment, which may be recognised as reportable segment at the discretion of the management of the enterprise concerned, is to be considered as turnover for purposes of Section 5 of the Act. In this context, it is noted that in terms of explanation (c) to Section 5 of the Act,

"the value of assets shall be determined by taking the book value of the assets as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout-design or similar other commercial rights, if any, referred to in sub-section (5) of Section 3".

iii. Accordingly, value of turnover is taken as provided in the books of accounts of the enterprise concerned. In the instant case, as per the books of account, total turnover of PFTL in India for FY 2012-13 was Rs. 1,853.90 crore. Thus, based on the book value, assets and turnover of PFTL, exceeds the *De Minims* Exemption threshold applicable at that point of time and therefore the said combination becomes a notifiable transaction.

10. *Aspect 2: Issue pertaining to period of limitation from inquiring into a combination by the Commission.*

10.1 *Submission of IDAL:* IDAL, in its response, has stated that "*For levying a penalty on an enterprise under Section 43A of the Act, the Commission has to come to a finding that there has been a contravention of the Act by the enterprise. Such a finding can be arrived at by the Commission only pursuant to an inquiry into whether the candidate transaction is a 'combination'. Such inquiry itself by the Commission however has a*

bar of limitation of one year from the date of coming into effect of the 'combination' (provided under Section 20(1) of the Act)."

10.2 *Observation of the Commission*

a) Section 20(1) of the Act provides:

"The Commission may, upon its own knowledge or information relating to acquisition referred to in clause (a) of Section 5 or acquiring of control referred to in clause (b) of Section 5 or merger or amalgamation referred to in clause (c) of that Section, inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India:

Provided that the Commission shall not initiate an inquiry under this sub-section after expiry of one year from the date on which such combination has taken effect."

b) Thus, *proviso* to Section 20(1) of the Act only provides limitation of one year on competition assessment of a combination by the Commission and not on the aspect of initiation of proceedings under Section 43A of the Act. The provisions of Section 43A of the Act relate to imposition of penalty for non-submission of information on a notifiable combination. Section 43A of the Act provides for deterrence in cases where combination, which were required to be notified, were not notified to the Commission, before consummation.

c) The Commission after ascertaining under Section 20(1) of the Act that the transaction is a combination under Section 5 of the Act, proceeds as per provisions of Section 43A of the Act, if required.

11. In view of the foregoing, the Commission is of the considered opinion that there is a contravention of the provisions of sub-section (2) of Section 6 of the Act as IDAL has failed to notify the Transaction within stipulated time and also consummated the same.

12. It is reiterated that the Act clearly provides, irrespective of whether there is any appreciable adverse effect on Competition in India or not, there is mandatory regime for notifying a combination to the Commission.

13. In view of the foregoing, it emerges that IDAL has failed to give notice to the Commission in accordance with the provision of sub-section (2) of Section 6, which attracts penalty under Section 43A of the Act. Section 43A of the Act reads as under:

"If any person or enterprise who fails to give notice to the Commission under sub-section (2) of Section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one per cent of the total turnover or assets, whichever is higher, of such a combination"

14. Accordingly, in terms of Section 43A of the Act, a maximum penalty of one per cent of the combined value of turnover of the Parties in India can be imposed. However, considering the totality of the facts of the case and explanation given by IDAL, the Commission deemed it appropriate to impose a penalty of INR 10,00,000/- lakh (INR ten lakh only) on IDAL.

15. IDAL shall pay the penalty within sixty (60) days from the date of receipt of this order.

16. The Secretary is directed to communicate to IDAL accordingly.