NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Competition App. (AT) No. 26 of 2020

IN THE MATTER OF:

Travel Agents Association of India **...Appellant**

Versus

Competition Commission of India & Ors.

...Respondents

Present:

For Appellants : Mr. MM Sharma, Ankit Singh Rajput, Adv.

For Respondent : Ms. Shiva Lakshi, Cgsc
Mk Ghosh, Tina Garg, Adv. for R3
Srashti Parashar, CCI
Shama Nargis, Dy. Director
Ranjan Sardana, CCI

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

The Appellant has filed this appeal under Section 53B of the Competition Act, 2002 (in short 'Act') against the order dated 08.05.2020, passed by the Competition Commission of India (in short 'CCI') by which an information filed by the Appellant bearing case no. 4 of 2020 under Section 19(1)(a) of the Act for the alleged violation of Section 3(4) and 3(1) of the Act by the Department of Expenditure, Government of India (R2), Balmer Lawrie & Co. Ltd.

(R3) and Ashok Travels and Tours (R4) has been closed in terms of Section 26(2) of the Act.

2. The Travel Agents Association of India (TAAI) is a company incorporated under the Companies Act, 1956 whereas the Department of Expenditure (Respondent No. 2) is the nodal department of the finance ministry of the central govt. of India, Balmer Lawrie & Co. Ltd. (Respondent No. 3) is a government company under the ministry of petroleum and natural gas, government of India and Ashok Travels and Tours (Respondent No. 4) is one of the divisions of the India Tourism Development Corporation, a Government of India undertaking. Both Respondent No. 3 and Respondent No. 4 are the exclusive travel agents, approved by Respondent No. 2.

3. The Appellant vide information dated 28.01.2020, under Section 19(1)(a) of the Act, approached Respondent No. 1 against the exclusionary market practices adopted by Respondent No. 2, in favour of the Respondent No. 3 and 4, for closing the market and denial of market access to the Appellant which is stated to be a company incorporated in the year 1952, an old Travel and Tourism Association having a membership of 2500 + companies involved in the tourism business.

4. The case set up by the Appellant is that the exclusionary market conduct of Respondent No. 2 is prevailing from the last 14 years and has restricted the market access for travel agent services for booking air tickets in India and has adversely impacted benefits of fair competition which would have resulted in lower prices and better services to the end consumers.

5. It is alleged that Respondent No. 2 had issued an office Memorandum bearing No. 19024/1/E.IV/2005 on 24.03.2006 titled 'Guidelines on Air Travel on Official Tours- Purchase of Air Ticket From Authorised Agents'. The Office Memorandum (hereinafter referred to as the 'OM1') contained direction to all government officials including the employees of the public sector companies to exclusively utilise the services of either Respondent No. 3 or Respondent No. 4 while booking air tickets for official travel and in this manner, foreclosed a substantial portion of the market to the private sector travel agents.

6. The Appellant has further alleged that it had approached earlier by way of an information which was assigned case no. 39 of 2010 to challenge OM1 but the Respondent No. 1 vide its order dated 15.09.2010 closed the case no. 39 of 2010 under Section 26(2) of the Act on the ground that the Respondent No. 2 is not an Enterprise and the Government being the consumer for such

services was entitled to make the choice for booking of air tickets through its authorised travel agents only.

7. The Appellant has alleged that it had to approach the Court again (second time) after 10 years having suffered by OM1 and subsequent OMs issued by ministry of the major public sector undertakings extending the same directions to the employees, though the consumers of the services provided by the travel agents were desirous of availing the services of the private sector travel agents as per clause 2 of the office memorandum no. 19024/22/2017-E-IV dated 19.07.2017 issued by the Respondent No. 2. However, it is alleged that the Respondent No. 2 rejected the overwhelming choice of the actual consumers and directed the ministries and departments of the government to continue utilize the services of only Respondent No. 3 and 4.

8. It is also alleged that OM No. 19024/22/2017-E.IV dated 27.02.2018 was issued wherein it was decided that "seeking relaxation of air travel guidelines pertaining to purchase of air tickets from authorised agents should have prior approval of the Secretary of the Administrative Ministry before referring the same to the Respondent No. 2" and then the Ministry of Road Transort and Highways issued a circular dated 28.02.2019 bearing No.

N20011/29/2016-E.II reiterating strict compliance of air travel guidelines in terms of the original impugned OM 1.

9. The Appellant has alleged that the conduct of Respondent No. 2 constitutes an anti-competitive refusal to deal in terms of Section 3(4)(d) and Section 3(1) of the Act, made the Appellant to approach the Respondent No. 2 vide the present information for the second time as the information filed in the year 2010 was dismissed by the R1 without proper economic analysis on the adverse effect on competition.

10. It was thus prayed that an enquiry under Section 26(1) of the Act may be initiated against the R2 and 3 to ascertain whether the OMs issued by the R1 has caused an appreciable adverse effect on competition (AAEC) in the market in India. However, the information has been closed by the CCI in terms of Section 26(2) of the Act which has led to the filing of the present appeal.

11. In the reply filed by the Respondent No. 3, it is alleged that the second information on which the impugned order has been passed is not maintainable and the Appellant has not come to the Court with clean hands and is guilty of abusing the process of law because the Appellant is trying to reagitate an issue which has already been adjudicated upon and issue involved is no more res integra.

12. It is alleged that OM1 which is subject matter of the second information from which the present appeal has arisen was also subject matter of the first information as it was challenged by the same Appellant before the CCI bearing case No. 39 of 2010 raising identical issues which was closed by a detailed order dated on 15.09.2010 under Section 26(2) of the Act.

13. It is further alleged that the Appellant has challenged the order dated 15.09.2010 by way of an appeal no. 21 of 2010 before the Competition Appellate Tribunal but vide order dated 26.09.2012 the appeal was dismissed and it was held that OM1 do not contravene any of the provisions, more particularly Section 3 and 4 of the Act. It is also submitted that the order of the Appellate Authority dated 26.09.2012 was not further challenged by the present appellant before the Hon'ble Supreme Court though it had the remedy, therefore, order dated 26.09.2012 became final against the Appellant on the issues involved and decided.

14. It is also alleged that the Appellant has concealed the fact that the OM1 was challenged by Saint Travel Services before the Hon'ble Delhi High Court in WP(C) No. 3380 of 2012 in which the issue was raised as to whether the administrative decision of the Union of India preferring the Respondent No. 3 and 4 herein to the exclusion of other travel agents is inviolation of Article 14 of the

Constitution of India and the Hon'ble Delhi High Court vide its order dated 29.10.2024 upheld the validity of the OM1 holding that the decision to avail the services of public sector enterprises over other pvt. travel agents cannot be subjected to judicial review and the petitioner therein had no vested right to insist that the Govt. authorities should avail its services.

15. It is further submitted by the Respondent that second information (Case No. 4 of 2020) filed by the Appellant before the CCI regarding OM1 and the question of law and facts raised therein are barred by the principle of res judicata because the same issue has already been decided on merit between the same parties in the first information submitted by the Appellant. In this regard, it is alleged that principle of res judicata is based on three maxims, namely, nemo debet lis vexari pro una et eadem causa which means no man should be vexed twice for the same cause, interest reublicae ut sit finis litium which means it is in the interest of the state that there should be an end to a litigation and res judicata pro veritate occipitur which means a judicial decision must be accepted as correct. It is also alleged that doctrine of res judicata is a fundamental concept based on public policy and private interest which has been conceived in the larger public interest which requires that every litigation must come to an end,

hence, applies to all proceedings including the proceedings under the Competition Act, 2002. It is further alleged that the issue raised in the present case were the issues in the information case no. 4 of 2020 (first information) wherein the validity of the OM1 was challenged, whether the OM is an agreement between R2, 3 and 4 within the meaning of Section 2(b) of the Act, whether the OM 1 has adversely effected the competition for the private travel agents in the market for air tickets booking by the government employees and whether the department of expenditure, ministry of finance, government of India is an enterprise within the meaning under Section 2(h) of the Act . It is alleged that these issues were directly and substantially in issue between the same parties i.e present Appellant, Union of India represented through the Department of Expenditure, Ministry of Finance, Balmer Lawrie and Co. Ltd. and Ashok Travels & Tours Ltd. which have been comprehensively decided by the CCI vide its order dated 15.09.2010 and appeal filed by the Appellant against the said order was dismissed on 26.09.2012 which attained finality because no further appeal was filed.

16. Counsel for the Respondent has also alleged that by filing of the second information, the Appellant is seeking a review of the earlier order dated 15.09.2010 and 26.09.2012 which had been

passed in the first information filed by the Appellant which is not permissible in law.

17. Counsel for the Respondent has thus submitted that second information filed by the Appellant and the present appeal is nothing else but an abuse of process of court and therefore, not only the appeal deserves to be dismissed but also the Respondent should be compensated with cost for dragging the Respondents into the litigation which has already attained finality in the first round.

18. The main plank of the submission of the Appellant is that though the first information filed by the Appellant was decided against it by CCI on 15.09.2010 and by the Appellate Authority on 26.09.2012 but since the market is dynamic, therefore, second information has been filed which should not have been dismissed by the Tribunal only on the ground of res judicata and should have been decided the same on merits.

19. It is argued that the Respondent No. 1 has erroneously held that the Respondent No. 2 is not an enterprise under the Act by ignoring the fact that it is controlling an economic activity and has foreclosed the entire market for private travel agents. In this regard, he has referred to a decision of the Hon'ble Supreme Court in the case of CCI Vs. Coordination Committee of Artists and

Technicians of W.B Film and Television, (2017) 5 SCC 17 to contend that the supreme court has clarified that any entity regardless of its form, constitutes an enterprise within the meaning of section 3 of the Act when it engages in economic activity. An economic activity includes any activity, whether or not profit making that involves economic trade. It is also argued that since the procurement of air tickets through travel agent is an economic activity, therefore, Respondent No. 2 by way impugned OM1, by creating duopoly only in favour of Respondent No. 3 and 4 and foreclosing the above market for thousands of travel agents across India is controlling this economic activity through the impugned OMs which action is amenable to scrutiny under the Act. It is submitted that conclusion drawn by the Respondent No. 1 that the Respondent No. 2 is not an enterprises is ex-facie erroneous because it has only seen the official function of R2. It is further submitted that the buyer's choice is sacrosanct when it comes to public procurement as held by the CCI vide its order dated 20.12.2011 in Jindal Steel and Power Limited Vs. Steel Authority of India Limited, Case No. 11 of 2009. It is also submitted that since the Appellant has also challenged OM dated 19.07.2017 and 27.02.2018, therefore, the cause of action for filing the present information arose almost seven to eight years since the

CCI last assessed competition in the relevant market. Therefore, the Commission's observation that TAAI had earlier filed a case against Balmer Lawrie and Ashok Travels being case No. 39 of 2010 raising similar issues" is untenable under the law.

20. He has also submitted that in case no. 73 of 2014 Amit Mittal Vs. DLF Ltd. it has been observed that in competition law cases period of assessment is crucial since markets by their very nature are dynamic and keep changing with time.

21. On the other hand, Counsel for the Respondents have argued that the Appellant has no legal right to file second information on the same cause of action as it has challenged OM1 and the subsequent OMs are only clarificatory in nature. OM1 has already been upheld not only by the Hon'ble Delhi High Court but also challenge to OM1 made by the Appellant by way of first information has been rejected when the CCI had closed the matter by its order dated 15.09.2010 and appeal filed to this order dismissed by the Appellate Authority. It is therefore submitted that it is a case which is squarely covered by the principles of res judicata as enshrined under Section 11 of the Code of Civil Procedure, 1908 but has the applicability as principles of public policy to all proceedings including the proceedings under the Act.

22. We have heard Counsel for the parties and perused the record with their able assistance.

23. There is no dispute in this case that the Appellant had earlier filed the first information assailing the validity of OM1 and has alleged that there is violation of Section 3 of the Act. The Appellant has invoked Section 3(1) and 3(4) which are reproduced as under:-

> "3(1). No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.
>
> 3(4). Any other agreement amongst enterprises or persons including but not restricted to agreement amongst enterprises or persons] at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—
> (a) tie-in arrangement;
> (b) exclusive [dealing] agreement;
> (c) exclusive distribution agreement;
> (d) refusal to deal;
> (e) resale price maintenance, shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.
> [Provided that nothing contained in this sub-section shall apply to an agreement entered into between an enterprise and an end consumer.]

> Explanation.—For the purposes of this sub-section,—
> (a) "tie-in arrangement" includes any agreement requiring a purchaser of goods or services, as a condition of such purchase, to purchase some other distinct goods or services;
> (b) "exclusive dealing agreement" includes any agreement restricting in any manner the purchaser or the seller, as the case may be, in the course of his trade from acquiring or selling or otherwise dealing in any goods or services other than those of the seller or the purchaser or any other person, as the case may be;]
> (c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods 6[or services] or allocate any area or market for the disposal or sale of the goods [or services];
> (d) "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods [or services] are sold or from whom goods 6 [or services] are bought;
> (e) "resale price maintenance" [includes, in case of any agreement to sell goods or provide services, any direct or indirect restriction] that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged."

24. A bare reading of Section 3(1) says that to invoke this provision the entity has to be an enterprise. Enterprise is defined in Section 2(h) which read as under:-

> "(h) "enterprise" means 1[a person or a department of the Government, including units, divisions, subsidiaries, who or which is, or has been, engaged in any economic activity, relating to the production, storage, supply,

distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space;]

Explanation.—For the purposes of this clause,—

(a) "activity" includes profession or occupation;

(b) "article" includes a new article and "service" includes a new service;

(c) "unit" or "division", in relation to an enterprise, includes—

(i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;

(ii) any branch or office established for the provision of any service;"

25. In so far as per Section 3(4) is concerned it talks about agreement amongst enterprise.

26. The issue as to whether the Respondent No. 2 is an enterprise and OM 1 is an agreement has already been decided by the Respondent No. 1 in case no. 39 of 2010 decided on 15.09.2010 holding that neither the Respondent No. 2 is an enterprise within the meaning of Section 2(h) nor OM1 is an agreement between Respondent No. 2, 3 and 4. In this regard relevant observations

made by the Respondent No. 1 in case no. 39 of 2010 are reproduced as under:-

> "9.1 It is obvious that the main objective of this OM is to rationalize the expenditure by taking advantage of competition among airlines. As per this OM a Central Government Official is free to procure air ticket directly from any airline or through Internet for official domestic visits. It is only when an official wants to utilize the services of travel agents it has been limited to the opposite parties, who are also required to ensure that the procurement of the ticket should be on the best bargain across all airlines. Thus the allegation of the informant that the government officials have no alternative but to purchase tickets only from the opposite parties, being factually incorrect, cannot be sustained.
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> 9.2 In the present case, Government of India is the consumer of air ticketing services and a consumer is free to make a choice as far as selection of goods or services are concerned. This has also to be considered in view of direct accrual of benefit to the consumer i.e. Government of India. Having imposed the condition upon the opposite parties to procure the air tickets on the best bargains available across all airlines, the consumer i.e. Government of India is doing nothing but ensuring benefit to itself.
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> 9.3 It is evident from the record that the informant has made allegations against the Government of India but it has not been made a party in the present matter.

Otherwise also, the Department of Expenditure, Ministry of Finance, Government of India cannot be said to be engaged in any activity which relates to production, storage, supply, distribution, acquisition or control of article of goods or provision of services. Therefore, the Government of India is not covered under the definition of enterprise provided in section 2(h) of the Act. The impugned O.M. issued to governed the official travels of its employees cannot be termed as an activity which can have any bearing on competition in the relevant sector. Moreover, the Government of India is the consumer in the present case, availing the services of the opposite parties in the procurement of air tickets for its employees for official domestic visits.

9.4 There is no case of horizontal agreement/restraint under Section 3(3). OM issued by the Department of Expenditure, Ministry of Finance, Government of India cannot be treated as an agreement on horizontal line. The opposite parties and the Government of India are not engaged in the business of identical or similar trade of goods or provision of service. The Government of India, in the present case, is a consumer and not engaged in the identical or similar trade of goods or services as that of the opposite parties.

9.5 The Government of India, being a consumer, is not producing anything, so it cannot be said that there is a vertical agreement between the Government of India and the opposite parties. The alleged refusal to deal has not resulted out of any vertical agreement, as discussed

above. It is the choice of the Government of India, like a normal consumer, to avail the service of a particular travel agency. Moreover, there is a direct accrual of benefit to the Government of India. Hence the provisions of Section 3(4) are also not attracted.

9.6 So far as the allegation relating to abuse of dominance is concerned the informant has not placed any cogent or credible material to substantiate its averment. The relevant market in this case is the air ticketing service market of domestic air travel. The policy of government has ensured competition by allowing free and fair environment in the relevant market. Thus, in the present case the Government of India being itself a consumer, cannot be said to be a dominant enterprise in the relevant market. The impugned O.M. has been issued apparently with a view to ensure economy in air travel expenses. Therefore, no case of contravention of section 4 of the Act is made out in this case against the Government of India or the opposite parties. The Commission has also taken into consideration various guiding factors as laid down in section 19(4) while taking its view that the opposite parties are not enjoying a dominant position in the relevant market.

10. In view of the aforegoing discussion the allegations made in the information do not fall within the mischief of either section 3 or section 4 of the Act. Therefore, the Commission is of the view that the information filed by the informant and the material as placed before commission do not provide basis for forming a prima facie

opinion for referring the matter to the Director General to conduct the investigation. The matter is therefore liable to be closed at this stage forthwith. The necessary corollary of this is that the interim relief prayed for is also not maintainable and the application of the informant under section 33 is disposed of accordingly."

27. The Appellate Authority dismissed the appeal of the Appellant on 26.09.2012 making the following observations:-

"10. We have perused the order passed by the CCI which is impugned herein. It is obvious from that order that the CCI has considered the Office Memorandum dated 24.3.2006 in detail. When clauses (i) to (viii) in paragraph 3 of the Office Memorandum are considered individually as well as collectively, it is clear that the objective of the Government of India (Respondent No. 4) was to secure competitive prices for the air travel undertaken by the their officers. Clauses(i),(ii), (iii), (iv) and (v) very specifically bring out the intention of the Government to save he costs. Clauses (vi) and (vii) speak about the convenience in securing the air tickets. It is only clause No. (viii) which seems to have irked the complainant. The clause runs as under :-

"Whenever the officer seeks to utilize the service of travel agents, it should be limited to M/s. Balmer Lawrie & Company and M/s. Ashok Travels and Tours. The above agencies would also ensure that procurement of tickets is made on best available bargain across all airlines."

Therefore, it is not that the Government officials who wish to take the air travel have under all the circumstances to approach Respondent Nos. I and 2 for securing their tickets. In fact the reading of clauses (i) to (vii) suggests that the Government official can purchase any ticket directly across the window provided the fare for such

ticket docs not exceed the normal fare of the entitled class for the said officer. Once that position is clear it is obvious that the complainant completely misunderstood the aforementioned Government Order. It is only when the Government official seeks to utilize the services of the travel agents, then he has to approach respondent Nos. I and 2. The reason is not far to discern. Respondent Nos. 1 and 2 have financial nexus with the Central Government. They are also public sector undertakings where Central Government has stake. If the Government has to secure the services, it obviously becomes a consumer receiving those services with a choice to select the entity to provide those services. Merely because it is a Government, there is nothing in law from prohibiting it to be a consumer. Government like any other person must have choice to choose the travel agencies with which it has to do the business. Nothing has been shown that Respondent Nos. 1 and 2 would cost more in case the Government takes their services. The basic principle is that every consumer must have choice to decide from whom it would receive the services. In that view, we do not find anything wrong with the questioned Government Memorandum.

12.As regards the finding that the Government is a consumer of air ticketing services, we are of the opinion that the approach of the CCI is correct. There is no reason why the Government cannot be termed as a consumer in these circumstances of the present matter, more particularly, when it is seeking the services
for securing air tickets on the reasonable rates.

13. The argument that because the Government is not a "person", therefore, it cannot be a consumer is obviously incorrect as has been rightly pointed out by the respondents. The definition of "person" is an inclusive definition and the term cannot be unnaturally restricted. There cannot be a narrow interpretation of the term "person". Once that view is taken the Government can be

treated to be a person and also the consumer. If we have a glance at the definition of the "person", it suggests that a local authority or an artificial juridical person also can be included in the term "person"。 If that is so, there is no reason why the Government should be excluded from being a person.

14.....Because of this peculiar language, the appellant has to say that the consumer must be a person. Even if we agree with that argument, we see nothing which can stop the Government from being a consumer. The CCI is also correct in holding that there is no vertical agreement between the Government of India and Respondent Nos. 1 and 2, we endorse that finding.

15.The learned counsel for the appellant also tried to say that Government of India was abusing its dominant position in the market. Once we hold that Government of India itself is a consumer, it cannot be said to be a dominant enterprise in the relevant market. The CCl is right in holding that the Government is a consumer in the relevant market for procuring the air tickets for domestic air travel. The Government in its role as a consumer has sought the services of Respondent Nos. 1 and 2, there is no question of its dominance merely because the Government officials purchase large number of tickets. It cannot be said that it is a dominant enterprise in the relevant market. It is not that the Government itself is in the business of the ticket travel industry. In fact it is a consumer and therefore there would be no question of contravention of Section 4 of the Act.

16. In so far as the contention that the Government Memorandum was in the nature of anti-competitive agreement, the finding of the CCI is correct that the said Government Memorandum does not amount to an agreement. It is an internal administrative decision to deal with a particular agency in the matter of securing air tickets. In our opinion, it cannot come within the mischief of any of the sub-section of Section 3 of the Act.

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18. The other argument by the appellant is that this Government Memorandum is unreasonable and arbitrary and as such it is contravention of Article 14 of the Constitution of India. For the same purpose the other two rulings are also cited namely Kuldeep Singh Vs. Government of NCT of Delhi reported in 2006 AIR (SC) 2652 and New Horizons Ltd. Vs. Union of India reported in 1995 (1) SCC 478. We have carefully seen these rulings and do not find anything in these rulings in support of the contention raised that the action is in any way contrary to Article 14 of the Constitution. All the rulings are entirely different on facts and cannot be applicable to the present facts. An administrative decision to avail of the services of Respondent Nos. 1 and 2 in the first place is not an agreement with Respondent Nos. 1 and 2 and secondly it is not a trading activity. It is also not distributing state largesse. At any rate, our task in this Tribunal would only be limited to decide as to whether the action on the part of the Government in passing the Government Memorandum is in contravention of any of the provisions of the Act. For the reasons given, we hold that the aforementioned Government Memorandum in no way contravenes any of the provisions under the Act, more particularly, Section 3 and Section 4 thereof. In that we do not find any infirmity in the order of the CCI and confirm the same. The appeal is dismissed. However, under the circumstances, we pass no order as to costs."

28. In the present case, the Respondent No. 1 has referred to all the three aforesaid issues and passed the order against the Appellant in the following manner which read as under:-

"15. The Commission notes that the information filed in this case does not have any allegations of abuse of

dominance (Section 4) and pertains to alleged violation of Section 3(4) and Section 3(1) of the Act. Even otherwise for the reasons mentioned in subsequent paragraphs of this order, a case under Section 4 (abuse of dominance) of the Act would not be made out against DOE, Balmer Lawrie and Ashok Travels and therefore the Commission does not deem it fit to grant further time as sought by TAAI.

16. The Commission notes that analysis of allegations of TAAI require determination of the issues, namely, a) Whether DOE is an 'enterprise', within the meaning of Section 2(h) of the Act?; b) whether the agreement executed between DOE, Balmer Lawrie and Ashok Travels is in contravention of provisions of Section 3(4) of the Act read with Section 3(1) of the Act?; and c) whether the agreement executed between DOE, Balmer Lawrie and Ashok Travels is covered under Section 3(1) of the Act?.

17. The Commission notes that TAAI had earlier filed a case against Balmer Lawrie and Ashok Travels, being Case No. 39 of 2010 raising same issues. In the said case, TAAI, on similar facts, had sought quashing of Office Memorandum 1 issued by DOE for allegedly being arbitrary and anti-competitive and thus in contravention of provisions of Sections 3 and 4 of the Act. Vide order dated 15.09.2010, the Commission closed the case under Section 26(2) of the Act.

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18. The Commission notes that the decision of the Commission dated 15.09.2010, passed in Case No. 39 of

2010, was challenged by TAAI before the erstwhile Hon'ble COMPAT. The erstwhile Hon'ble COMPAT, vide order dated 26.09.2012, upheld the decision of the Commission.

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19. It appears that the order passed by the erstwhile Hon'ble COMPAT was not impugned further and has attained finality.

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21. With respect to the first issue whether DOE is an 'enterprise', the Commission notes that TAAI has stated that definition of the term 'enterprise' has evolved with time and there are judicial decisions which may be considered for fresh assessment for the purpose of the case. Reliance has been placed upon certain judgments of the Hon'ble Supreme Court and Hon'ble High Courts, to regard DOE as an enterprise. As per TAAI, DOE is an enterprise which is undertaking economic activity in the procurement of air ticket services.

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24. As per the definition, an enterprise means a person or department of government which is engaged in any activity relating to production, storage, supply, distribution, acquisition of control of any article or goods, or provision of services.

25. The Commission notes that the 'activity' in question necessarily needs to be an economic activity. The question in the present case therefore arises whether DOE, is engaged in an economic activity to be regarded

as an enterprise under the provisions of Section 2(h) of the Act while issuing the impugned circulars.

26. As per the website of Ministry of Finance, the Commission notes that DOE performs the following functions: "The Department of Expenditure is the nodal Department for overseeing the public financial management system in the Central Government and matters connected with state finances. It is responsible for the implementation of the recommendations of the Finance Commission and Central Pay Commission, monitoring of audit comments/ observations, preparation of Central Government Accounts. It further assists central Ministries/ Departments in controlling the costs and prices of public services, reviewing system and procedure to optimize outputs and outcomes of public expenditure. The principal activities of the Department include overseeing the expenditure management in the central Ministries/ Departments through the interface with the Financial Advisers and the administration of the Financial Rules/ Regulations/ Orders, pre-sanction appraisal of major schemes/ projects, handling bulk of the central budgetary resources transferred to State. The business allocated to the Department of Expenditure is carried out through its Personnel &Establishment Division, Public Finance (States) and Public Finance (Central) Divisions, Office of Controller General of Accounts, Office of Chief Adviser Cost, and Central Pension Accounting Office."

27. Upon perusal of the activities performed by DOE, it appears that DOE oversees the public financial management system in the Central Government and matters connected with state finances and is responsible for the implementation of the recommendations of the Finance Commission and Central Pay Commission. The Commission observes that DOE's principal activities appear to be in realm of policy making and interface with various ministries and not commercial in nature. Accordingly, DOE cannot be regarded as an 'enterprise' in terms of Section 2(h) of the Act especially in relation to circulars which are impugned, which is nothing but manifestation of a government policy in relation to its availing of particular services as a consumer.

28. The second issue is whether the purported agreement executed between DOE, Balmer Lawrie and Ashok Travels is in contravention of provisions of Section 3(4) of the Act read with Section 3(1) of the Act. The Commission notes that TAAI has alleged that by choosing not to deal with the private players, DOE has indulged in refusal to deal under Section 3(4) read with Section 3(1) of the Act. In this regard, the Commission notes that there does not seem to be any vertical relationship between DOE and Balmer Lawrie and Ashok Travels as DOE does not fall at any level of production chain in a market. In view of above, the Commission is of the view that as there is no vertical agreement between DOE, Balmer Lawrie and Ashok Travels under Section 3(4) of the Act and no case

of contravention of provisions of the Act is made out under Section 3(4) of the Act.

29. The last issue is whether the purported agreement executed between DOE, Balmer Lawrie and Ashok Travels is covered under Section 3(1) of the Act. In this regard, the Commission observes that Office Memorandums and subsequent circulars are not in the nature of agreement pertaining to an economic activity as discussed above but are internal administrative decision of the Government to deal with a particular agency in the matter of securing air tickets. Such policy decisions of the Government emanating through circulars cannot be termed as an agreement under Section 2(b) of the Act and consequently not the kind of agreement envisaged under Section 3(1) of the Act. Accordingly, the Commission is of the view that no case of contravention of provisions of Section 3(1) of the Act is made out against the DOE, Balmer Lawrie and Ashok Travels.

30. In view of the foregoing, the Commission is of the opinion that there exists no prima facie case, and the information filed is closed forthwith against the Opposite Parties under Section 26(2) of the Act."

29. It is pertinent to mention that the Hon'ble Supreme Court in CCI Vs. Co-Ordination Committee of Artists and Technicians of W.B. Film and Television and Ors. (Supra) has held that the Department of Expenditure, Ministry of Finance, Government of

India, cannot be considered or regarded as an enterprise in terms of Section 2(h) of the Act, 2002 in relation to the Office Memorandum dated 24.03.2006.

30. The CCI has also held that there is no vertical agreement between the Respondent No. 2, 3 and 4 under Section 3(4) of the Act, 2002 and thus there is no case of contravention of said provisions of the Act, 2002. It is also held by the Hon'ble Supreme Court in Pharmaceuticals Ltd. & Ors. Vs. Punjab Drugs Manufactures Association & Ors. in regard to the validity of the policy decision of the Government regarding purchase of medicines for usages in Govt. hospitals and dispensaries only from public sector manufacturers that:-

> "2. Before the High Court of Punjab & Haryana in civil Writ Petition No.6144/87, the petitioners challenged the constitutional validity of the policy decisions of the Government of Punjab whereby directions were issued to the purchasing authorities that certain medicines used in the Government hospitals and dispensaries were to be purchased from public sector manufacturers only. The High Court was pleased to allow the petition and quashed the said policy decision by a judgment dated 3.6.1988. Being aggrieved by the said judgment and order of the High Court, the State of Punjab has preferred C.A. No.3723/88 before this Court and some of the aggrieved respondents have preferred C.A. No.3744/88.
>
> .....
>
> 6. In these appeals before us, learned counsel appearing for the appellants have reiterated the arguments that

were addressed before the High Court. The main contentions of the appellants are : (a) that by the impugned policy the State has created a monopoly in favour of the public sector undertakings and since the said monopoly is created not by an Act or a Statute but by an executive order the same is violative of Articles 19(1)(g) and 19(6) of the Constitution; (b) that the directions to purchase medicines only from public sector undertakings would amount to an act of discrimination. Hence, it is in violation of Article 14 of the Constitution.

.....

8. We have perused the impugned policy whereby the State Government had directed the authorities concerned to purchase certain medicines only from public sector undertakings or their dealers. In our opinion, the impugned policy only directs that certain drugs are to be purchased from the specified manufacturers. This does not preclude the other manufacturers or their dealers from either manufacturing or selling their products to other customers. It is of common knowledge that the requirement of drugs is not the need of the Government hospitals and dispensaries only. As a matter of fact, the need of the Government hospitals and dispensaries must be only a fraction of the actual demand in the market which demand is open to be met by the manufacturers like the appellants. Monopoly as contemplated under Article 19(6) of the Constitution is something to the total exclusion of others. Creation of a small captive market in favour of a State owned undertaking out of a larger market can hardly be termed as creation of monopoly as contemplated under Article 19(6) of the Constitution, more so because this captive market consists only of State owned hospitals and dispensaries. Thus, on facts, we agree with the High Court that there is no monopoly created by the impugned policy. We are supported in this view of ours by a catena of decisions of this Court.

9. A Constitution Bench of this Court in the case of Rai Sahib Ram Jawaya Kapur & Ors. V. The State of Punjab (1955 2 SCR 225) while dealing with similar restrictions imposed by the State on the purchase of text books held that a publisher did not have the right to insist on any of their books being accepted as text books. This Court held : "So the utmost that could be said is that there was merely a chance or prospect of any or some of their books being approved as text books by the Government. Such chances are incidental to all trades and businesses and there is no fundamental right guaranteeing them. A trader might be lucky in securing a particular market for his goods but he loses that field because the particular customers for some reason or other do not choose to buy goods from him, it is not open to him to say that it was his fundamental right to have his old customers for ever."

Further, while negativing the contention of the petitioners in that case based on Article 19(1)(g) of the Constitution, the Court came to the conclusion that the question whether the Government could establish a monopoly without any legislation under Article 19(1)(6) of the Constitution is altogether immaterial.

.....

16. It is clear from the various judgments referred to above that a decision which would partially affect the sale prospects of a company, cannot be equated with creation of monopoly. In Ram Jawaya Kapur's and Naraindass's cases (supra) the Constitution Bench also held that the policy restrictions, as discussed above, can be imposed by exercise of executive power of the State under Article 162 of the Constitution. Therefore, the contention of the appellants in regard to creation of monopoly and violation of the fundamental right under Articles 19(1)(g) and 19(6) should fail. The judgments cited above also show that preference shown to cooperative institutions or public sector undertakings being in public

> interest, will not be construed as arbitrary so as to give rise to a contention of violation of Article 14 of the Constitution
> .....
> 19. For the above reasons, we are of the opinion that the High Court was right in coming to the conclusion that by the impugned policy, there was no creation of any monopoly nor is there any violation of Articles 14, 19(1)(g) or 19(6) of the Constitution. In view of the above, we are of the opinion that these appeals should fail and the same are dismissed accordingly. No costs."

31. The Hon'ble Delhi High Court has also held in WP(C) No. 3380 of 2012 that :-

> "15. It is also relevant to note that the travel agency services availed by the respondents are not material given the overall volume of services required by non-government authorities. In this view, excluding the petitioner from business generated by the respondents would not disable the petitioner from carrying on its business.
> 16. As stated earlier, the petitioner has no vested right to insist that the respondents should avail its services. And, in the given circumstances, where the substantial business is generated by non-government authorities, the administrative decisions cannot be assailed on the ground of violating Article 19(1)(g) of the Constitution of India.
> 17. In the given circumstances, the writ petition and the application are dismissed. No order as to costs."

32. Thus, in view of the aforesaid facts and circumstances it is very well proved that the Appellant has approached the

Respondent No. 1 by filing second information on the same facts and circumstances against the same opposite parties with the same prayer which has already been declined in the first information filed by the Appellant and the order of the CCI was tested and upheld by the Appellate Authority when the appeal of the Appellant was dismissed and no further appeal by the Appellant was carried to the Hon'ble Supreme Court which seal the fate of the Appellant in so far as this litigation is concerned.

33. In this view of the matter the salutary principle / legal maxim that nemo debet lis vexari pro una et eadem causa would spring in to the action that no man should be vexed twice for the same cause which has been adjudicated in the present case by the Appellant because even if it is presumed that the economic activities are dynamic, as stated by the Appellant, the fact remains that the two courts have already held that the Respondent No. 2 is not an enterprise and OM1 is not an agreement inviolation of Section 3(4) of the Act, therefore, these issues cannot be reagitated and the court cannot be called upon to decide the same by passing a lengthy judgment and the wasting time which may be used for disposal of a genuine case, therefore, the present appeal is found without any merit and while dismissing this appeal, the Appellant is saddled with costs of

Rs. 5 lacs which shall be deposited by the Appellant in the Prime Minister Relief Fund within a period of 15 days from the date of passing of this order.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indevar Pandey]
Member (Technical)

New Delhi
25th October, 2024.

Sheetal