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## COMPETITION COMMISSION OF INDIA

Case No. 22 of 2021

### In Re:

**Kalpit Sultania,  
H. No. G-401, Rashmi Apartment, Harsh Vihar,  
Pitampura, Saraswati Vihar S.O.,  
North-West Delhi, Delhi - 110034.**

**Informant**

### And

**IREL (India) Ltd.,  
Plot No. 1207, ECIL Building,  
Veer Savarkar Marg,  
Opp. Siddhivinayak Temple,  
Prabhadevi, Mumbai - 400028.**

**Opposite Party**

### CORAM:

**Ravneet Kaur  
Chairperson**

**Anil Agrawal  
Member**

**Sweta Kakkad  
Member**

**Deepak Anurag  
Member**

### Present:

For Informant:

Ankur Sood, Advocate  
Roshan Santhalia, Advocate  
Puja Jakhar, Advocate

For Opposite Party:

Tarun Gulati, Senior Advocate  
Abhay Joshi, Advocate  
Aayushi Sharma, Advocate  
Kumar Sambav, Advocate  
Bhaavi Agrawal, Advocate  
G. Balasubramanian, GM, IREL



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## ORDER

### ***Brief Facts as per Information***

1. This order shall dispose of the Information filed under Section 19(1)(a) of the Competition Act, 2002, ('Act') by Mr. Kalpit Sultania ('Informant'), alleging contravention of the provisions of Section 4 of the Act by IREL (India) Ltd. ('OP'/ 'IREL').
2. As stated in the Information, OP is a Government of India ('GOI') undertaking under the administrative control of Department of Atomic Energy ('DAE') and is engaged in production and sale of minerals such as Ilmenite, Rutile, Zircon, Monazite, Sillimanite and Garnet as well as various value-added products through four operational units located in the States of Odisha, Kerala and Tamil Nadu. The Information relates to the actions of OP *vis-à-vis* Beach Sand Sillimanite and does not concern OP's other activities.
3. As per the Informant, Sillimanite is a natural sand-based product generated during the extraction of rare earth compounds from beach sand and is of two types *viz.*, Beach Sand Sillimanite/ Sillimanite and underground mined Sillimanite; which are qualitatively different from each other. Beach Sand Sillimanite is used primarily by refractory manufacturers for lining furnaces and it is also used in the ceramic industry. It is also stated that underground mined Sillimanite available in India has excessive impurities that diminishes the quality of the refractory and is therefore, neither cost effective nor can it replace Beach Sand Sillimanite.
4. The Informant has averred that imported Andalusite is the closest replacement of Sillimanite in terms of quality; however, the former is expensive *vis-à-vis* the latter, which makes Andalusite not an effective substitute of Beach Sand Sillimanite.
5. It is stated that earlier, mining and supply of Beach Sand Sillimanite was permitted to be undertaken by both public and private enterprises. In 2016, Sillimanite was included in the category of atomic minerals by Central Government Notification



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No. S. O. 2356 (E) dated 11.07.2016. Subsequently, the DAE, *vide* Notification S.O. 2685 (E) dated 27.07.2019, prohibited grant of operating rights in respect of atomic minerals in any offshore areas in the country to any person, except the Government or a Government Company or a Corporation owned or controlled by the Government. This prohibition made OP the only corporation engaged in the production of Beach Sand Sillimanite in India.

6. In relation to the allegations, the Informant has suggested the relevant market to be “*mining and supply of Beach Sand Sillimanite in India*”.
7. As per the Informant, OP has abused its dominant position in the relevant market by:
  - i. indulging in prohibitive increase in the prices of Sillimanite from Rs. 9000/- Per Metric Ton in 2016-17 to Rs. 14000/- Per Metric Ton in 2020-2021;
  - ii. following discriminatory pricing against the interests of the Micro, Small & Medium Enterprises (‘MSMEs’) in the domestic market, while favouring multi-nationals and/or foreign parties - it was stated that rates for domestic MSMEs was Rs. 14000/- Per Metric Ton which was higher than the rate of Rs. 11,000/- being charged from foreign companies/ multi-nationals; and
  - iii. fixing the supply of Beach Sand Sillimanite as per its whims and fancies and forcing its customer to accept arbitrary quantity.
8. In view of the above, the Informant has alleged that the OP has contravened the provisions of Section 4(2)(a)(i) and Section 4(2)(b)(i) of the Act.

***Prima-facie consideration by the Commission***

9. The Commission considered the Information in its ordinary meeting held on 01.09.2021 and directed OP to file para-wise reply/ response(s) along with documents, if any, by 04.10.2021, with an advance copy to the Informant. The Informant was also directed to file comments to the reply/ response(s) of OP, if any, latest by 22.10.2021. In compliance of the direction of the Commission, both OP



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and Informant filed their respective reply/response(s) on 16.11.2021, and 06.12.2021, after seeking extension of time.

10. In view of the submission of the Informant and OP, the Commission was of the *prima facie* opinion that OP is an ‘enterprise’ under extant provision of Section 2(h) of the Act. The Commission noted that the Informant has delineated the relevant market as “*mining and supply of Beach Sand Sillimanite in India*”, which has not been denied by the OP. For the reasons adduced by the Informant, the Commission was of the opinion that the relevant market in the instant case is ‘*mining and supply of Beach Sand Sillimanite in India*’. On the issue of dominance of OP in the relevant market, the Commission noted that the OP has acquired a dominant position by virtue of it being a government owned company having exclusive right to undertake mining and supply of BSM (including Sillimanite) in India. Based on facts and circumstances of the case, the Commission noted that OP enjoys economic power and commercial advantage which allows it to operate independently of the market forces. Accordingly, the Commission was *prima facie* satisfied that there existed a case of contravention of Section 4 of the Act, as alleged by the Informant and *vide* an order dated 03.01.2022 passed under Section 26(1) of the Act, directed the Director General (‘DG’) to cause an investigation into the matter and submit a report.

### ***DG Investigation Report***

11. The DG submitted its Investigation Report on 22.07.2022, in confidential and non-confidential version, after seeking extensions of time. The findings of the Investigation Report are summarised below.
12. As per the Atomic Energy Act, 1962, Beach Sand Minerals is a suite of seven minerals which includes Monazite (a prescribed substance) besides Zircon, Ilmenite, Rutile, Leucoxene, Garnet & Sillimanite. In the process of extraction, through sequential concentration of Monazite & Zircon, Sillimanite is produced as a by-product. Since all these minerals occur together, in order to conserve the strategic mineral in the beach sand, entire BSM was included in the list of atomic



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minerals under Mines and Minerals (Development and Regulation) Act, 1957 ('**MMDR**'). By virtue of Atomic Minerals Concession Rule, 2016 and notification dated 27.07.2019, mining of Sillimanite by private companies stood completely prohibited. Further, Ministry of Mines, *vide* its order dated 01.03.2019, terminated all mineral concessions of BSM found in the teri ore beach sand, held by private companies. However, the private enterprises were allowed to procure, process and trade the beach sand minerals except Monazite.

13. The DG found that OP is an 'enterprise' for the purpose of the present case as the allegations pertain to its activities with respect to the Beach Sand Sillimanite and not the other activities/operations carried out by it. Further, the DG noted that Sillimanite is a by-product and not a strategic mineral obtained during the extraction process of BSMs. Beach Sand Sillimanite is not used by OP in atomic energy, currency, defense and space, hence mining/production of the same is not a sovereign function performed by the OP.
14. Based on the submission of OP, Informant and third parties, the DG concluded that underground mined Sillimanite is not substitutable with Beach Sand Sillimanite on account of two major factors:
  - a. Underground mined Sillimanite contains impurities and high iron content material which is not usable in manufacturing high quality refractory bricks.
  - b. Underground mined Sillimanite available in India is of poor quality and is not cost effective as crushing and grinding processes are required before using it.
15. The DG also analysed substitutability between Sillimanite and Andalusite, Sillimanite and Kyanite, Sillimanite and Bauxite and Sillimanite and grogs & aggregates *etc.* On the basis of price, physical/chemical properties, presence of impurities *etc.*, the DG concluded that Beach Sand Sillimanite is not substitutable with Kyanite/Andalusite/Bauxite and others. The DG also compared the average price charged by OP and Kerala Minerals and Metals Ltd. ('**KMML**') (a government of Kerala undertaking) and found that the price charged by KMML is much higher than the price charged by OP, which indicates high consumer



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dependency on Beach Sand Sillimanite, non-existence of countervailing buying power with the consumers and non-availability of economically viable substitute in the market. Therefore, the DG defined relevant product market as '*mining and supply of Beach Sand Sillimanite*'. Further, the DG noted that there are no geographical barriers for production and sale of relevant product and conditions of competition for supply of Beach Sand Sillimanite are distinctly homogenous all over India. Thus, the DG delineated the relevant market in the instant matter as "*mining and supply of Beach Sand Sillimanite in India*".

16. The DG noted that by virtue of Central Government Notification dated 27.07.2019, only two entities namely; OP and KMML remained in the business of mining and production of Beach Sand Sillimanite in India. The DG noted that market share of OP is above [REDACTED] for the period of alleged abuse and it also enjoys considerable financial power, resources and infrastructure in the relevant market, especially from 2019-20 onwards. In addition, based on the OP's commercial advantage over its competitors, its significant control over supply, dependence of the consumers on OP, dominant position acquired by OP as a result of Government Policy, high entry barriers (regulatory barriers) in the relevant market and no countervailing buying power of the consumers, the DG concluded that OP holds dominant position in the relevant market.

17. With regard to the allegations regarding excessive pricing, the DG, on the basis of data submitted by OP for the period from 2015-16 to 2020-21 relating to the cost of production and price of relevant product, concluded that the [REDACTED]. Further on the basis of price cost margin, the DG found that profitability of OP [REDACTED]. Accordingly, the DG concluded that OP, by charging unfair prices in the relevant market of Beach Sand Sillimanite in India, has contravened the provisions of Section 4(2)(a)(ii) of the Act.

18. In relation to the allegation of discriminatory pricing and supply conditions, the DG noted that [REDACTED]



[REDACTED] for which it entered into long term contract with [REDACTED], followed by another agreement in [REDACTED] and an agreement [REDACTED]. The DG found that unlike the agreement of [REDACTED], the agreement of [REDACTED] which was for [REDACTED] only but was termed by OP as long-term contract. As per the DG, this was an attempt to distinguish the said long term agreement with [REDACTED] and other [REDACTED] agreement entered by way of Expression of Interests ('EOIs') with other parties.

19. The DG observed that the *w.e.f.* [REDACTED], OP started charging [REDACTED] per MT from all the consumers. However, prices charged from [REDACTED] was around Rs. [REDACTED] per MT for the year [REDACTED] and [REDACTED]. Therefore, the decision of IREL to enter into long term contract with [REDACTED] at such low prices by allowing discounts on bulk quantity shows the discriminatory pricing policy of OP in favour of [REDACTED]. Considering these factors, the DG concluded that IREL was engaged in discriminatory pricing in the Beach Sand Sillimanite market in India in contravention of Section 4(2)(a)(ii) of the Act.

20. As regards the allegation of discriminatory supply conditions, the DG found that OP neither accepted nor negotiated the quantity of Beach Sand Sillimanite requested by the consumers in response to EOIs issued by it. Rather, it offered a standard Quality Sales Contract ('QSC') which contained pre-determined quantity for each such buyer. The DG observed that OP supplied more quantity to MNCs/foreign companies than what was supplied to domestic consumers which resulted in restricted supply for MSME consumers, thus harming their interests. [REDACTED]  
[REDACTED], in other cases, only OP had the prerogative of levying penalty as well as denying supply in case of default by other customers. The DG also found the submission of OP regarding *pro rata* reductions being applied to all whenever demand was greater than supply was not applied in the case of [REDACTED]. Further, it was also observed that export quantity had [REDACTED]  
[REDACTED] which substantiates the allegation that OP



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adopted discriminatory practices in favour of [REDACTED]. Accordingly, the DG concluded that OP indulged in discriminatory supply of Sillimanite against domestic customers *vis-à-vis* foreign customers in contravention of Section 4(2)(a)(i) of the Act.

### ***Consideration of the DG Report and hearing***

21. The Commission, in its ordinary meeting held on 26.07.2022, considered the Investigation Report and *vide* an order of the same date, directed the parties to file their objections/suggestions and responses/rejoinder thereto. In addition, OP was directed to file its financial statements for financial years 2019-20, 2020-21 and 2021-22. *Vide* submission dated 29.10.2022, OP filed its objections/suggestions in confidential and non-confidential version, along with a copy of its financial details, after seeking due extension of time. The Informant filed his objections/suggestions on 15.11.2022.

22. Thereafter, on 29.11.2023, the Commission heard the parties on the Investigation Report and directed them to file written synopsis of their oral arguments. OP was further directed to furnish the following information:

- i. Monthly data of quantity demanded, quantity supplied and the rate at which supplies were made for each of the buyers for the period 2016-2022.
- ii. Party wise details of MOU/Agreement for supply of Beach Sand Sillimanite indicating the name of the buyer, period of MOU/Agreement, quantity and rate during the period 2016-2022.

23. In compliance thereof, the Informant and OP filed their respective written synopsis/submissions on 14.12.2023 and 08.01.2024, after seeking extension of time.

### ***Reply/Objections/Suggestions of OP***

24. OP reiterated its earlier stance that it does not fall under the definition of 'enterprise' as defined under Section 2(h) of the Act, since, it is involved in extraction of





सत्यमेव जयते



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Sillimanite, which is ancillary to the core function of extraction of minerals strategic to the GOI's atomic energy program. It also submitted that to store/stock the strategic minerals as needed by the GOI, it is necessary for IREL to dispose of the non-strategic minerals in a timely manner by selling it to customers and industrial buyers.

25. OP has relied on judgement of the Hon'ble Supreme Court in *Mansukhlal Dhanraj Jain vs. Eknath Vithal Ogale* [(1995) 2 SCC 665] to state the words 'any activity relating to' as used in Section 2(h) of the Act should be read and interpreted widely. OP has further relied on order of the Commission in Case No. 19 of 2019, judgement of the Hon'ble Supreme Court of India in *Physical Research Laboratories vs. K.G. Sharma* (AIR 1997 Supreme Court 1855), the Hon'ble Delhi High Court's decision in *UOI vs. CCI & Ors.* (AIR 2012 Delhi 66) to establish that the activity relating to extraction of Sillimanite is a sovereign function and therefore, OP cannot be held as an 'enterprise' under the provisions of the Act.
26. OP also submitted that it functions within strict oversight of DAE, GOI, with the primary objective of mining and extraction of the strategic mineral Monazite from beach sand ore and supplying it to the GOI for atomic energy program. It also stated that every aspect of IREL's operations is subject to strict regulations as well as supervision by the DAE, GOI.
27. OP also submitted that the Informant wrongfully argued that IREL cannot be exempted under Section 2(h) of the Act as no notification has been issued by the Central Government under Section 54 of the Act. It was averred that Section 54 of the Act provides that the Government may exempt entities from the application of the Act and it would be erroneous to exclude only those entities from the scope of 'enterprise' under Section 2(h) that have been specifically exempted under Section 54 of the Act. Exemption under Section 54 is applicable on the enterprise. OP's contention is that it is not an enterprise under Section 2(h) of the Act.



सत्यमेव जयते



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28. OP stated that the Informant's stand before the Commission is replete with contradictions, where on one hand, he has urged to view IREL's disposal of Sillimanite on a standalone basis, and on the other hand, has submitted that IREL is akin to 'State' and is required to extend equal treatment under Article 14 of the Indian Constitution.
29. OP submitted that DG has defined the relevant market narrowly and thus failed to consider viable substitutes of Sillimanite as being part of the same market. As per OP, in order to delineate relevant market, the DG is bound to take into consideration those products which form sufficient degree of interchangeability between all the products in so far as specific usage of such products are concerned. OP contended that the DG sought information regarding substitutes from parties without even considering if these parties were qualified to provide the correct perspective and information on such a critical issue.
30. OP relied on the observation of the Commission in *Hiveloop Technology vs. Britannia Industries Ltd.* (Case No. 18 of 2021) to assert that merely on the basis that certain brands/categories/types of products are more popular amongst the customers cannot be ground to make the relevant product market narrower.
31. Reiterating its earlier submission, OP stated that the DG failed to consider the submissions on record from expert bodies such as DAE and Ministry of Mines, which are most appropriately placed to provide submissions on substitutability of Sillimanite and instead undertook a flawed approach by only relying upon the opinions of a few third parties, whose details were provided by the Informant itself.
32. OP submitted that the DG simply considered the number of responses received in favour or against substitutability of Sillimanite and overlooked the qualitative aspect of the responses while conducting analysis. It is stated that the DG completely failed to appreciate the factors set out under Sections 19(6) and 19(7) of the Act for assessment of the relevant product and geographic market by emphasizing demand side substitutability. It submitted that even in assessing



सत्यमेव जयते



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demand side substitutability, the DG has erroneously delineated the relevant market on the basis of extremely selective responses received from a very small number of supposed users of Sillimanite, that in no manner represent the entire demand side for Sillimanite and its substitutes in the market. OP submitted that the DG's analysis of substitutability also did not account for the fact that not only there are other substitutes of Sillimanite available in the market, but that there is no evidence on record to indicate that customers' operations would be or were in fact adversely impacted due to an alleged non-supply of Sillimanite by IREL.

33. In order to assess relevant product market, OP has submitted that all minerals which can be alternatively used in place of Sillimanite, form part of the relevant product market and these include Sillimanite mined from underground/rock sources, Andalusite, Kyanite, Bauxite, Kaolin, plastic/non-plastic clay, super duty fire clay, other clays, Hydroxyl-Aluminosilicate refractory materials (Kaolinite, Pyrophyllite and Sericite), Bauxite and synthetic alumina aggregates, recycled refractory materials (Grog) and other high alumina materials used in refractory industry, foundry industry and ceramics industry, amongst others. It stated that substitutability of Sillimanite has to be considered from the perspective of Indian consumers across all the industries that use Sillimanite and not just refractory industry. OP provided details of specifications of the relevant substitutes and its substitutability with Beach Sand Sillimanite in its submissions. Based on specifications, data, usage and responses of the certain buyers of Sillimanite, the OP submitted that Sillimanite extracted from beach sand and rock are perfectly substitutable. Further Kyanite, Andalusite and Sillimanite have same end usage and are chemical polymorphs and hence substitutable. Refractory grade bauxite and other low-cost materials (grogs and aggregates *etc.*) are also viable substitutes of Sillimanite.

34. For assessment of relevant geographic market, OP submitted that since the import of Kyanite, Andalusite, Sillimanite has increased in the recent past and therefore, the relevant geographic market shall be India, but including imports as well. Sillimanite and its substitutes can be procured by the consumers from suppliers in



सत्यमेव जयते



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India and in absence of any import restrictions, they are in fact being freely imported into India by various end users.

35. OP suggested that the correct definition of relevant market should be *'market for supply of Sillimanite, its associated minerals (polymorphs) and substitutes in India (including imports)'*. It also submitted that IREL's average market share in a correctly defined market from [REDACTED] would be merely [REDACTED].
36. OP submitted that it cannot be considered to have a dominant position under Section 4 of the Act and that the DG has erred in finding it to be dominant in the 'relevant market' as it does not operate independently of competitive forces. According to IREL, the price trend of Sillimanite over the past year has been market driven and fluctuations in price have been based on absorption capacity and demand- supply dynamics of the market.
37. OP submitted that it is in a position of being a major supplier of Sillimanite owing to the policy decisions of the GOI and the regulatory framework. DG Report erroneously observed its share to be [REDACTED] without citing data sources; whereas based on market share data of IREL in Alumino-Silicate minerals, its share in the total market has been much lower than [REDACTED] of the market and was reducing since [REDACTED] till [REDACTED].
38. It was further stated by IREL that since disposal of Sillimanite is crucial for the smooth conduct of its core operations, it cannot price Sillimanite arbitrarily but has to keep in mind the price absorption of the market, the pricing of the substitutes of Sillimanite, price charged by KMML (which has priced Sillimanite higher than that charged by IREL) and presence of other domestic and international suppliers of Sillimanite and its substitutes in India. OP further submitted that if it fails to provide fair and sustainable commercial terms to its customers, it stands the risk of stockpiling Sillimanite, thereby impacting its core operations of extracting strategic minerals. It has a greater dependence on its customers for the off-take of Sillimanite stocks.



39. OP submitted that it even had to float promotional schemes for evacuation of Sillimanite and since offloading is crucial, it entered into Quantity Sales Contract ('QSC') to ensure continuous evacuation of the mineral which is the rationale behind contract with [REDACTED]. In 2016, since IREL's Sillimanite inventory had become significant, IREL agreed to renew the Sales and Purchase Agreement ('SPA') with [REDACTED] at a lower price. It has been further stated by the OP that its prices are determined based on market dynamics and is lower than the prices charged by KMML, imported Sillimanite and other substitutes. Further, IREL is not in a position of strength as it also cannot affect its competitors in its favour as its prices have always been lower than KMML's even though KMML is a smaller supplier of Sillimanite than IREL.
40. OP has stated that KMML, despite being smaller, has gained market share which completely refutes the finding of dominance of IREL based on market share. OP submitted that the DG failed to consider that IREL's market shares have been consistently reducing, while KMML's market share increased significantly [REDACTED]. OP further stated that consistent reduction in the market share indicates that OP does not have control akin to that of a dominant enterprise, which can influence the market in its own favour. Furthermore, the market share of an entity cannot be a definitive and exclusive indicator of its dominance and the market share data in the DG Report is non reliable. Citing factors under Section 19(4) of the Act, OP has averred that even assuming that the 'relevant market' has been defined correctly by the DG, the market share of IREL cannot be said to be an indicator of its dominance. OP has relied on orders passed by the Commission in *Belair Owner's Association vs. DLF and Ors* (2011 SCC Online CCI 189) and *HT Media Limited vs. Super Cassettes Industries Limited* (2014 SCC Online CCI 120) to substantiate the argument that market share is not a conclusive determinant of the position of dominance of an enterprise.
41. It is also submitted that an analysis of dominant position under Section 4 of the Act requires consideration of the prevailing dynamics in the market and the DG has failed to holistically consider the competition dynamics in the market *i.e.*, the



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presence of substitutes for Sillimanite as well as imports of Sillimanite and its substitutes by players in the market.

42. OP has further submitted that there are no entry barriers in the market for supply of Sillimanite as the restriction on mining of Beach Sand Mineral is a statutory restriction under the regulations and policies issued by GOI and there are no restrictions on any new GOI or state government entity from entering the market, mining of Sillimanite from another source *i.e.*, hard rock, import of Sillimanite or on mining of BSM Ore that does not meet the prescribed threshold with respect to Monzonite.
43. IREL submitted that Sillimanite is a by-product of extraction of BSM ore and mining of strategic minerals is controlled by GOI and it is not the prerogative of IREL to decide and implement any possible increase in mining and supply of Sillimanite. IREL's mining and extraction of minerals is subject to various statutory provisions, clearances, and regulatory approvals from centre and state agencies leading to determination and stipulation of extent of mining which IREL may undertake. OP further submitted that the available quantity of Sillimanite in the BSM ore after the extraction is out of control of the OP and therefore, DG erred in noting that production of Sillimanite was in control of IREL and IREL itself could increase production of Sillimanite without any regulatory clearances.
44. It has been stated by IREL that it is a Central Public Sector Enterprise owned by the GOI and is designated as a Miniratna Category-I. It is under the administrative control of DAE. Private players occupied a larger market share compared to IREL before the policy changes drove them out from the market due to illegal mining. It is only due to changes in GOI policy that such players are no longer operating in the market. Therefore, to attribute dominance to IREL is completely erroneous. It is also submitted that given its operations which are carried out in a fully regulated and controlled environment, in accordance with the mandate of GOI, the Commission must appreciate that OP's position is unique and it cannot be compared to any other supplier of Sillimanite or its substitutes in the market. In view of the



सत्यमेव जयते



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control and supervision by the GOI over every aspect of IREL's operations, the question of IREL having the ability to 'operate independently of the competitive forces in the market' or to 'affect competitors in its favour' cannot even arise.

45. In response to the contentions of the Informant, IREL submitted that there is no cogent evidence and material on record to establish that it has violated the provisions of Section 4 of the Act and stated that it is an established principle that being dominant in itself is not in violation of the provisions of the Act.
46. IREL further submitted that it has not engaged in excessive or unfair pricing as alleged by the Informant. It stated that pricing of minerals is determined based on demand supply equilibrium and not on the system of cost of production. This is the reason of existence of London Metal Exchange (LME) which publishes prices of major metals from which prices of their minerals are derived. It is submitted that Sillimanite is a naturally existing mineral, it is only the cost of extraction which can be determined with certainty, and the total cost of production / the economic value cannot be determined with accuracy. IREL adopts absorption pricing as a mechanism for determining the price of Sillimanite. While pricing Sillimanite, IREL weighs various factors such as cost of production, indirect costs incurred, availability and prices of its substitutes, availability of other alternative materials, the composition of the material supplied, and willingness of the market to absorb the prices and that its ability in determining prices is capped to ensure timely evacuation of the mineral and avoid black marketing/hoarding. IREL states that its pricing of Sillimanite is not arbitrary in nature and it has not received any complaints about its prices being unreasonable.
47. IREL denied allegations of excessive /unfair pricing and deriving super normal profits from sale of Sillimanite since such revenue constituted [REDACTED] of total revenue of IREL. Relying on the decision of the European Court of Justice ('ECJ') in the case of *United Brands Co. and United Brands Continental BV v Commission [1978] ECR 207*, according to OP, the test laid down in the said decision, to establish that a price charged by an entity was in fact excessive, such



सत्यमेव जयते



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price should be exorbitantly high or should be such that it has no relation to the price charged for it. As per OP, the DG erred in its application of legal tests to arrive at predetermined findings. In applying the principle from the *United Brands* decision, the DG only calculated the margin in cost of production and the sales value of Sillimanite and concluded that the prices are excessive. This, however, is only the first limb of the test and to accurately determine whether the prices are excessive or not, the DG was required to compare this price margin with other relevant factors. OP submitted that for determination of the final cost of production, it is required to apportion the costs till the point of separation of Sillimanite also as an indirect cost of production of Sillimanite. The costs/expenses incurred by IREL in obtaining necessary statutory clearances for mining of the BSM ore and the processes undertaken till the separation of Sillimanite from the strategic mineral Monazite and from the BSM ore are also indirect costs incurred in the production of Sillimanite. The cost of extraction of Monazite amongst other material has to be suitably apportioned in the cost of production of the non-strategic minerals such as Sillimanite.

48. IREL stated that it has been increasing prices post a sudden surge in demand of Sillimanite after the private players were driven out of the market following suspension of licences for mining of BSM by the GOI. Changes in prices has also been as per the market demand and supply conditions and in line with testing market absorption of the prices. OP averred that increase in prices by KMML of Sillimanite were far greater than the increase of price by it and that due to the high quality of Sillimanite, the buyers ascribe a higher economic value to the product of OP. As a result, consumers have absorbed the price increase of the product and despite gradual price increase, have not switched to other players or substitutes.

49. Relying on European Commission's decision in *Scandilines Sverige AB vs. Port of Helsingborg Case Comp./A.36.568/D-3*, IREL submitted that the DG should have considered the economic value of Sillimanite and whether the customers of Sillimanite were willing to pay the prices charged by it. Reliance was also placed on the Commission's observation in *Kapoor Glass Pvt. Ltd. vs. Schott Glass India*





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*Pvt. Ltd. 2012 SCC Online CCI 15* to state that the DG has failed to establish that the prices charged by IREL are in fact excessive as per tests laid down in the said cases and legal jurisprudence. Citing the same case, OP has further stated that erstwhile Competition Appellate Tribunal (“COMPAT”) has set out a two-step test to establish a case for discriminatory pricing. A practice undertaken by an enterprise would be considered discriminatory if there is: (i) dissimilar treatment of equivalent transactions; and (ii) harm/likely harm to competition by which buyers suffered disadvantage against each other. In the present matter, IREL has not offered different prices to similar customers. Therefore, DG has erred in comparing the prices charged to [REDACTED] under long term contractual obligations and the retail prices offered to other customers to arrive at a finding of discriminatory pricing. In view of the above, OP submitted that it has not engaged in discriminatory pricing.

50. As per OP, the DG has erred in its application of the test of excessive pricing as suggested by the EC in the case of *Deutsche Post AG-Interception of Cross-Border mail [2001] OJL 331/40*. As per this test, an antitrust authority must compare the prices charged by a dominant entity to those charged by its next competitors to assess whether a dominant entity is charging excessive prices. It is submitted that the prices charged by OP during the period under investigation were lower than that of the KMML, despite the latter having smaller market share. OP submitted that DG misapplied the test and arrived on pre-determined conclusion that IREL charged excessive price in the relevant market. A correct application of the test under the *Deutsche Post* decision would clearly show that IREL’s prices is not excessive considering the significantly higher prices charged by its competitors.

51. Further, OP has stated that the DG has not analyzed supply relationship of any other foreign customer or MNC other than [REDACTED] for arriving at discriminatory supply conclusion. OP has refuted that [REDACTED] is a foreign company and stated that it is a domestic company incorporated in India and the prices charged to them are not substantially different from what is being charged to other domestic companies. Any difference in price and quantity offered to [REDACTED] are justified on the grounds of long-standing relationship between both the parties and bulk lifting of quantity.



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52. OP has submitted that it is evident from the findings of the DG that price of Sillimanite increased prior to the policy change in the market and it did not increase the prices post policy change. Thus, as per OP, assuming it gained a dominant position in the market after the policy change of 2019, the fact that the price increases were affected prior to attaining alleged dominance proves that alleged anti-competitive price increases could not have been a consequence of its alleged dominant position.
53. It also submitted that pricing policy of IREL, as captured in its periodic internal meetings shows that various factors are taken into account while determining the prices, namely demand and supply dynamics, inventory, prices of the competitors, imports of substitutes like Andalusite, *etc.* Furthermore, these prices are then approved by the Board of IREL, which also consists of nominees of DAE. Pertinently, the market absorption with respect to the price of Sillimanite are also accounted for in undertaking price revision for Sillimanite.
54. OP, while relying on the decisions of the Commission in *Pawan Kumar Agarwal vs. Rashtriya Ispat Nigam 2011 SCC Online CCI 47* and order of the then Hon'ble COMPAT in *Shubham Sanitarywares vs. CCI and HSIL Ltd. 2016 SCC Online Compat 457*, has averred that offering discounts to long standing customers on reasonable commercial grounds cannot be considered as discriminatory or unfair. OP has submitted that it had granted discounts in lieu of justifiable ground of long-standing commercial relations which mutually benefited both the parties. This helped [REDACTED] and hence are not arbitrary and irrational. Moreover, prices offered to [REDACTED] have also been increased simultaneously with increase in prices for other customers. IREL has also offered attractive discounts to other buyers in the market based on their requirement and the volume of Sillimanite to be lifted as admitted by other parties and a small difference in percentage of discounts to [REDACTED] on account of being a bulk buyer, cannot be alleged as engagement in discriminatory pricing practices.



55. OP has further submitted that more than [REDACTED] of its customers of Sillimanite are domestic MSMEs. Although the core operations of OP do not require or mandate the sale of Sillimanite to any specific customer category, it has always strived to support and provide Sillimanite to MSMEs. The promotional schemes offered by OP have been allowed for evacuation of large quantities of Sillimanite in timely manner and it provided Sillimanite to all customers without preference or discrimination. [REDACTED]

56. OP objected to the DG Report by stating that DG has failed to analyze the alleged discriminatory pricing practices of IREL with relevant legal principles as set out in various judgements. Supply terms offered to [REDACTED] were justifiable as per policy and the transactions with [REDACTED] were not similar to the transactions with other parties. An analysis of the downstream market of IREL would show that there has been no negative effect of the alleged conduct of IREL on the competition in the downstream industry. Had there been a negative impact on the MSME customers, IREL would not have been able to grow and sustain an MSME customer base of more than 90%. Further, MSMEs are free to obtain supply from KMML and / or other suppliers of Sillimanite and its substitutes if IREL was engaging in discriminatory practices.

57. OP submitted that for sale of Sillimanite through the method of Expression of Interest ('EOI') invitation, it required prospective customers to be actual end consumers of Sillimanite and be able to provide monthly breakup of the entire quantity that they would require over the course of next year. OP further claimed it supplied Sillimanite to customers who are end users of the product and it does not deal with customers who are dealers, as has been wrongly alleged by the Informant and also erroneously recorded by the DG.



58. OP has stated that the DG failed to appreciate its following methodology for disposal and sale of Sillimanite across different customer categories:

i. Long term contractual obligations (contracts for more than one year) – [REDACTED]

[REDACTED]

[REDACTED] Such contracts facilitated evacuation of Sillimanite by IREL at such time, when the market for Sillimanite was not firmed up and IREL was unable to dispose of Sillimanite. However, as the demand in the market firmed up, IREL's reliance on them for disposal has reduced. [REDACTED]

[REDACTED]

ii. Annual contracts (with term up to one year) – Till March 2018, IREL devised a 'rebate-cum-discount scheme' wherein discounts were provided based on the off-take volume commitments by the respective customer. Subsequently, after the market firmed up and there was assured offtake pattern in the market, IREL devised the EOI mechanism for entering into Annual Material Linkage through Quantity Sales Contract ('AMLQSC') in July 2018. IREL issues EOI to invite customers interested in entering into annual contracts with IREL for the supply of Sillimanite. These customers are required to register their annual demand with IREL and provide an undertaking that they are not engaging in trading of Sillimanite. It is pertinent to note that the supply of Sillimanite by IREL to such customers is based on the past offtake *i.e.*, the 'established demand', of each such customer.

iii. Retail customers – A third category of customers *i.e.*, retail customers, procure Sillimanite from IREL without entering into any formal contracts and buy round the year subject to availability of stocks with IREL and procure Sillimanite at listed price.



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59. OP has submitted that the DG has wrongly concluded that it is engaged in discriminatory pricing by carrying out erroneous comparison between the prices charged under long term contracts and the prices charged to retail customers. Furthermore, the DG has only evaluated the pricing terms offered to [REDACTED] and its associated companies, without enquiring into and considering the discounts that were actually offered by OP to customers in other categories. The DG failed to notice those instances wherein [REDACTED] or its associate companies were not provided any discounts.
60. OP has submitted that DG has erroneously found it to have engaged in discriminatory supply in violation of Section 4(2)(a)(i) of the Act and asserted that it has instead followed prudent business practices and devised fair and transparent policies, for undertaking supplies of Sillimanite to its customers which are extracted from BSM ore. IREL's core function is to support GOI's atomic programs. Therefore, IREL has nothing to gain from engaging in any of the alleged abusive practices.
61. OP has submitted that when demand of Sillimanite increased from 2019, it needed a formal supply procedure and thus introduced the system of quantity contracts under which it floats EOI for attracting potential buyers. OP claims this policy has also been approved by the competent authority and is in line with DAE's pre-2007 licensing policy. In cases when demand is higher than the production, IREL calculates the quantity to be offered on the basis of past offtake of the buyers. For the parties that do not enter in such annual contracts, IREL earmarks certain quantity for sale at list price. This usually caters to such buyers that do not have a fixed demand pattern for the whole year.
62. OP submitted that it has exported limited quantity in order to meet domestic demand. For speedy and continuous disposal of Sillimanite, in 2014, IREL launched discount cum rebate schemes and 4 parties availed discounts under the scheme. In 2018, IREL floated EOI from user industry to enter into MoU for 1 year and entered into MoU with 5 customers during this period. Further in 2019, another



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invitation for EOI to enter into QSC for 1 year was initiated, 13 parties applied in response to this invitation and out of these 4 parties entered into QSC during FY 2019. OP has stated that with limited availability of Sillimanite and high demand, IREL supplied to all as per standard mechanism and assures that it made best efforts in supply of possible quantities to the remaining 9 parties without QSC. In FY 2021, IREL's production of Sillimanite increased and therefore, supply was increased equitably as per structured mechanism. The supply mechanisms followed by IREL have been logical, systematic, fair, and transparent. For FY 2022, IREL followed the policy of supply based on the average lifting in three years- 2017-18, 2018-19 and 2019-20. The earmarked quantity of 13,000 MT was proportionately distributed amongst those that were considered for QSC during the year 2020-21. IREL stated that it is important to highlight that IREL's sales / supply policy / mechanism has been approved by the competent authority and is in line with DAE's licensing policy.

63. OP has submitted that DG erred in concluding that IREL refused supplies to the existing customers, while making supplies to dealers who are selling Sillimanite to industry at much higher prices. OP has submitted that it had taken all necessary steps to prevent parties from trading Sillimanite at higher prices to disadvantage of the actual users by having terms in EOI/supply contract which prevents export or resale of Sillimanite.

64. Reiterating its submissions, the OP, *vide* submission dated 08.01.2024, stated that

[REDACTED]

[REDACTED]. It is noted that when the supply of Sillimanite surpasses the industry's demand, IREL readily fulfills the entirety of such demand (based on the 'established demand' of such customers), however, when the supply available with IREL falls short of the demand, the only viable and rationale recourse available to IREL is to distribute the available quantity of Sillimanite amongst its customer base in fair and equitable



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manner. In case of demand exceeding the supply of Sillimanite, with a view to ensure equitable and sustainable supply of Sillimanite across its customers, IREL pro-rates the supply of Sillimanite based on the 'established demand' of the customers.

65. OP has submitted that there has been no imposition of unfair or discriminatory terms by it. The mining and extraction of BSM is highly regulated and the quantity of Sillimanite extracted also depends on the natural mineral content of the mined product and therefore, there is no certainty with respect to the quantity of Sillimanite that would be available at the end of the extraction process. The customers remained free to purchase Sillimanite from any source and are not bound to source Sillimanite from only OP. OP did not impose any terms that might reduce the consumer choice or even restrict customers from purchasing Sillimanite or its substitutes. The increase in import of Sillimanite and its substitutes is evidence that the customers of Sillimanite are increasingly relying upon imports and can meet their demands through other alternatives. Further, OP has submitted that the DG should have undertaken an effects-based analysis under the Act and appreciated that there was no harm caused to competition or to consumers due to its conduct. The OP has relied on decisions of the Commission in *JSW Paints Ltd. vs. Asian Paints Ltd. (Case No. 36 of 2019 and Case No. 17 of 2021)*, *Schott Glass India Pvt. Ltd. & Ors. vs. CCI & Ors. (Case No. 22 of 2010)*, *Pandrol Rahee Technologies Pvt. Ltd. vs. Delhi Metro Rail Corporation Ltd. & Ors. (Case No. 03 of 2010)*, *Explosive Manufacturers Welfare Association vs. Coal India Ltd. & its Officers (Case No. 4 of 2010)* to buttress the arguments that effect based approach keeping in view the market dynamics and reasonable justifications are required while analyzing the allegedly abusive conduct.

66. As per OP, [REDACTED], IREL applied pro-rata reductions on account of lesser quantity of Sillimanite available for disposal, which shows that IREL has not discriminated in favour of [REDACTED] or foreign customers by providing them higher quantities. Furthermore, the quantities supplied to [REDACTED] have consistently reduced year on



year, and there has been an increase in supply to other customers. In view of a more assured offtake pattern of customers other than [REDACTED], [REDACTED] [REDACTED] and also requested [REDACTED] to participate in EOI, like all the customers, to enter into an annual contract. This demonstrates that IREL has not been discriminatory in favour of [REDACTED] and [REDACTED] [REDACTED].

67. The OP submitted that, in consideration of its detailed submissions in the objections, the Hon'ble Commission must set aside the finding of a contravention against IREL under the DG Report, since there is no contravention under the Act by IREL, no penalty should be imposed under Section 27(b) of the Act on IREL.

68. Further, OP submitted that notwithstanding the submissions made by OP even if contravention is found, the Hon'ble Commission must exercise discretion under Section 27(b) of the Competition Act and refrain from imposing a penalty on IREL since there is no harm to competition or consumers or economic harm due to such a contravention. The Hon'ble Commission must consider the following mitigating factors while assessing penalty, if any, to be imposed on IREL:

- i. Peculiarities of the market pertaining to mining of BSM.
- ii. IREL has not earned supernormal profits from sales of Sillimanite.
- iii. No harm to competition in the market or consumers can be attributed to IREL.
- iv. IREL has not previously found to be in contravention of the Act.
- v. IREL extended full cooperation to the DG during the investigation.

69. If penalty is imposed, the 'relevant turnover' *i.e.*, revenue earned by IREL from sale of Sillimanite to its customers in India should be considered for computation of penalty.





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70. OP has submitted that there could be possible unauthorized disclosure of case records and questionable *bona fide* of the informants in cases filed against IREL. Informant's commercial relationship with IREL has not been established and allegations pertaining to excessive pricing or discriminatory pricing could have legitimately been raised by the end-customers of IREL before the Hon'ble Commission. It also appears that the Informant in this case is a proxy for Beach Mineral Producers Association ('BMPA') (informant in the Case No. 26 of 2022) and the on-going cases against IREL before the Hon'ble Commission have been filed at the behest of members of BMPA who seem to have interests in mining of non-strategic minerals. IREL submitted that the Hon'ble Commission is not bound by the findings in the DG report and must independently apply its mind to the DG report under Section 26 of the Act.

#### ***Reply/Objections/Suggestions of the Informant***

71. The Informant, in its submission dated 14.12.2023, stated that the allegation in the present matter is with regards to IREL's abuse of dominant position in connection with the sale of Sillimanite which is sold independently of other minerals and thus the scope of inquiry in the present case does not concern any other activities of OP. It is also submitted that Sillimanite having no nuclear/atomic use and the sale/supply of Sillimanite being purely a commercial activity, its mining/sale cannot be considered as a sovereign activity. Thus, the exemption of OP under the category of 'sovereign functions' as defined under Section 2(h) of the Act is wholly inapplicable.

72. Furthermore, the Informant submitted that it is settled that OP is indeed charging an increased and excessive price because of its dominant position from buyers of Sillimanite, which is being done by OP only for the purpose of increasing the profit and thereby clearly showing that OP is not conducting any sovereign function. Reliance have also been placed on the judgement of Hon'ble Delhi High Court in *Union of India v. Competition Commission of India and Ors.* (AIR 2012 DELHI 66,), and of Hon'ble Gujarat High Court in *Umedmiya R. Rathod and Ors. v. State of Gujarat* [AIR 2017 (NOC) 1146 (GUJ.)], to state that an entity may be carrying



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out part sovereign and part non-sovereign functions/activities, in which case the non-sovereign activities of the entity would fall within the ambit of the Act and the exemption would only apply for the sovereign function. In the present matter, sale/supply of Sillimanite is a non-sovereign activity undertaken by OP and thus, no exemption under Section 2(h) of the Act can be claimed by it. The Informant has also submitted that the claim of OP that it is involved in the function ancillary to sovereign/strategic function is baseless.

73. Reiterating its earlier submission, the Informant has submitted that the reliance placed by the OP on Case No. 19 of 2019 titled *Beach Mineral Producers Association v. Directorate General of Foreign Trade (DGFT) & Ors.* is misplaced. The said case related to a challenge to the activities undertaken by OP in compliance to an export policy formulated by DGFT. As such, in the cited case, the alleged incidents of anti-competitive practices arose from implementation of the said policy and not on account of business decisions/practice of OP. It is stated that the activities undertaken by OP which have resulted in violation of Section 4 of the Act are not as per any policy/Govt. order *etc.*

74. The Informant has stated that there is no notification under Section 54 of the Act issued by the Central Government exempting the applicability of the Act to OP. In the absence of any such notification, OP would fall under the purview of the Act.

75. The Informant has agreed with the findings of the DG on the issue of delineation of relevant market, market dominance of OP and abuse and the same are not repeated herein.

### ***Commission's Analysis***

76. The Commission has carefully perused the information, the DG Report, the replies/suggestions/objections to the DG Report and the written submissions made by the learned counsel(s) of the parties, post hearing.



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77. The Commission, on the basis of the material available on record, notes that the following issues arise for consideration and determination in the present case:

- i. Whether IREL is an ‘enterprise’ in terms of provisions of the Act?
- ii. What is the ‘relevant market’ in the present case?
- iii. Whether IREL holds a dominant position in the relevant market?
- iv. Whether IREL has abused its dominant position in terms of Section 4 of the Act?

**Issue (i):** *Whether OP is an ‘enterprise’ as defined in Section 2(h) of the Act?*

78. The first test in an analysis pertaining to the abuse of dominant position under the provision of Section 4 of the Act requires the Commission to establish that the entity against whom allegations have been levelled falls under the category of ‘enterprise’ or a ‘group’. In this connection, the Commission has perused the report of the DG and submissions of the parties on the issue.

79. The Commission noted in its *prima facie* order dated 03.01.2022 that IREL is an enterprise and the DG has also returned the same finding. At this juncture, it is pertinent to look into the provision of Section 2(h) of the Act which says that only Departments of Central Government dealing with atomic energy, defence, currency and space are exempted from the meaning of enterprise. The Commission notes that OP is a Public Sector Undertaking designated as Miniratna Category-I, engaged *inter alia*, in mining and sale of Beach Sand Sillimanite on commercial considerations to domestic and international customers. The Commission has considered the submission of OP that its functions are ancillary to the strategic/sovereign function, which exempt it from the purview of enterprise. The Commission observes that the scope of ‘Sovereign Function’ has been analysed in plethora of cases by Hon’ble Supreme Court of India, High Courts and Tribunals. The Hon’ble Supreme Court in *Coal India Limited and Anr. Vs. Competition Commission of India and Anr. (2023)10 SCC 345*, in paragraph 81, held that:



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*“81...The first appellant is not a Department of the Government. It is a Government Company. In fact, what is excluded from the definition of the expression ‘enterprise’, is a Government Department carrying on ...”*

80. The Commission observes that IREL, the erstwhile Indian Rare Earths Limited is a Public Sector Undertaking and an unlisted Public Company, was incorporated on August 18,1950. It became a full-fledged Government of India Undertaking under the administrative control of Department of Atomic Energy in year 1963. It has its own Board of Directors for managing its overall affairs. Accordingly, the Commission is of the considered view that IREL is not a department of the Government. The Commission notes that Sillimanite is sold by the OP in the open market for monetary consideration. Thus, IREL does not qualify for an exemption from the provisions of Section 2(h) of the Act with respect to the activity of mining and sale of Sillimanite in India. Based on the above and nature of activities carried on by OP, the Commission finds no reason to deviate from its *prima facie* order dated 03.01.2022 where it held OP to be an enterprise under the Act. Accordingly, the Commission finds OP to be an enterprise under extant provision of Section 2(h) of the Act.

***Issue (ii): What is the ‘relevant market’ in the present case as defined in Section 2 (r) of the Act?***

81. The Commission notes that in order to delineate relevant market, the DG sought information from OP, Informant as well as third parties such as competitors, consumers and relevant Government Authorities. The Commission further notes that the DG has analysed the substitutability between Beach Sand Sillimanite, Sillimanite mined from underground/Rock, Andalusite, Kyanite, Bauxite and other low-cost raw materials, as discussed earlier and concluded that Beach Sand Sillimanite is a standalone relevant product from user perspective. Further, the DG has stated that the condition of demand and supply of Sillimanite is homogenous throughout the India. Accordingly, the DG has defined relevant market as *“mining and sale of Beach Sand Sillimanite in India”*.



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82. OP has stated that the DG has defined the relevant market narrowly and thus failed to consider viable substitutes of Sillimanite as being part of the same market. OP has averred that the DG did not consider the responses of DAE and Ministry of Mines on the aspect of substitutability of Beach Sand Sillimanite. OP suggested that the correct definition of relevant market should be *'market for supply of Sillimanite, its associated minerals (polymorphs) and substitutes in India (including imports)'*.
83. The Commission has perused the Information, Investigation Report and submissions of the OP with regard to substitutability. The Commission notes that contrary to OP's claim, the DG considered the responses of the DAE and Ministry of Mines along with the responses of certain consumers of Sillimanite. The Commission observes that the DG not only relied on demand side substitutability but also on economic analysis whereby it was evident that OP was able to increase the prices profitably without losing its sales, which indicated that there were no available substitutes of Beach Sand Sillimanite, which could be considered substitutable by the consumers.
84. The Commission observes that substitutability, as envisaged under the Act, has a different connotation than substitutability, as used in general parlance. To that extent, two products having similar chemical composition may be generally deemed as similar; however, when looked at from the lens of the Competition Act, the same two products may not be substitutable/interchangeable on the parameters given under Section 2(t)/19(7) of the Act. It may be noted that in terms of the provisions of the Act, substitutability of a product is determined on the basis of parameters such as price, intended use and characteristics of the product under consideration.
85. The Commission notes that the relevant market suggested by OP is wide and lacks precision as it is not clear which associated minerals (polymorphs) or substitutes (including imports) pose competitive constraints to Beach Sand Sillimanite, the product under examination. The Commission further notes that OP in its' objections/suggestions to the investigation report of the DG has submitted as under:



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“.....However, due to the high quality of Sillimanite provided by IREL, the buyers ascribe a higher economic value to these products. As a result, they have absorbed the price increase of the product and despite gradual price increase, have not switched to other players or substitutes.” In view of this submission, OP seems to indicate that the Sillimanite sold by it has no effective substitute. In view of the foregoing, the Commission agrees with the relevant product market as delineated by the DG.

86. With regard to delineation of relevant geographic market, the Commission notes the submission of DG that there are no geographical barriers for production as well as sale of Sillimanite in India. OP has stated that the relevant geographic market in the matter is India including import. The Commission, while agreeing with this contention of the OP, notes that the import of Sillimanite, if any, in Indian market may be appropriately considered under the relevant product market. However, there would be no change in geographic market as competition concerns (even accounting for imported relevant product) would still be evaluated within the boundary of India. Accordingly, the Commission finds no reason to disagree with the finding of DG and accepts the relevant geographic market in the instant case as ‘India’.

87. Based on the above analysis, the Commission holds that the relevant market in the present case as “*mining and supply of Beach Sand Sillimanite in India*”.

***Issue (iii): Whether OP holds a dominant position within the scope of Section 4 of the Act?***

88. In terms of the provisions contained in Section 19(4) of the Act, the Commission, while determining whether an enterprise enjoys a dominant position or not in the relevant market under Section 4, shall have due regard to all or any of the factors provided therein. The Commission has considered the submission of the Informant, OP and DG while analysing the issue of dominance in succeeding paragraphs.

89. The Commission notes that by virtue of DAE notification dated 27.07.2019, grant of operating rights in respect of atomic minerals in any offshore areas in the country



was restricted to the Government or a Government Company or a Corporation owned or controlled by the Government. As a result of the said notification, (i) private sector players operating in the relevant market, namely Trimex Sands Pvt. Ltd. ('TSPL') and VV Mineral were prohibited from mining/selling Sillimanite; and (ii) only OP and KMML remained in the business of mining/selling Sillimanite in India. The Commission has perused the domestic supply data of Sillimanite collected by the DG from IREL, KMML and TSPL for the period 2016-17 to 2021-22. From the data, the Commission observes that OP has the largest market share in terms of sales volume and value in aforesaid period. The Commission observes that the market share of OP has shown growth from around [REDACTED] in [REDACTED] to about [REDACTED] in [REDACTED] and [REDACTED] in [REDACTED]. Further, the market share of KMML has increased from [REDACTED] in [REDACTED] to [REDACTED] in [REDACTED].

90. The Commission also notes the contention of the OP that it is not dominant as it has a market share of less than [REDACTED] during the period [REDACTED] and [REDACTED]. In this regard, the Commission observes that dominance is always assessed in respect of the relevant market under consideration, which, in the present case, is '*mining and sale of Beach Sand Sillimanite in India*'. However, the market share arrived by OP pertains to a different market *i.e.*, including market for alumino-silicates. Accordingly, the market shares as suggested by OP to hold that it is not dominant is not acceptable.

91. The Commission further notes that OP has contended that the DG has erroneously calculated its market share without citing data source. The Commission observes from the DG report that the same was estimated based on the sales data submitted by OP, TSPL and KMML. Therefore, the contention of the OP that the DG has erroneously calculated the market share of OP, without citing a source for the data, is misplaced. However, the Commission is willing to accept the suggestion of the OP that imports should be part of the relevant market. From the data submitted by OP, the Commission observes that import of Sillimanite constitutes a miniscule proportion (*i.e.*, less than [REDACTED] of the total domestic production). Thus, even after



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accounting for imports, market share of OP would be in excess of [REDACTED], a clear position of market leader and an indicator of dominant position.

92. The Commission also notes from the DG report that IREL has sizeable assets and turnover *vis-à-vis* its competitors. Further, from its own submission, it is clear that the consumers of IREL have absorbed high price of Sillimanite, which indicates not only dependence of consumers on it but lack of countervailing buying power.

93. The Commission also notes that OP has submitted that KMML has been able to garner a market share of [REDACTED] in [REDACTED], which indicates that OP is not dominant. The Commission, in this regard, is of the view that despite the aforesaid growth in market share of KMML, the fact remains that OP enjoyed the status of being the market leader during the period of alleged contravention by having more than [REDACTED] market share in the relevant market, even after accounting for imports into Indian market. Thus, there can be no denial of the fact that OP is dominant in the relevant market.

94. The contention of the OP that the market share of an entity cannot be a definitive and exclusive indicator of its dominance and therefore, the findings of DG with respect to dominance of the OP cannot be relied upon. However, the Commission observes that the DG has analysed dominance based on various factors, as provided under Section 19(4) of the Act, and not alone on the basis of market share. Further, market share of an entity can be a strong indicator of its presence in the market and simply cannot be brushed aside *in toto* in absence of other negating factors.

95. Therefore, based on above discussion, the Commission is in agreement with the conclusion drawn by the DG that the OP enjoyed a dominant position in the defined relevant market.

***Issue (iv): Whether OP has abused its dominant position in terms of Section 4 of the Act?***





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96. With regard to the question whether OP has abused its dominant position or not, the Commission, on the basis of the Information, DG report and submission of the parties, has identified following questions for consideration:

- a. Whether OP has violated the provisions of section 4(2)(a)(ii) by charging unfair/ excessive prices from the consumers?
- b. Whether OP violated the provisions of section 4(2)(a)(ii) by discriminating amongst the buyers?
- c. Whether OP violated the provisions of section 4(2)(a)(i) by imposing discriminatory supply conditions?

***a. Whether OP has violated the provisions of section 4(2)(a)(ii) by charging unfair/ excessive prices from the consumers?***

97. At the outset, the Commission notes that the Section 4(2)(a)(ii) of the Act states that there would be an abuse of dominant position by an enterprise if it directly or indirectly, imposes unfair or discriminatory price in purchase or sale (including predatory price) of goods or services. The Commission also notes that the DG concluded that price increase of Sillimanite was much higher than the increase in cost of production. Further, when there was decline in cost of production, corresponding reduction in prices was not seen. Thus, it appeared that the [REDACTED] as stated by DG in its Investigation Report.

98. The Commission notes from the submission of the OP that price of Sillimanite in the year [REDACTED] was [REDACTED] PMT. From [REDACTED] to [REDACTED], the price was [REDACTED] PMT and it increased to [REDACTED] PMT in the year [REDACTED]. OP has ascribed the price increase to the ban imposed on private players in July [REDACTED] due to which the market was constrained on the supply-side and therefore, as normal market dynamics, price had to increase. [REDACTED]



[REDACTED]

99. It is also pertinent to note that OP has stated that none of the customers who purchase Sillimanite from IREL have ever complained or raised grievances with respect to charging of excessive prices by IREL and the DG has shown no evidence of any such complaints by customers. On the contrary, IREL's vigilance department received a complaint that it was charging lower prices, causing losses to IREL.

100. The Commission notes the submission of the OP that pricing decision is taken on account of several relevant factors such as demand and supply dynamics, inventory, prices of the competitors, imports of substitutes, market absorption capacity *etc.* and that the DG wrongly applied legal tests to determine excessiveness of prices.

101. After considering the arguments and counter arguments regarding excessive price, the Commission is of the considered view that pricing decision is a complex mechanism which takes into account the dynamics of the market such as demand and its elasticity, possible rival reaction, availability of imported substitutes *etc.* The Commission also finds merit in the argument of the OP that in order to arrive at the final cost of Sillimanite, the DG ought to have considered joint cost till the point of separation, as the Sillimanite is a 'by-product'. [REDACTED]

[REDACTED]

[REDACTED]. Thus, the price charged by KMML was much higher than IREL despite KMML being a much small player. The Commission also notes that allegation have been levelled in respect of higher quantities being offloaded to a particular company and its associates and also that the price charged is substantially lower *vis-à-vis* what is being charged from other customers. There seems to be no economic incentives for the OP, being in a dominant position, to indulge in such activities where it sold higher quantities at lower prices. Further,



the Commission is of the view that market price is best left to the dynamic interaction between forces of the market and intervention would normally be required only in appropriate cases based on facts and circumstances of such a case.

102. The Commission notes that Sillimanite is a by-product which is obtained during the process of extraction of Monazite. IREL disposes of such by-product to ensure operational continuity and in the process meet the demands of customers operating downstream. The Commission observes that disposal of Sillimanite has an inextricable nexus with its core and strategic operations of supplying Monazite to the Government of India.

103. In view of the facts and circumstances and preceding analysis, there is no reason for the Commission to hold that OP has indulged in excessive pricing. Resultantly, no case of contravention of Section 4(2)(a)(ii) of the Act is made out against the OP.

***b. Whether the OP violated the provisions of section 4(2)(a)(ii) by charging discriminatory prices?***

&

***c. Whether the OP violated the provisions of section 4 (2)(a)(i) by imposing discriminatory supply conditions?***

104. Considering the fact that the allegations of discriminatory prices and supply conditions are interlinked, the Commission has taken up these two issues together for examination.

105. The Commission notes that the DG has concluded discriminatory pricing by the OP on the basis that IREL offered lower price *i.e.*, [REDACTED] PMT to [REDACTED] while it charged [REDACTED] PMT to domestic customers/MSMEs. The DG further concluded that OP has given dissimilar treatment to similarly placed players *i.e.*, domestic MSMEs *vis-à-vis* foreign companies/multinationals, resulting in distortion of the competitive market conditions in the downstream market, thereby



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violating Section 4(2)(a)(ii) of the Act. OP has submitted that it has not engaged in the practice of discriminatory pricing as it has offered similar discounts and schemes to all its customers based on the volume offtake by them. It has uniformly offered discounts and schemes to all its customers. Terms offered to [REDACTED] are completely justifiable and reasonable when assessed in light of the various relevant factors, including but not limited to longstanding relation, long term commitments and higher volume offtake. While denying charges of discriminatory pricing, OP has stated that [REDACTED] and other customers are not similarly placed. The Commission further observes that OP granted discounts to other categories of customers depending on their level of offtake.

106. At the outset, the Commission notes that [REDACTED] is not a foreign company but an entity incorporated in India and governed by the laws of India. The Commission has perused the DG Report and submission of the parties in this regard and observes that there is a difference between prices charged to [REDACTED] *vis-à-vis* OP's other customers. The Commission notes that OP has provided justification for charging different prices to different customers. The Commission is of the view that OP granted discounts in lieu of commercial relations and based on justifiable grounds of long-standing commercial relationship which has mutually benefited the parties. To that extent, the Commission notes that there is a historical relationship between OP and [REDACTED] and its associate companies in as much as when there was [REDACTED] [REDACTED] of the by-product *i.e.*, Sillimanite adversely affecting the core operation of the OP, [REDACTED] agreed to offtake the same through a discount-cum-rebate scheme which was extended from time to time. Further, the Commission also observes that when demand from domestic consumers grew, OP requested [REDACTED] to come through the EOI route, the same channel which was offered to other domestic customers. Accordingly, the market seems to be corrected even on the assumption that there was discrimination and allegations of discriminatory pricing in contravention of Section 4(2)(a)(ii) of the Act against OP, accordingly, does not sustain.



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107. The Commission notes that the DG has returned a finding that IREL has refused to supply quantity requested by the customers at the initial stage of EOI and has supplied more quantity to MNCs/foreign companies/ [REDACTED] than domestic/MSME consumers, thus creating discriminatory supply conditions. The Commission also notes that quantity of Beach Sand Sillimanite provided by the OP to [REDACTED] and its associate companies is the highest amongst all the customers and there were unilateral penal provisions in the hands of IREL in the supply agreement with domestic customers/MSME as opposed to the agreement entered with [REDACTED] where this right was mutual. The Commission also notes that [REDACTED] of the customer base of IREL for Sillimanite are domestic MSMEs. The Commission notes that OP has claimed that the production of Sillimanite cannot be predicted as it is a by-product. The Commission further notes that IREL being a public sector undertaking is involved in strategic sector and cannot increase production to meet the demand of customers on its own. This capacity of production faces various constraints including lack of mining leases, feedstock shortages *etc.*

108. As observed earlier, OP has devised different methodology for disposal and sale of Sillimanite across different categories of customers based on availability of quantity, past relationship and duration of contract *etc.* The Commission notes that the quantities were supplied to the parties in a categorised manner wherein, OP enters into long term contracts, annual contracts based on EOI and through retail category as stated *supra*. The Commission observes that terms of contract including the supplies are largely guided by the nature of agreement which parties entered into with OP. The Commission notes that, for commercial and historical reasons, [REDACTED] stood on a different footing than other customers with whom OP entered into supply agreement as brought out in preceding paragraphs. As adduced earlier, the long-term contract has given way to contract through EOI. Therefore, Commission is of the view that quantity supplied by OP to different categories of consumers of Sillimanite may be different for the reasons such as long-standing business relations, assured off-take quantity, past off-take *etc.* and therefore, may not be discriminatory. Here, it is trite to say that every commercial enterprise enjoys freedom to carry out trade and take appropriate business decisions. As a normal



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business prudence, the Commission has reasons to believe that, a party buying in bulk would get better terms (including purchase price) than a small buyer. Unless and until there are manifest contravention of the provisions of the Act, the freedom of enterprise remains sacrosanct and the Commission would not like to dictate the terms of the trade. Based on the facts of the case and analysis, the Commission is of the view that no case of contravention of Section 4(2)(a)(i) of the Act for adopting discriminatory practices in supply of Sillimanite favouring MNCs/foreign customers as against domestic customers is made out against the OP.

109. Considering the facts and circumstances of the case, material on records, Investigation Report of the DG, submission made by the parties and analysis carried out in preceding paragraphs, the Commission is of the view that the OP is covered under the ambit of enterprise prescribed under extant provision of Section 2(h) of the Act and is dominant in mining and sale of Beach Sand Sillimanite in India. However, no case of contravention of provisions of section 4(2)(a)(i) and 4(2)(a)(ii) of the Act is made out against the OP. Accordingly, the matter is directed to be closed.

110. Before parting with the order, the Commission deems it appropriate to deal with the request of the parties seeking confidentiality over certain documents/information filed by them under Regulation 35 of the Competition Commission of India (General) Regulations, 2009. The Commission notes that during the course of the proceedings, parties had filed their respective submissions in confidential as well as non-confidential version. Certain excerpts from such submissions, over which confidentiality has been sought, have been relied upon by the Commission. Such excerpts, which have been reproduced or used in this order, have not been granted confidentiality. The rest of the documents/information on which confidentiality has been sought by the parties is allowed for a period of five years, subject to Section 57 of the Act. It is, however, made clear that nothing used in this order shall be deemed to be confidential or deemed to have been granted confidentiality, as the same has been used for the purposes of the Act in terms of provisions contained in Section 57 thereof.



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111. The Secretary is directed to communicate to the parties, accordingly.

**Sd/-  
(Ravneet Kaur)  
Chairperson**

**Sd/-  
(Anil Agrawal)  
Member**

**Sd/-  
(Sweta Kakkad)  
Member**

**Sd/-  
(Deepak Anurag)  
Member**

**New Delhi**

**Date- 08.10.2024**