

**Competition Commission of India**

**Case No. 53/2011**

Dated : 30.11.2011

**Pitambra Books Private Limited, Delhi**

**- Informant**

- 1. Primary Education Department, Office of the Director, Andhra Pradesh Open School, Andhra Pradesh**
- 2. Sh. S.V Prasad, Chief Secretary and Chairman, Andhra Pradesh Open School, Govt. of Andhra Pradesh, Hyderabad**
- 3. Dr. D. Sambasiva Rao, Principal Secretary and Vice Chairman, Andhra Pradesh Open School, Govt. of Andhra Pradesh, Hyderabad**

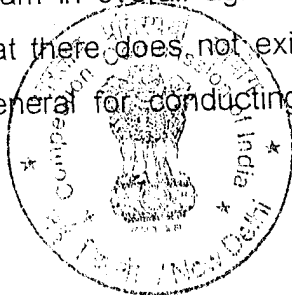
**- Opposite Parties**

**Order under Section 26(2) of the Competition Act, 2002**

**Per M.L. Tayal, Member (Supplementary)**

The present information has been filed under Section 19 (1)(a) of the Competition Act, 2002 (the Act) on 06.09.2011 by Pitambra Books Private Limited, Delhi (Informant) against Primary Education Department, Office of the Director, Andhra Pradesh Open School, Andhra Pradesh (Opposite Party-1), Sh. S.V Prasad, Chief Secretary and Chairman, Andhra Pradesh Open School, Govt. of Andhra Pradesh, Hyderabad (Opposite Party-2) and Dr. D. Sambasiva Rao, Principal Secretary and Vice Chairman, Andhra Pradesh Open School, Govt. of Andhra Pradesh, Hyderabad (Opposite Party-3) (collectively called as Opposite Parties) alleging that the conduct of the Opposite Parties is in violation of Section 3 and Section 4 of the Act.

2. The Commission has passed an order under section 26(2) of the Act in respect of the above information and I am in overall agreement with the reasoning given and conclusions drawn therein that there does not exist a prima facie case for making a reference to the Director General for conducting investigation into the matter and



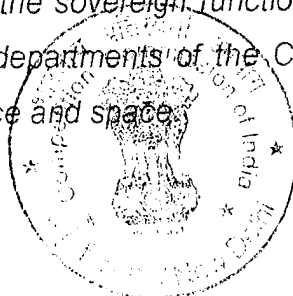
accordingly, the proceedings related to this matter are closed forthwith under section 26(2) of the Act.

3. However, with regard to the observations of the Commission in the abovementioned order at para 12, I hold a different opinion. Contrary to what has been said in the aforesaid para, I am of the considered view that none of the opposite parties named in instant matter falls within the definition of 'enterprises' as envisaged in section 2(h) of the Act. The observations of the Commission in the aforesaid para are as under;

*" The Commission observes that as per the information in the instant matter the Opposite Parties named in the allegation are associated with the invitation of tender for procuring the services of printing, supply and distribution of text books. With regard to this activity of inviting tender for procurement of services of printing, supply and distribution of text books, they would fall under the definition of 'enterprise' within the meaning of Section 2(h) of the Act and their conduct is therefore liable for examination under Section 4 of the Act."*

4. Before proceeding further it would be pertinent to have a look at the definition of 'enterprise' which also finds mention in the order of the Commission. Section 2(h) of the Competition Act, 2002 defines an 'enterprise' as under;

*" Enterprise means a person or a department of the Government, who or which is, or has been, engaged in any 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, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, 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."*

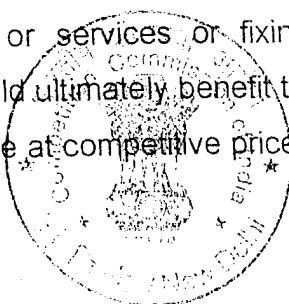


*Explanation.- For the purposes of this clause,—*

- (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;”*

5. It is noted that in order that any entity falls within the meaning of 'enterprise' as per Section 2(h) of the Act, it is necessary that it is or has been '*engaged in any activity*' of the nature defined therein. The activities mentioned in the said section are economic and commercial market activities in nature. The reason is that if a person's activities are not market activities in nature, there would be no anti-competitive element or impact of its conduct in any market because such person would not be competing in any market. Consequently, intervention of a competition agency would also not be required. The words '*engaged in*' preceding the words '*any activity*' assumes significance here. The words 'engaged in' reflect both regularity and continuity of the activities mentioned in the section. A pertinent question is whether the Opposite Parties in the instant case are '*engaged*' in any of the activities mentioned in Section 2(h).

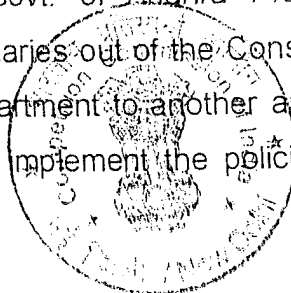
6. It would be pertinent to mention that the preamble of the Act, *inter-alia*, provides for establishment of this Commission to prevent practices having adverse effect on competition and to promote and sustain competition ***in the markets***. The Indian Competition Act, 2002 like any other competition law seeks to take care of the supply side of the market to make production and supply chain efficient, to ensure free and fair competition among economic firms at the market place so that firms may compete with each other and offer their products and services in market without limiting the supplies of goods or services or fixing prices. It is foreseen that competition among the firms would ultimately benefit the consumers since as a result better products would be available at competitive prices. This would also increase the



efficiencies of firms and incentivize them to innovate. Competition agencies, therefore, endeavour to encourage not only static but also dynamic competition at the market place. It is considered that competition results in total welfare encompassing both consumers' as well as producers' welfare. However, what is looked into is the behaviour of the firms at the market place so that market is not distorted in the interest of a few firms acting either in collusion or unilaterally to the overall disadvantage of consumers.

7. Indian Competition Act like any other competition law also seeks to promote and protect competitive forces in the market. Competition at a market place essentially means that individuals and firms strive for a greater share of market of goods and services and earn higher profits as a consequence. It is a mechanism for allocating productive resources to their most highly-valued uses and for encouraging efficiency. Since the competition laws essentially look into the structure, conduct and performance of firms at a market place, competition assessment of conduct of any non-economic or non-market entity whose basic activity is not market activity or commercial in nature, would be futile because such entities are not competing firms or economic enterprises in any market. In economics, "enterprise" is one of the 4 factors of production along with labour, capital and land. While labour earns wages, capital earns interest and land earns rent, enterprise earns profits. The definition of "enterprise" in Section 2(h) reflects market theories essentially applying to this economic factor of production and indicates entities that operate as firms in a market with a view to earn profit. An entity which is not such an enterprise or firm cannot be examined under competition law.

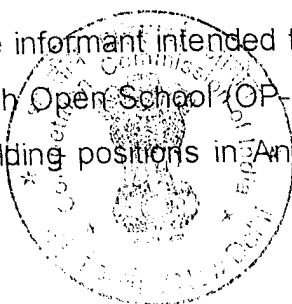
8. In this case, as far as OP-2 and 3 are concerned, they are Government Servants implementing and executing the policies and directions of the Government of Andhra Pradesh. They are holding key positions not only in Andhra Pradesh Open School Society (APOSS) but also in Govt. of Andhra Pradesh. OP-2 and OP-3 as Government Servants are paid salaries out of the Consolidated Fund of India. They may be transferred from one department to another and wherever they are posted their role will be to execute and implement the policies of Government for which



salaries shall be paid to them. They do not produce anything nor provide service in any market to earn profits as an economic enterprise. Therefore, it cannot be said that OP-2 and OP-3 are engaged in any activity of the nature mentioned in Section 2(h).

9. As per information, it is the director of Andhra Pradesh Open School (APOSS), who has issued the impugned tender on behalf of Primary Education Department, Govt. of Andhra Pradesh named as OP-1, for the purchase of services of printing, supply and distribution. As far as OP-2 and OP-3 are concerned, just because they are discharging duties in position of Government Servants in APOSS, they cannot be termed as 'enterprise' engaged in the activity of purchase of goods and services. It is noted from the website of APOSS that Chief Minister of State happens to be its patron. In addition, there are other govt. functionaries who are also occupying some position in the society. If the OP-2 and OP-3 are to be held as 'enterprises', then all other govt. functionaries who are holding some position in the society including the Chief Minister of the State would also fall in the definition of the 'enterprise'. This conclusion, in my view, would be bereft of any economic rationale and cannot be the intent of the legislature. If the argument is taken forward, ministers and officers of any Ministry or Department of Govt. which is buying any goods or services would fall under the definition of enterprise since it is possible that tenders are issued with their approval. To hold a person as enterprise for the purpose of Competition Act *merely* because the person is purchasing some goods or services and even if that purchase is not further exploited commercially, would be erroneous and potentially damaging for the economy. It would be akin to applying theory of firms to labour and concluding labour has an upward sloping supply curve instead of backward sloping labour supply curve. The natural backward inflexion point could then be misinterpreted as collusive output control by labour. It would lead to bizarre conclusions or remedies.

10. It is not clear whether the informant intended to charge only Primary Education Department or Andhra Pradesh Open School (OP-1) of anti-competitive conduct but since OP-2 and OP-3 are holding positions in Andhra Pradesh Open School, they

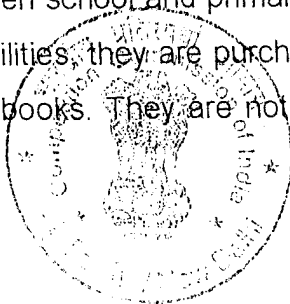


have also been named in the information as respondents. However, for the reasons mentioned above and to remove any ambiguity, I hold that OP-2 and OP-3 cannot be termed as 'enterprises'.

11. As far as the Opposite Party No.-1, i.e. Primary Education Department and Andhra Pradesh School (APOS) are concerned, I find that their basic activity is to implement the policies of Govt. of Andhra Pradesh relating to primary education and open school in the state of Andhra Pradesh. It is noted that Andhra Pradesh Open Schools aim at providing an alternative system of education to the dropout children who have missed the benefits of formal schooling. The objectives of the Open Schools are to implement the government's policy of providing sound, relevant education at the school stage through open learning system such as distance education and correspondence course to prioritized groups, and of providing opportunities to dropout children at the school stage to achieve universal education at a cost borne by the state.

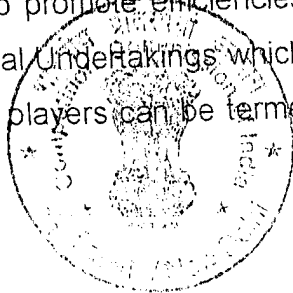
12. As such, OP-1 cannot be said to be "engaged in any activity" of the production, storage, supply, distribution, acquisition or control of any article or good, or provision of service as defined in Section 2(u) of the Act.

13. As per Section 2(h) of the Act, the persons who are 'engaged' in activities relating to "provision of services" may be termed as enterprises. Further, Section 2(u) of the Act stipulates that the "Service" for the purposes of Competition Act needs to be in connection with business of any industrial or commercial matter. For the mere fact that these entities (OP-1) are purchasing services of printing for getting the text books printed, supplied and distributed for schools, they cannot be held as "enterprises". The primary duty of these entities is promotion and implementation of the policies of government in the field of open school and primary education and in that capacity, in discharge of their responsibilities, they are purchasing services of printing, supply and distribution of school text books. They are not 'engaged' in any commercial or industrial activities.



14. A moot question is whether the Opposite Parties are operating in a market competing as market players in midst of competitors or responding to the competitive forces. I find that the activities of Opposite Parties are not guided by the general economic principles of demand, supply and price. It is not that they behave like firms engaged in economic and commercial activities and are competing at a market place or are acquiring (or buying) a product or service and are thereafter selling it in the market in competition with others with a motive to earn profit or drive out competition. In this case, they are procuring services of printers for getting text books printed, distributed and supplied as part of their responsibilities of implementation of policy of Govt. of Andhra Pradesh towards school education in general and education of drop-outs and neo-literates in particular. In context of the facts of this case, the economic competition is among the printers who as enterprises and are competing in market to get the orders of printing from different consumers, including APOSS.

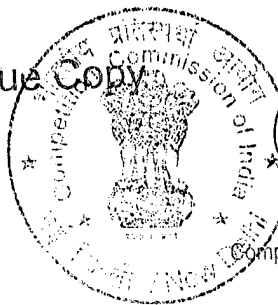
15. A related issue needs consideration. Can any person, including a Govt. Department or a functionary of Govt. be termed as an 'enterprise' within the meaning of Section 2(h) of the Act merely for their occasional activities relating to purchase of some goods or services to carry out their assigned functions? I am of the view that unless any govt. entity is solely engaged in the activities of production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services or activities mentioned in Section 2(h), their occasional purchase of goods or services in discharge of their duties assigned to them by the govt., or to facilitate the functioning of their department does not bring them within the ambit of the term 'enterprise' as conceived in the Act. The intent of legislature in section 2(h) appears to include all those govt. entities which are engaged in commercial activities and are acting at a market place like any other commercial firm within the definition of 'enterprise'. The economic rationale is that the govt. entities, wherever engaged in commercial activities or business, must also compete with private firms in a market place on an equal footing, so as to promote efficiencies in the market. Thus, State owned enterprises and Departmental Undertakings which are engaged in commercial activities and are acting as market players can be termed as 'enterprises'. However,



those entities which are performing non-commercial and non-market functions such as legislation, welfare, policy formulation, implementation, adjudication, regulation or enforcement and in course of performing their assigned duties, are purchasing some goods or services, cannot be termed so. Thus, police department cannot be held as an "enterprise" because it is purchasing bullet-proof vests; a court cannot be an "enterprise" because it is purchasing computers for court work; an intelligence directorate cannot be held as "enterprise" for purchasing surveillance equipment nor can a regulatory authority be held an "enterprise" because it purchases data software because here they are not acting as economic firms making purchases of raw material or input with a view to have profit optimizing output in a market. The purchases are purely for their own administrative use.

16. In view of these facts and for the reasons given above, I concur with the decision of the Commission in the instant case that prima facie no case is made out for making a reference to the Director General (DG) for conducting investigation into this matter under Section 26 (1) of the Act. However, in addition to the reasons given in the Commission's majority order, I am of the considered opinion that the entities mentioned as OP-1, OP-2 and OP-3 in the information cannot be said to be 'enterprises' within the meaning of Section 2(h) of the Act and hence Section 4 does not apply to them. There is no concern of Section 3 in the case.

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*S. P. Gahla*  
08/12/2011  
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