COMPETITION COMMISSION OF INDIA

Suo Moto Case No. 03 of 2011

In Re: Suo-moto case against LPG cylinder manufacturers

1. M/s International Cylinders (P) Ltd.	**Opposite Party No. 1**
2. M/s HIM Cylinders Ltd.	**Opposite Party No. 2**
3. M/s OMID Engineering Pvt. Ltd.	**Opposite Party No. 3**
4. M/s S.M. Cylinders	**Opposite Party No. 4**
5. M/s Tirupati LPG Industries Limited	**Opposite Party No. 5**
6. M/s Tirupati Cylinders Limited	**Opposite Party No. 6**
7. M/s Balaji Pressure Vessal Ltd.	**Opposite Party No. 7**
8. M/s R.M.Cylinders Private Ltd.	**Opposite Party No. 8**
9. M/s Confidence Petroleum India Limited	**Opposite Party No. 9**
10. M/s Sanghvi Cylinders Private Limited	**Opposite Party No. 10**
11. M/s BTP Structural (India) Pvt. Ltd.	**Opposite Party No. 11**
12. M/s Konark Cylinders & Containers (P) Ltd.	**Opposite Party No. 12**
13. M/s SKN Industries Limited	**Opposite Party No. 13**
14. M/s Surya Shakti Vessels Pvt. Ltd.	**Opposite Party No. 14**
15. M/s GDR Cylinders Pvt. Ltd.	**Opposite Party No. 15**
16. M/s Kurnool Cylinders (P) Ltd.	**Opposite Party No. 16**
17. M. M. Cylinders (P) Ltd.	**Opposite Party No. 17**
18. North India Wires Ltd.	**Opposite Party No. 18**
19. M/s Krishna Cylinders	**Opposite Party No. 19**
20. M/s Shri Ram Cylinders	**Opposite Party No. 20**
21. M/s Mauria Udyog Limited	**Opposite Party No. 21**
22. M/s Supreme Tecnofabs Private Limited	**Opposite Party No. 22**

23. M/s Bhiwadi Cylinders Pvt. Ltd.	**Opposite Party No. 23**
24. M/s Faridabad Metal Udyog Pvt. Ltd.	**Opposite Party No. 24**
25. M/s Haldia Precision Engineering Pvt. Ltd.	**Opposite Party No. 25**
26. M/s Gopal Cylinders	**Opposite Party No. 26**
27. M/s Om Containers	**Opposite Party No. 27**
28. M/s Universal Cylinders (P) Ltd.	**Opposite Party No. 28**
29. M/s Super Industries	**Opposite Party No. 29**
30. M/s Shri Shakti Cylinders Private Limited	**Opposite Party No. 30**
31. M/s Sarthak Industries Limited	**Opposite Party No. 31**
32. M/s Alampally Brothers Ltd.	**Opposite Party No. 32**
33. M/s ECP Industries Ltd.	**Opposite Party No. 33**
34. M/s Asian Fab Tec Ltd.	**Opposite Party No. 34**
35. M/s A.K.M.N. Cylinders Pvt. Ltd.	**Opposite Party No. 35**
36. M/s Lite Containers Pvt. Ltd.	**Opposite Party No. 36**
37. M/s Sahuwala Cylinders Pvt. Ltd.	**Opposite Party No. 37**
38. M/s Rajasthan Cylinders & Containers (P) Ltd.	**Opposite Party No. 38**
39. M/s Vidhya Cylinders (P) Ltd.	**Opposite Party No. 39**
40. M/s Mahaveer Cylinders Limited	**Opposite Party No. 40**
41. M/s Tee Kay Metels Pvt. Ltd.	**Opposite Party No. 41**
42. M/s Sunrays Engineers Pvt. Ltd.	**Opposite Party No. 42**
43. M/s Jesmajo Industrial Fabrications Karnataka Pvt. Ltd.	**Opposite Party No. 43**
44. M/s Carbac Holdings Ltd.	**Opposite Party No. 44**

<u>CORAM</u>

Mr. Ashok Chawla
Chairperson

Mr. Anurag Goel
Member

Mr. M. L. Tayal
Member

Mr. S. L. Bunker
Member

Appearances: Shri Sharad Gupta, Advocate of M/s Sharad Gupta & Associates for the opposite party Nos. 14, 23, 28, 40 and 42.

Shri Atul Nanda, Senior Advocate with Shri Ankur Sood, Advocate for the opposite party Nos. 27, 29, 37 and 41.

Shri N S Nanda Kumar, Advocate for the opposite party Nos. 15, 16 and 17.

Shri Manas Kumar Chaudhuri and Shri Vijay Pratap Singh Chaudhuri, Advocates of M/s Khaitan & Co. LLP for the opposite party Nos. 18, 25 and 44.

S/Shri Amol Sinha, Anshum Jain and Rahul Kochar, Advocates for the opposite party Nos. 1, 2, 3, 4, 5, 6, 11, 12, 13, 21 and 30.

S/ Shri Pradeep Aggarwal, Rajesh Aggarwal, Advocates for the opposite party Nos. 08, 09, 10, 19, 20, 22, 24, and 26.

Shri Praveen Mahajan, Advocate for the opposite party No. 39.

Shri P K Bhalla, Advocate for the opposite party No. 32.

Shri Kuljeet Rawal, Advocate for the opposite party No. 31.

Shri M M Sharma, Advocate for the opposite party No. 33.

Shri R. Satish Kumar, Advocate for the opposite party Nos. 34, 35 and 36.

Shri Manan Verma, Advocate for the opposite party No. 38.

Shri O P Gaggar, Advocate for the opposite party No. 43.

Order under Section 27(b) of the Competition Act, 2002

The *suo-moto* proceedings were initiated by the Commission on the basis of the information received in Case No. 10 of 2010, *M/s Pankaj Gas Cylinders Ltd*. v. *Indian Oil Corporation Ltd*. In that case, an information was filed by M/s Pankaj Gas Cylinders alleging unfair conditions in the tender floated by M/s Indian Oil Corporation Ltd. (IOCL) for supply of 105 lakh 14.2 Kg. capacity LPG Cylinders with SC valves in the year 2010-11. While considering the Director General (DG)'s investigation report, the Commission felt that an investigation was necessary in case of all the bidders who were the suppliers of 14.2 kg. LPG cylinders in that tender. In the investigation report in Case No. 10 of 2010, it was noted by the DG that there was a similar pattern in the bids by all the 50 bidders who submitted price bids for various States. The bids of a large number of parties were exactly identical or near to identical for different States. The DG had observed that there were strong indications of some sort of agreement and understanding amongst the bidders to manipulate the process of bidding.

2. It was on this basis the Commission directed drew up the *suo moto* proceedings in the matter and ordered the DG to investigate the matter. The DG, after investigations, submitted a detailed investigation report to the Commission. After considering this investigation report, the Commission directed that copies

thereof be forwarded to the parties seeking their objections. After considering the replies/ objections of the parties, the Commission passed the final order dated 24.02.2012 in Suo Moto Case No. 03 of 2011 holding the parties specified therein to be in contravention of the provisions of section 3(3)(d) of the Competition Act, 2002 (‘the Act’). It was also held by the Commission that the said parties were liable to pay penalty on the basis of their average turnover.

3. Aggrieved thereby and dissatisfied therewith, forty-four (44) parties preferred appeals under section 53-B of the Act against the abovesaid order of the Commission dated 24.02.2012 before the Competition Appellate Tribunal (‘the Tribunal’). The Hon’ble Tribunal *vide* its order dated 20.12.2013 in Appeal Nos. 21-44, 46-58 of 2012 disposed of the said appeals by passing the following order:

> *(1) That the findings of the CCI in respect of the breach of Section 3(3)(d) are confirmed against all the appellants.*
>
> *(2) The penalties ordered by the CCI shall stand stayed till such time that the CCI takes the final decision in the matter after hearing the parties. For this purpose, the matter is remanded to the CCI.*

4. It may also be pointed out that the Hon’ble Tribunal while issuing the interim order had directed that the order of the Commission would be stayed if the parties deposit 10% of the penalty amount and furnish security for the rest of 90% of the penalty amount, to the satisfaction to the Registrar, Competition Appellate Tribunal. *Vide* the order dated 20.12.2013, the Hon’ble Tribunal ordered direction to prevail till the Commission finally decides upon the penalties. It may, however, be pointed out that M/s Balaji Pressure Vessal Ltd.

did not report or file any submissions and it was much later the financial details were filed.

5. Hence, this order.

6. At the outset, it may be noted that pursuant to the order dated 20.12.2013 of the Hon'ble Tribunal all the forty-four (44) appellants, except few parties, reported to the Commission as directed. Rest approached the Commission beyond the timeline fixed by the Hon'ble Tribunal. Subsequently, some of the parties which did not report before the Commission within the stipulated time, approached the High Court of Delhi whereupon it was ordered that the petitioners therein be also heard alongwith other parties. In these circumstances, the Commission heard all the parties on various dates on the issue of penalty.

7. Before proceeding further, it would be appropriate to notice the pleas taken by the parties in their respective applications and oral/ written submissions.

Submissions of the opposite party Nos. 14, 23, 28, 40 and 42

8. These opposite parties filed their respective submissions taking substantially similar pleas through a common counsel Shri Sharad Gupta and hence the same are noted together illustratively from the submissions made in the case of the opposite party No. 23.

9. The counsel raised a preliminary legal plea on the interpretation and application of the proviso to section 27(b) of the Act which shall be adverted to and dealt within the course of the order.

10. Next, it was argued that penalty was imposed for an infringing action which took place on 1st or 2nd March 2010 and "the last three preceding financial years", mentioned in section 27 (b) of the Act must necessarily be the three

consecutive financial years preceding March 1 and 2, 2010, both the dates falling in the financial year 2009-2010. Thus, the last three preceding financial years for the purpose of section 27(b) of the Act in this case are 2008-2009, 2007-2008 and 2006-2007, which precede the financial year 2009-2010.

11. It was submitted that the "main clause" of section 27(b) of the Act mandates the Commission in this case to reckon 2008-09, 2007-2008 and 2006-2007 for the purpose of calculating the average turnover for the last three preceding financial years. The Act grants no discretion to the Commission in the choice of the last three preceding financial years. Despite this legal position, the Commission acted in violation of the provisions of section 27(b) of the Act in calculating the penalties imposed on the various bidding companies.

12. Coming to the issue of relevant turnover, it was pointed out that in para 57 of the order dated 20.12.2013, the Hon'ble Tribunal has referred to its judgment dated 29.10.2013 in *M/s Excel Crop Care Limited* v. *Competition Commission of India & Ors.* (Appeal No. 79 of 2102), wherein, the Hon'ble Tribunal had held that where a particular concern is a multi-commodity company, the relevant turnover should be considered and not the total turnover.

13. In this regard, it was sought to be argued that it is extremely relevant and important to note that the "main clause" of section 27(b) refers to "the turnover", while the proviso in section 27(b) refers to "its turnover". Since the two expressions have been used in the same section of the Act, it has to be necessarily presumed that the legislature has deliberately differentiated between the two expressions. And, therefore, "the turnover" has to carry a meaning, which is different from that of "its turnover". In accordance with the common usage of English language, "its turnover" has to connote the "total turnover" of an entity, relating to all its activities and all its products. "The turnover", due to the presence of the definite article "the", must refer to some particular turnover

only. Section 27(b) of the Act is a penal provision and, therefore, only appropriate meaning should be assigned to the words "the turnover" used therein, in accordance with the above submitted principles, since the quantum of the penalty to be imposed by the Commission is dependent on this meaning only.

14. Based on the above, it was submitted that "the turnover" may be taken to mean the turnover of 14.2 kg LPG cylinders to Indian Oil Corporation Limited only after deducting therefrom the statutory duties like excise duty, education cess, higher education cess, VAT and CST *etc*. taking into consideration the turnovers of three relevant preceding financial years *viz.* 2006-07, 2007-08 and 2008-09, for calculating the average turnover. This deduction is only logical because the applicant has just collected the statutory levies and deposited the same to the government exchequer, without retaining any part thereof with itself.

15. Lastly, the counsel argued that the Commission may consider the following mitigating factors for the purposes of imposition of penalty:

(i) Section 3 of the Act came into force on 20.05.2009 *i.e*. only a few months prior to March, 2010, when the offence of cartelization and bid-rigging took place. Therefore, in accordance with the guidance given by the Hon'ble Tribunal, the nascent stage of competition jurisdiction should be one of the factors to be taken into consideration while inflicting penalties.

(ii) This is for the first time that the applicant has been found to have engaged in cartelization and bid rigging. There is no evidence that it has been cartelizing in the past. Therefore, some consideration should be shown for this factor also in accordance with the guidance given by the Hon'ble Tribunal.

(iii) The contract for supply of 14.2 kg LPG cylinders was in the direction of fulfilling an important national objective *viz*. weaning away the consumers from polluting fuels and from using firewood in rural areas, thereby reducing the forests. The applicant completed the exercise in time and there is no complaint on record either about any delayed supply or any deficiency in the quality of cylinders supplied to IOCL. Therefore, in accordance with the guidance given by the Hon'ble Tribunal, some credit has to be given to the applicant, and consequently, the penalty imposed on the applicant should be reduced.

(iv) The applicant is willing to give an undertaking to the Commission that it would implement a competition compliance programme as a part of its corporate governance. The Commission may kindly consider this as a mitigating factor for the purpose of reducing the penalty imposed on the applicant.

(v) Another important fact that should be considered as a mitigating factor, is that there is no direct evidence against the applicant regarding its involvement in the offence of cartelization to rig the bid.

16. It was also mentioned by the counsel appearing for these answering parties that the above submissions/ arguments are in continuation of the submissions made by the applicants dated 10.02.2014. As similar submissions have also been made by one of the parties *viz*. M/s Vidhya Cylinders Pvt. Ltd., the same shall be noted while recording its submissions.

<u>Submissions of the opposite party Nos. 27, 29, 37 and 41</u>

17. Pursuant to the directions contained in the order of the remand, the answering opposite parties, as noted above placed before the Commission information based on the audited balance sheet and profit and loss account under the following three categories:

(a) Sales Turnover figures of the last three years *i.e*. FY 2006-07, FY 2007-08 and FY 2009-10 and average sales figures with reference to the 14.2 Kg cylinder tenders with IOCL.

(b) Sales turnover figures of last three years *i.e*. FY 2006-07, FY 2007-08 and FY 2009-10 and average sales figures with reference to LPG cylinder tender of the opposite parties with IOCL, HPCL and BPCL.

(c) Sales turnover figures of last three years *i.e*. FY 2006-07, FY 2007-08 and FY 2009-10 and average sales figures of the entire business of the opposite parties which also includes income received from unrelated areas such as: Auto Container, Pre-stressed Concrete Sleepers, Scrap, Other Sales, and Transport Charges.

18. It was argued that although all of the above information has been provided to the Commission in the interests of full disclosure, only the figures set out in the first category ought to be taken in account by the Commission being the income figures in relation to the alleged anti-competitive activity.

19. In this regard, the opposite parties relied on the interpretation and mandate of section 27 of the Act. In the submission of the opposite parties herein, section 27(b) of the Act requires that the maximum penalty of 10% based on the turnover of the opposite party for the last 3 years received by the opposite party from such agreement. The words 'parties to such agreement' makes it clear that the intention of the legislature is to punish the making of such anti-competitive agreement. It, therefore, follows that it is only income/turnover from such agreements which are in violation of section 3 that will be used for computation of penalty. Any other interpretation or that which encompasses other income of the opposite parties would amount to penalising legal activities of the opposite parties. Reliance was placed upon the remand order and other

decisions of the Hon'ble Appellate Tribunal to argue that the penalty has to be levied upon the relevant turnover. These orders will be noticed during the course of the order while examining such pleas.

20. Another extremely important aspect of the matter which would bring to bear on the issue of penalty is the relative position of the opposite parties in the concerned market especially *vis-a-vis* IOCL. While deciding the quantum of penalty, the Commission will look at the conduct of the opposite parties and whether such conduct has been pernicious enough to warrant a high penalty.

21. It has been argued that the present case and the proceedings emanating therefrom are off shoot of Case No. 10 of 2010, *Pankaj Gas Cylinders Limited* v. *Indian Oil Corporation*. In the case, M/s Pankaj Gas Cylinders challenged inclusion of clause 6 in Annexure II *i.e*. the holiday listing clause read with clause 18 Annexure I in the tender which gave IOCL power not to deal with certain parties who were on the 'holiday list'. Importantly, M/s Pankaj Gas Cylinders contended that IOCL was in a dominant position and the clause was an abuse of dominant position. The Commission had found a *prima facie* case and by order dated 30.03.2010 ordered the DG to conduct an investigation into the matter and submit its report. The DG in his report dated 15.09.2010 while treating relevant market as "14.2 Kg cylinders as per technical specifications described in the tender documents" came to a conclusion that IOCL is in a position of dominance and exercises market power by taking decisions independently of competitive forces prevailing in the market of procurement of 14.2 Kg LPG cylinders and can also affect consumers in its favour. In the order dated 22.06.2011, the Commission went through the bidding process, the terms of the tender conditions *etc*. and agreed with the findings of the DG that IOCL was in a dominant position while applying the tests under section 19(4)of the Act. Based upon this, it was submitted that one of the tests under section 19(4) of the Act is 'countervailing buying power.' It was pointed out that this phrase was

coined by Galbraith (1952) to describe the ability of large buyers in concentrated downstream markets to extract price concessions from suppliers. Galbraith saw countervailing power as an important force offsetting suppliers increased market power arising from the general trend of increased concentration in US industries.

22. In view of the above, it was canvassed that if the test of relevant market is applied in the present tender, and IOCL has been found to be dominant by judicial pronouncement while testing the very same tender, then as a clear, logical and inescapable consequence, IOCL and its bidding process are by nature, definition and character largely insulated from any form of anti-competitive actions. Moreover, the position of IOCL has also been tested under section 19(4) of the Act and one of the parameters therein is countervailing buyer power which by definition implies the ability to exert influence on suppliers (such as the Applicants). This crucial factor would have bearing on the quantum of penalty sought to be imposed by the Commission, contends the counsel.

23. It was next submitted that the intent of the opposite parties in breaking or contravening any existing law would also be a factor to be borne in mind before the Commission imposes penalty. It was prayed that the provisions of the Act are relatively new and unknown, especially given the social background and commercial position of the opposite parties. These are not large firms or big industrial houses with legal departments which would advise them on commercial/ economic laws and hence there was no intention on the part of the opposite parties to commit any action in contravention of provisions of the Act. The opposite parties are also not repeat offenders and this factor may also be applied by the Commission. It was pointed out that section 3 came into force on the Statute Book on 1st March 2009 whereas present tender was floated in March 2010. The said penalty would also impose great financial hardship in certain cases and even lead to closure of the businesses concerned. It was argued that the Hon'ble Tribunal has in the matter of *MDD Medical Systems India Pvt. Limited*

v. *Foundation for Common Cause and People Awareness,* Appeal No. 93 of 2012 decided on 25.02.2013 in paras 28 and 29 held these to be mitigating factors.

24. In view of the above, the answering opposite parties submitted that given the non-pernicious activities of the opposite parties herein especially given the dominant position of the IOCL, no penalty should be imposed or the quantum of penalty to be levied on the opposite parties may be kept to the bare minimum.

Submissions of the opposite party Nos. 15, 16 and 17

25. The opposite party Nos. 15, 16 and 17 filed their respective submissions through common counsel which are substantially similar and, as such, are illustratively noted from the submissions made by one of the answering opposite parties.

26. The applicants are private limited companies and captive manufacturers and suppliers of empty steel cylinders of 14.2 Kg. or 33 litres and 19 Kg. to IOCL, Hindustan Petroleum Corporation Limited and Bharat Petroleum Corporation Limited.

27. It has been submitted that LPG is an essential commodity under the control of Ministry of Petroleum and Natural Gas (MoP&NG). Its demand and supply is regulated by directives of MoP&NG under the LPG (Regulation of Supply and Distribution) Order, 2000. The annual requirement of consumers/ public of LPG cylinders, their pattern of procurement from captive manufacturers like the applicants herein is decided by MoP&NG.

28. It was further submitted that the immediate previous system of procurement and final pricing of cylinders by these oil companies was carried out under approved formula called New Pricing Formula effective from

01.04.1994 which is based on annual contracts with specific order quantity periodically given by oil industries. The procurement policy contains rates per cylinder payable by oil industries by a method of calculation/ formula with reference to cost of body shell, other steel components, Wholesale Price Index (WPI), excise duty, VAT and other taxes, transportation charges from manufacturing place to gas filling plants.

29. It was also submitted that the current pricing system came into effect from 01.04.2001. The three PSU companies are adopting the same system. Under this system, the manufacturers are permitted to charge provisional price in the initial invoices with the delivery documents, giving details of manufacturing cost, excise duty, VAT, transport *etc*. and other expenses as per format.

30. It was submitted that the final price is determined by the oil industries from their desk with reference to their standardized ratios for cost of inputs and WPI. The supply of cylinder is not on the basis of demand and supply to the consumers. It is predetermined quantity at a ratio for each oil company by the government. Each oil company fixed the quantum of cylinders to be supplied for each State. The price of gas cylinder is also fixed in the approved formula of the government. The oil companies are getting a fixed amount as interest free deposit for the cylinder entrusted to the consumer. The empty cylinder is always the property of the oil companies. The consuming public are charged for the gas only. The cylinder cost is always retained by oil industry as deposit. The suppliers of LPG cylinders are not allowed to manufacture cylinders of the same capacity and design or some other type of gas cylinders for consumption of public and they are bound to manufacture and supply LPG cylinders only to the PSUs during the relevant period. The only left over activity is to procure empty gas cylinders from the pre-approved manufacturers as per the directives of MoP&NG. The procurement is adopted by way of allocating specific quantity periodically for basis of annual contract for manufacture and supply by the

individual manufacturer. The quantity for each manufacturer is based on the installed capacity, past performance of production and deliveries as per the terms and conditions of the annual contract. The production cost is not a constant value and varies based on utilized capacity, as the fixed cost of the unit remains same irrespective of the quantity produced. Thus, the production cost of the manufacturer is also controlled by the oil industry based on the quantity determined and ordered by oil industry. The new entrants as manufacturers are also given specific quantity on the basis of their assurances and infrastructure facility.

31. It was also stated that the steel components are directed to be purchased from the named or designated suppliers only. The lowest price among the designated suppliers of steel and components is given for fixing the price per cylinder in the invoice irrespective of source of supply and its cost. The one essential component to release the gas from the cylinder is Pressure Valve. The valve is separately manufactured on behalf of the PSUs and supplied to the cylinder manufacturer for fitting in the cylinder. The valves fitted in the cylinders by the manufacturers are separately procured by the PSUs and, in turn, PSUs are supplying these valves to the cylinder manufacturers.

32. It was argued by the answering opposite parties that they furnished the vital disclosure documents pursuant to the summons issued by the Commission besides giving statements on oath to all the questions put by the DG.

33. It was contended that the other oil companies adopted *ex*-factory price as value in the invoice. Only IOCL fixes total value inclusive of other factors. The additions should be excluded from turnover. The proposed penalty on turnover is excessive and will lead to closure of factory of applicants. The workers and their family will be thrown out in streets. The applicants have to face all banks and creditors. The companies cannot survive. If the average cost of turnover of

cylinders supplied to IOCL is taken into account, the charging of 7% on total turnover on the business of the company becomes drastic and disproportionate to the violations. The applicants submit that the violation found out is not the making of the applicants. The price quoted by the applicants may be exempted from the cartel nature of agreement and rule of reasons suggested in the Raghavan Committee report may be adopted by not imposing penalty. It was also submitted that exemption contemplated under section 3(d) such as the concept of joint venture in the public interest of equal distribution of gas cylinders and to maintain the viability of the units of the manufacturers may be applied for dropping the penalty.

34. Lastly, it was prayed that in light of true disclosures made by the applicants, the monetary penalty may be waived and dropped.

<u>Submissions of the opposite party Nos. 18, 25 and 44</u>

35. These opposite parties also filed their respective submissions through common counsel which are substantially similar and, as such, are illustratively noted from the submissions made by one of the answering opposite parties.

36. Adverting to the mitigating factors, it was submitted that the calculation of penalties by the Commission in the impugned order in respect of the answering opposite parties is arbitrary and liable to be revisited.

37. It was highlighted that the Commission in the impugned order has exonerated M/s Punjab Cylinders and M/s JBM Industries, even though their prices were identical with the other bidders in the States where they submitted the bids, on the grounds of *inter alia* corporate espionage, absence of any reason to collude *etc.* It was pointed out that though M/s Punjab Cylinders and M/s JBM Industries were not in appeal before the Hon'ble Tribunal, referring to their exoneration, the Hon'ble Tribunal observed in paragraph 19 of its order that

"…[w]e are not satisfied at all with the reasons given by the CCI for their exoneration".

38. In this context, it was submitted that even the answering opposite parties had neither any business-justification or *quid pro quo* nor any occasion to collude with bidders whose prices were found matching with its prices in any of the States. Considering this and the observation of the Hon'ble Tribunal, it was submitted that since the applicants are again before the Commission, the grounds of exoneration as applied on M/s JBM Industries and M/s Punjab Cylinders should be identically applied in case of the answering opposite parties. Law of equality has not been maintained by the Commission by exonerating two parties who were in the same footing. This fact should be taken into consideration by the Commission while reconsidering the penalty on the answering opposite parties.

39. It was further submitted that the impugned order was relatable to the tender issued by IOCL due on March 03, 2010 for supply of LPG 14.2 Kg cylinders for domestic usages. However, the Commission has inflicted the penalty based on the overall turnover of the answering opposite parties from their entire business, which includes their revenue from orders received out of tenders of IOCL, BPCL and HPCL products beyond 14.2 Kg cylinders and income from sale of scrap and rejected raw material. It was submitted that, since impugned order was relatable to the tender issued by IOCL, only the turnover from the sale of 14.2 Kg LPG cylinders to IOCL should be taken into account for determination of the amount of penalty.

40. It was also stated that if the calculations are made by taking into account only the turnover relatable to the business from IOCL, which should be the relevant turnover, the amount of penalty would be significantly lower.

41. A grievance was made that the Commission provided no basis or reason for imposing a penalty at the rate of 7% of the average overall turnover for preceding three years from entire business of the applicants. It was submitted that it is a settled principle of law that if there is discretion with the authority (section 27 of the Act is a discretionary power), it is bound to take into account all the aggravating or mitigating circumstances and exercise the discretion laid down under the law, 'judicially'. A decision in the absence of reason or basis is an arbitrary decision. Therefore, the Commission should reconsider its decision with regard to determination and the amount of penalty imposed on the applicants.

42. Moreover, the Commission *vide* a Notification No. L- 3(2)/Regln.-Gen(Amdt)/2009-10/CCI dated 31 March 2011 had amended the regulation 48 of the CCI(General) Regulations, 2009 thereby foreclosing the opportunity of being heard to the parties before finalising the quantum of penalties. As such, the answering applicants did not get any opportunity to submit mitigating factors before the Commission.

43. It was submitted that the LPG cylinder 14.2 Kg industry works on a very thin profit margin. It is undisputed fact that the cost of production of a unit of 14.2 Kg LPG cylinder in domestic category is more than 86% of the total cost as such a reasonable margin of profit is lawful especially when the bidders do not have a right to determine the sale price of the products at its will. The power of IOCL to negotiate with tenderers and counter offer a lower rate before fixing the prices cannot be ignored by the Commission. The foregoing goes on to prove that cylinder manufacturers, including the applicants herein have no free hand in pricing its products.

44. It was also submitted that the demand-side market is highly concentrated and the market is a collective monopsony. Only *i.e.* PSU-OMCs can buy 14.2

Kg LPG cylinders for domestic use (as per a Gazette Notification dated 26 April 2000 issued by Ministry of Petroleum and Natural Gas, companies in the private sector cannot supply LPG to domestic consumers in 14.2 KG category of LPG cylinders). The necessary corollary is that the LPG cylinder manufacturers have to make supplies of 14.2 KG cylinders strictly to the PSU-OMCs, and there is no other player either in public or in private except for three OMCs *viz*. IOCL, BPCL and HPCL, to whom alternate supplies can be made. Therefore, in view of the market realities of LPG cylinder market, a lenient view should be taken by the Commission while imposing the penalties.

45. In view of the above facts and ratios enunciated by the Commission, it was submitted that in the present case the Commission may also like to follow the similar principles as identical circumstances exist:

(i) The applicants are also small sector enterprises.

(ii) Cost of production of a unit of 14.2 Kg LPG domestic category is more than 86% of the total cost and there, is no unreasonable profit. Further, procurement of all major raw materials (steel and S.C. valves) for cylinder manufacturing is regulated by IOCL, both, in terms of source as well as pricing.

(iii) IOCL negotiates (without exception) the price with tenderers and offers a counter rates, therefore, in effect bidders do not have freedom to determine the sell prices freely.

(iv) PSU-OMCs are the only buyers (demand-side collective monopsony) of 14.2 kg cylinders and cylinder manufacturers do not have any alternate buyer.

(v) Finally, these applicants submitted that they have never breached the provisions of the Act in the past and have been complying with the Act for all its future supplies to PSU OMCs and such averments are substantiated with the facts that no direct information/ reference has ever been filed by the PSU OMCs before the Commission and no such filing has taken place against the answering applicants.

46. In view of the above, it was requested that the Commission should give due consideration to the market realities of 14.2 Kg LPG cylinder manufacturing market, countervailing buying powers of IOCL, regulated cost constraints *etc*. and exonerate the answering parties from the penalties.

47. Lastly, it was also prayed to reconsider the amount of penalty because a high penalty will ultimately lead to heavy liability on the books of the companies and they may not be able to survive/ revive post payment of the penalty.

<u>Submissions of the opposite party Nos. 1, 2, 3, 4, 5, 6, 11, 12, 13, 21 and 30</u>

48. These opposite parties have also filed their respective submissions through common counsel which are substantially similar and, as such, are illustratively noted from the submissions made by one of the answering opposite parties.

49. In the beginning, an attempt was made to challenge the findings of contravention. Thereafter, legal submissions were made on the interpretation of section 27 of the Act. It was argued that the relevant part of the provision by employing the word 'may' instead of 'shall' reflects the legislative intent by clearly giving a directory right to the Commission in contradistinction to mandatory duty to necessarily impose the monetary penalty.

50. It was further argued that as per clause (a) of section 27 of the Act, the Commission, after considering the facts and circumstances of individual case, may direct any enterprise or association of enterprises or person or association of

persons involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be. It was, thus, submitted that without prejudice to their rights, the parties in the present facts and circumstances and similarities prevailing with M/s JBM industries and being the first time offenders are ready to file affidavits in view of clause (a) of section 27 only.

51. Furthermore, it was submitted that the Commission should consider the present condition of the companies and the gravity of the offence and the circumstances in the case upfront *vide* its discretion at the time of quantifying the percentage of the penalty, if any. It was pointed out that as the words used in the section is 'may' and not 'shall', the words are to be construed in their strict sense and thus it is not necessary that in every case where a contravention is established, the Commission is bound to impose a penalty upto 10 % of the average turnover. Reliance was also placed on the decision of the Hon'ble Supreme Court in the case of *Jamatrak Kewaiji Goswami* v. *The State of Maharashtra*, 1968 AIR 178 and various other rulings delivered in the context of revenue matters.

52. Specifying the mitigating factors and reasons for non-imposition of penalty, it was argued that the relevant annual turnover in respect of manufacturing of 14.2 Kg LPG cylinders is less than the entire annual turnover of the companies. It was pointed out that the companies have incomes from other sources *i.e*. sale of steel scrap *etc.*

53. It was vehemently contended that the penalty has to be considered on the basis of relevant average annual turnover only *i.e.* from the sale of 14.2 Kg LPG cylinder to IOCL over last three years, which is the product in issue before the Commission. Reliance was placed upon the judgments passed by the Hon'ble Tribunal to support the submissions. It was argued that in *MDD Medical Systems*

India Private Limited & Ors. v. *Competition Commission of India & Ors*., the Hon'ble Tribunal in its judgment dated 25.02.2013 in Appeals Nos.93 to 95 of 2012 held: "*CCI must not only give the reasons in support of the quantum of penalty, but also consider the mitigating circumstances and then only come to the final conclusion regarding the quantum of punishment*."

54. In the case of *Gulf Oil Corporation and Ors.* v. *CCI* (explosive cartel bid rigging case), the Hon'ble Tribunal *vide* its judgment dated 18.04.2013 held: "*It was argued especially by Gulf Oil Corporation that we should consider not the turnover, but only the 'relevant turnover' for the purpose of inflicting the penalties. Same arguments were reiterated by some others like Solar Industries, whose claim was that their main turnover was because of the export market. Unfortunately, it was not clarified before us, as to what would be the extent of the relevant market in case at least in Gulf Oil Corporation and Solar industries. The other did not pursue that point very seriously". (para 65).*

55. It was submitted that in the case of *M/s United Phosphorous Limited* v. *Competition Commission of India* in Appeal No. 81 of 2012, the Tribunal has accepted that the relevant turnover shall be taken into account while imposing the penalty. The relevant part of the order has been reproduced as follows:

> *"All the learned counsels very seriously canvass the question of "relevant turn over" The argument that the appellants, United Phosphorous Ltd. and MIs. Excel Crop Limited, are the multi-product companies was not seriously disputed by Shri Balaji Subramanian, learned counsel for the CCI. We have no reason not to accept that factor. As regards the arguments based on EU and OFT guidelines, we are of the opinion that those guidelines are undoubtedly relevant in arriving at the issue of deciding upon the turn over. However, those guidelines cannot be treated as be all and end all in the matter and would have to be*

considered in the light of the facts of each case. We, however, accept the contention that in the circumstances of this case the relevant turn over should be considered in case of the two appellants who are multi product companies."

56. In view of the abovementioned judgments, it was submitted that it is amply clear that the Commission at time of imposing penalty should only consider the relevant turnover *i.e.* turnover in respect of manufacturing of 14.2 Kg LPG cylinders in the present case. It was further submitted that the Commission cannot treat all the parties with the same stick and on the same parameters and every company and bidder should be treated differently based on their own installation capacity, annual relevant turnover, number of times the company participated in the bids in last three years for the same product and other relevant mitigating factors available with the companies.

57. It was also contended that margin of profit in manufacturing of cylinders is very low and the companies have been supplying cylinders on meagre profits, due to heavily loaded terms and conditions in favour of IOCL, tough competition prevailing in the market, knowledge of rates of manufacturing and supplying of cylinders disclosed in previous years tenders of IOCL, HPCL, BPCL. Therefore, after negotiations by IOCL, the said meager profit estimated by the companies was further reduced due to the terms and conditions of the tender which placed IOCL in a dominant position. It was stated that the profit of percentage made by the companies in the present tender is very low and the penalty imposed by the Commission is very high thereby completely defeating the principle of proportionality.

58. It was also argued that the liability to pay penalty does not arise merely upon proof of default. The Hon'ble Supreme Court of India in *Hindustan Steel Ltd* v. *State of Orissa*, 1970 AIR 253 has observed:

> *"An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do sq. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."*

59. Without prejudice to the above submissions, it was submitted that there were no guidelines, parameters or method for calculating the penalties by the Commission in respect of the companies and manufacturers. The Commission has given same treatment to all the companies in spite of the fact that all the companies were differently placed. The Commission therefore acted in an arbitrary, illogical and unreasonable manner by imposing penalty in the same manner on all manufacturers without considering the extenuating facts and circumstances of the case of each company.

60. It was stated that the penalty, if levied, will have a deteriorating effect on the competition as it will force the companies to take measures in respect of not participating for such tenders in near future, thereby affecting fair trade practices

and creating monopoly in favour of some big companies which would affect the basic ingredient of the Act.

61. It was also alleged that the Commission in the order dated 24.02.2012 failed to evaluate the geographic market affected by the infringement, duration of the infringement, aggravating and mitigating factors *etc*. While imposing the penalty of 7%, the Commission has given no reason or finding for the imposition of such huge penalty on the companies. The Commission had adopted varying standards for imposing penalties on companies allegedly involved in a cartel. In early cases, the Commission imposed a token penalty of only Rs. 1 lakh. In subsequent cases, the Commission had imposed penalty ranging from 3% of the turnover to 10% of the turnover. The Commission, in any of these cases, did not provide any indication as to why 3% of the turnover was chosen in one case as opposed to 10% of the turnover in another case. The Commission had not only imposed disproportionate penalties, but the penalty imposed on the companies is also beyond its legitimate expectation. The tendering conditions were so heavily loaded in favour of IOCL, it gives unilateral rights without inhibitions to cancel, modify, reject or negotiate the tender with the companies on its own terms and conditions. Furthermore, IOCL also had the right to cancel or reject, without assigning any reasons, thereby it is IOCL who was in the dominant position as held by the Commission in the case of *Pankaj Cylinders*. It was submitted that due to one-dimensional tender and conditions of IOCL, if the companies do not agree on the negotiated rates, the companies would not be able to utilise their full installed capacity resulting in the closure of the companies. The companies submitted that mitigating factors available to them, which the Commission failed to consider is that the said penalty levied by the Commission if sustained, the companies would suffer irreparable loss and injury including financial distress and loss, which may ultimately result in the companies going into acute financial distress, affecting the competition and the livelihood of thousands of employees and their families who are working in the companies.

62. Lastly, it was submitted that the companies are first time offenders and were unaware of the present new Act which came into effect from May 2009. Without prejudice, it was submitted that in accordance with section 27(a) of the Act, the companies are ready to sign an affidavit deposing that they would not indulge in any sort of such activities resulting in any form of cartelization.

Submissions of the opposite party Nos. 08, 09, 10, 19, 20, 22, 24, and 26

63. These opposite parties have also filed their respective submissions through common counsel which are substantially similar and, as such, are illustratively noted from the submissions made by one of the answering opposite parties.

64. At the outset, it was argued that it is well settled law that the language of a penal provision has to be strictly construed and no tax or penalty can be levied unless it is specifically provided in the statute. Section 27 of the Act confers a very wide discretion on the Commission. The words "may", "all or any" and "as it deem fit" clearly show that the imposition of penalty is not mandatory. It is discretionary and if the Commission deems it fit, it may not impose any penalty at all. Reliance was placed upon the decision of the Hon'ble Supreme Court in the case of *Hindustan Steel Ltd* v. *State of Orissa*, AIR 1970 SC 253 to contend that penalty will not be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. There are no rules, regulations or specific guidelines providing for the procedure providing for the manner in which the discretion with regard to the quantum of penalty is to be exercised. It was submitted that no penalty or minimum or token penalty ought to be levied in the facts and circumstances of the present case.

65. It was further argued that nothing has been shown in the orders that any public interest has been adversely affected. No effort was made to determine the price of the cylinder and the extra profit made by the enterprises on account of the alleged contravention of section 3. It was argued that nothing is on record to show as to what loss is caused to IOCL or to the general public consequent to the alleged violation of section 3 of the Act. It was suggested that IOCL was benefited to the tune of Rs. 1.43 crores consequent to the procurement of the cylinders in the tender compared to the rates at which cylinders were procured in the last tender.

66. Reliance was also placed upon the judgments of the European Commission to contend that if the infringing agreements have insignificant adverse effect, then there could be no case for penalty.

67. In the alternative, it was argued that where finding is that parties are part of an Association the penalties should be imposed on the Association and divided amongst the members of the Association. No penalty should be levied in view of the peculiar facts of the answering applicants and without prejudice and in the alternative, it was submitted that considering the mitigating facts and circumstances and various factors, the penalty, if at all, levied should be token penalty or minimal penalty and on the infringing turnover or the relevant turnover *i.e.* in respect of the value of the sales of goods or services to which the infringement relates.

68. It was also argued that the word "turnover" in section 27(b) has a restrictive meaning as it is preceded by the word "the". This particularizes the turnover to be turnover in respect of which the inquiry is made and finding is recorded by the DG and the Commission. What is mentioned in section 27(b) is "the turnover" and not "turnover". Reference was made to the judgment of the Supreme Court and the High Courts to buttress the plea.

69. Reference was made to the remand order of the Hon'ble Appellate Tribunal which, in turn, has relied upon the order passed by the Hon'ble Tribunal in *Excel Crop Care Limited* v. *CCI* (Appeal No. 79 of 2012) to argue that the penalty ought to be imposed, if at all, in relation to the turnover of the 14.2 Kg cylinders supplied to IOCL.

70. The following mitigating circumstances were also pleaded:

(i) Applicant is Small Scale Industry and its working would be closed down if penalty is levied/ paid. As such, in the peculiar facts of the applicant no penalty ought to be imposed as penalty, if any, imposed would be confiscatory and would cripple the Applicant permanently. This is one factor which found favour with the Hon'ble Appellate Tribunal in the case of *Excel Crop Care Limited* v. *CCI* (Appeal No. 79 of 2012) wherein it was held in Para 69 and was considered to be one of the mitigating factors and penalty was reduced to $1/10^{th}$ awarded by the Commission.

(ii) The case of the applicant is not comparable to other Units and the order placed is miniscule of the total tender quantity. This shows that the applicant is a very small unit compared to other units.

(iii) Considering the financial health, the working capital of the applicant would be adversely affected and it would be forced to close down if penalties are levied.

(iv) Without prejudice, if the infringement is upheld finally in the appeal to be filed by the applicant before the Hon'ble Supreme Court, it is submitted that in such an event the applicant would be a first time offender.

(v) The jurisdiction of the Commission is nascent.

(vi) The applicant did not have a common agent. Admittedly, the applicant had not attended the Sahara meeting - Pg. 69 of the impugned order,

(vii) The applicant does not fall into the category of a leader and has not played any active part in any act, deed or thing. The applicant had no role to play at all,

(viii) Case of the applicant is at par with that of JBM and better than that of Punjab Gas which have been absolved in similar facts although Punjab Gas was a member of the Association. These two parties were left off on two grounds *i.e.* they were not members of the Association and they did not attend the meeting in Mumbai. These two grounds are squarely applicable to the case of the applicant also.

(ix) Imposition of deterrent penalties on the applicant is not justified and would cripple the applicant.

(x) Heavy penalty ought not to be imposed in the facts and circumstances of the present case.

71. So far as the answering applicant/ party *i.e*. M/s Confidence Petroleum India Ltd. is concerned, certain peculiar facts may be noticed.

72. In this connection, it may be noted that M/s Hans Gas Appliances Pvt. Ltd. and M/s Khara Gas Equipments Pvt. Ltd. merged with M/s Confidence Petroleum India Ltd. by an order dated 18.09.2009 of the High Court of Bombay. However, as the BIS, CCOE [Chief Controller of Explosive] and other licenses (pending for change of name) were in the name of M/s Hans Gas Appliances Pvt. Ltd. and M/s Khara Gas Equipments Pvt. Ltd., the tenders were filed in their individual names and orders were placed on them but the turnover in their names were included in the turnover of M/s Confidence Petroleum India Ltd. Further, as the appointed date of merger was 01.04.2007, the turnover of the companies

i.e. M/s Hans Gas Appliances Pvt. Ltd. and M/s Khara Gas Equipment Pvt. Ltd. are recorded in the books of M/s Confidence Petroleum India Ltd. w.e.f. 01.04.2007 and are consolidated.

73. It was further pointed out that M/s Andhra Cylinders (a unit of M/s Envy Cylinder Pvt. Ltd.) is a 100% subsidiary of M/s Confidence Petroleum India Ltd. and as such the turnover of M/s Andhra Cylinder is taken as the turnover of M/s Confidence Petroleum India Ltd. in the consolidated accounts under the Companies Act, 1956.

74. It was also argued that the applicant is multi-commodity companies and its turnover includes sale of raw materials, trading of bulk LPG gases, oxygen, Carbon di-oxide, turnkey project, auto LPG installations, bottling, hot and cold repair, logistics business and other business and also from manufacture and sale of LPG cylinders *etc.* The average turnover of the cylinder business is approx. 27.18% in case of all 3 PSUs and to IOCL is only 12.24%.

75. It was alleged that there is a significant error in the computation of turnover in the original order of the Commission. This is evident from the statement annexed which shows that the average turnover of all the commodities is Rs. 391.01 crores whereas the corrected turnover is Rs. 179.79 crores only as in the original order the turnover of units is taken separately and also taken in the consolidated turnover.

<u>Submissions of the opposite party No. 39</u>

76. It was submitted that section 27(b) of the Act is completely silent regarding any specific factors to be taken into consideration or the methodology to be adopted for imposition of penalty and as much as there are no guidelines framed and published by the Commission for imposition and determination of the penalties, hence the submission of the applicant in the representation as well

at the time of personal hearing of the case are well deserved to be considered in the present case before reaching out any decision to determine the penalty against the applicant.

77. It was stated that the order dated 24.02.2012 of the Commission so far it related to penalty contained neither discussion whatsoever nor any justification as to why the Commission had imposed the penalty @ 7% on average turnover of the applicant. It was stated that it is trite law that Commission is not only regulatory authority but it has an adjudicatory role also. Under section 27(b) there is discretion on the part of the Commission in ordering the penalty upto 10% of three years average turnover, and it is further settled law that it is also not as if a penalty has to be imposed because it is lawful to do so, hence the earlier penalty imposed by the Commission is liable to set aside and required to be adjudicated afresh by keeping in view the observations of the Tribunal. It was further stated that the Tribunal in its order dated 20.12.2013 has categorically held that the penalty imposed by the Commission lacked the justification and hence on this ground alone the earlier penalty levied on the applicant is liable to be set aside and decided afresh at minimal level.

78. A specific submission was made that for purpose of determining the penalty, the Commission shall consider the average turnover of 14.2 Kg LPG cylinders supplied to IOCL alone after deducting the statutory levies. It was argued that for determination of the turnover in the present case would be affected turnover *i.e*. the average turnover of 14.2 KG Cylinders to IOCL which is comparatively small when compared to the total average turnover of the applicant and the penalty be restricted at minimal level to the average turnover pertaining to IOCL 14.2 Kg cylinders alone. It was argued that larger interest of justice and as well purpose of the Act will be served if the Commission takes applicant's "relevant turnover net of statutory levies to which the infringement

directly relates" which in this case would be the average turnover of 14.2 kg LPG cylinders supplied to IOCL alone.

79. It was further stated that as levy of penalty on the Excise Duty, Education Cess, Higher Education Cess, VAT, CST will constitute the unjust enrichment to the exchequer as the penalty levied under the Act is collected by the Government of India. Hence, levy of penalty under the Act will result in double benefit to the Government first at the time of revenue collected at the time of the levy of aforesaid duties and thereafter again at the time of levy of penalty under the Act on aforesaid portion of statutory levies.

80. In present case, it was pointed out, the factor whether the alleged "cartel prices were ever implemented or not" is also relevant factor and mitigating factor in favour of the applicant while determining quantum of penalty. It was suggested that ultimately the prices were fixed by IOCL in the impugned tender through negotiation by calibrating the quoted prices as per their internal estimates.

81. It was also submitted that the applicant is small scale industry and hence it cannot be considered as corporate of large magnitude or conglomerate of worldwide operations capable of controlling the market forces. Thus, the nature of activity and as well as scale of operation of the applicant being those of SSl shall *per se* act as mitigating circumstances and rather qualifies the applicant for imposition of symbolic penalty only as there is discretion lies with the Commission not to even levy the penalty, the Act only prescribes for maximum extent of penalty but does not provide for minimum amount of penalty.

82. It was also contended that the applicant is a first time offender under the new legislation and, as such, it deserves no penalty or only symbolic penalty.

83. It was canvassed that question of relevant turnover as defined under the Act is open for fair, equitable and reasonable interpretation. The word 'turnover' is defined under section 2(y) of the Act as "turnover includes value of sale of goods or services". Thus, by virtue of very meaning of turnover the concept needs to be interpreted in present case with the relevant market, nature, duration, gravity and extent of the contravention, the loss or damage suffered as a result of the contravention, the market circumstances in which the contravention took place and the level of profit derived from the contravention. It was stated that once these criteria are applied, it would lead to conclusion in favour of the applicant.

84. It was further stated that in the investigation report, there is no conclusive finding supported with evidence which goes to establish that the applicant herein has earned high or unreasonable profit margin on sale of 14.2 Kg LPG Cylinders to IOCL by way of quoting the identical prices in as much as industry average of profit is wafer thin at @ 5% to 7% and there is no finding and evidence to the effect that award of the orders in impugned tender and resorting to the identical prices by the applicant resulted in immediate spurt or jump in profits or fortunes of the applicant. It was stated that complete absence of any evidence to this context is clearly a mitigating factor which needs to be considered while determining the penalties.

85. It was also pointed out that high cost component of the cylinder manufactured and factors thereof are relevant and are important guiding factor since cost of raw material is about 80-90% in total cost of cylinder. Hence, considering the minuscule increase in price of cylinder as compared to last tender which is even lower than the inflation rate of 7% to 8% clearly rules out the unfair profit margin on the part of the applicant which clearly goes to establish that there is no generation of high, unreasonable or unfair level of the profits by the applicant by way of infringing act. The aggravating factor of high

or unreasonable profit margin is completely absent in the case of the applicant which needs to be considered by the Commission while imposing the penalty in the present case.

86. It was also argued that it is a principle of statutory interpretation that penal provisions on account of the burden they impose are to be construed strictly and applying these well settled principles to the applicant case will only result in complete absence of aggravating circumstances and unconditional presence of mitigating factor in favour of the applicant herein which warrants only determination of symbolic penalty upon the applicant.

87. It was also stated that the object of the Act could not be to close down the business. Rather, it was suggested, closure of the applicant company will ultimately reduce the competition in the industry and therefore infliction of heavy penalty upon the applicant will rather go against the very preamble and purpose of the Act itself.

88. It was also pointed out that the applicant herein throughout the investigation cooperated with the agencies involved and its conduct remained exemplary which is mitigation factor in itself and ought to be considered by the Commission while taking any decision on imposition of penalty.

89. Lastly, it was also highlighted that the role of the applicant in quoting identical price in the impugned tender is not adjudged as leader or chief instigator of the infringement complained of in the present case. The act of the applicant which are stated to be violative are not intentional and there is no finding on record to suggest that the case of the applicant is that of repeated infringement.

Submissions of the opposite party No. 32

90. The answering opposite party made the following submissions:

(a) The applicant is a small manufacturer of LPG Cylinders domiciled in the State of Kerala with an installed capacity of producing 300000 LPG Cylinders *per annum*. Manufacture of LPG Cylinders is the only business of the applicant and the size of operations of the applicant is very small.

(b) The present owners/promoters of the applicant company took over the ownership and management of the applicant in the year 2005-06 by purchase of 100% equity from the previous owners/promoters. The applicant under the present owners had never been a member of or otherwise associated with any LPG Cylinders Manufacturers Association in India in any manner whatsoever.

(c) The applicant submitted a bid to Indian Oil Corporation (IOC) for supply of 1,50,000 LPG Cylinders for its home State of Kerala and for supply of 1,50,000 Cylinders for state of Tamil Nadu for the year 2011-12 against a tender floated by IOC. Since the price quoted by the applicant for supply for the State of Tamil Nadu was found to be the highest, no order was placed on the applicant for supply of cylinders for the State of Tamil Nadu.

(d) The price quoted by the applicant for supply in its own home State of Kerala was not the lowest and hence it could not get L-1 status in its own state of domicile. The price quoted by the applicant was Rs.1151 (Rs. 1159 in the previous year) per cylinder. The applicant was awarded an order to supply only 79090 cylinders against its bid for 1,50,000 cylinders, which constituted just about 25% of its installed capacity and less than One percent of the total quantity for which the tender was floated by 100, at a price of Rs.1141.53 per cylinder. There were six other bidders (including 2 groups of 3 parties and 2 individual parties) who quoted identical price as that of the applicant.

(e) The applicant had directly submitted its bid to the IOC and did not engage or employ the services of any agent or common agent for this purpose. The DG report, which is reproduced in para 5.2.3 of the impugned order dated 24.2.2012 of the Commission, does not name the Applicant as the one which had submitted its bid through any agent or six common Agents.

(f) The applicant is not part of those 44 cylinder manufacturers who had submitted a common reply/submissions to the DG report as found by the Commission. The list of 44 manufacturers prepared by the DG does not contain/include the name of the applicant.

(g) The Applicant has categorically stated on record before the DG that neither the Company nor any Director or any officer of the company is member of any LPG Cylinders Manufacturers Association nor any one from the Company has ever attended any meeting of any cylinder manufacturers at all. It has also been categorically stated that no one from the company attended any meeting of any LPG Cylinders Manufacturers or lunch or dinner alleged to have been held in Mumbai on 1st/2nd /3rd March, 2010. It was further stated that neither the Applicant nor any of it Director or any other officer is even aware of as to who happens to be the President or other office bearer of the said Association.

(h) There is nothing common between the applicant and the other LPG Cylinder Manufacturers in any manner whatsoever and there are no allegations in that regard made by DG in its report or by the Commission in the impugned order.

(i) The representative of the applicant during recording of his statement recorded by the DG and its reply to the Commission has categorically stated that applicant is not a member of any LPG Cylinder Manufacturer Association, did not attend any alleged meeting of manufactures held in Mumbai, did not engage the services of any agent for submission of its bid, did not file any common submissions to DG along with any other manufacturer and has acted completely independent in its bid and therefore cannot be clubbed together with other LPG Cylinder Manufacturers.

(j) It is pertinent to note that all other nine (9) bidders who had quoted the identical price as that of the Applicant for the state of Kerala, also quoted identical price for supply for the State of Tamil Nadu which was far too lower than the price quoted by the Applicant for the State of Tamil Nadu. This fact goes to conclusively prove that the applicant had no tie-up or arrangement or agreement with the other bidders who had quoted identical price as that of the Applicant for the state of Kerala. Had there been any collusion between the Applicant and these other nine parties, the Applicant would also have quoted the same price as those nine parties for supply for Tamil Nadu and would have thus got some order also like all the other nine bidders. It was submitted that no business entity would enter into any arrangement or agreement with another person to lose the share of its own business to other persons.

(k) Though the applicant had quoted for supply of 150000 Cylinders each for the state Kerala and Tamil Nadu, it got order for supply of only 79090 cylinders and that too for its home state of Kerala only. No order for Tamil Nadu was given to the applicant whereas the other nine bidders who had quoted identical price for supply for Kerala as well as for Tamil Nadu were given orders for both these states. This is a sure and strong indication that those nine bidders might have been working in tandem amongst themselves but the applicant had nothing to do with them. The price quoted by these nine bidders which happened to be identical with that of the applicant could either be a pure co-incidence or on account of leakage or corporate espionage. The applicant has also pointed out in its Statement on Oath recorded on 18.04.2011 that there could have been a leakage of its bid price and the possibility of corporate espionage could not be ruled out. It is not expected of someone becoming part of any agreement or arrangement which is detrimental to its own interest. After all, the sole purpose of any arrangement/ understanding among the bidders is to ensure that each one, who is a party to such arrangement, gets a fair share of total quantity to be procured by the tenderer.

(l) That there is nothing common between the Applicant and the other LPG Cylinder Manufacturers in any manner whatsoever and there are no allegations in that regard on record made by DG in its report or by the Commission in its order.

(m) That neither DG nor the Commission has any adverse finding or made any specific allegations against the Applicant in any manner whatsoever.

(n) The case of the Applicant is squarely covered by the reasoning given by the Commission in case of JBM Industry Limited (JBM) and Punjab Gas Cylinders Limited (Punjab Cylinders) and therefore deserves to be excluded for the same reasons as those given for exonerating JBM and Punjab Cylinders. In fact, it was pointed out that Hon'ble Mr. Prasad, Member of the Commission has specifically recorded in his separate order that different yardstick cannot be applied to other manufacturers who are similarly placed as JBM and Punjab Cylinders.

(o) To prove concerted action there must be either direct or circumstantial evidence that reasonably tends to prove that the parties have a conscious commitment to a common scheme designed to achieve an unlawful objective. In the case of the Applicant, no such commitment can be attributed to it keeping in view the price quoted by the Applicant for the states of Kerala and Tamil Nadu for which the Applicant had quoted.

(p) The bidding behaviour of the Applicant is not found to be consistent with the other bidders with whom the Applicant is alleged to have acted in concert and that the Applicant, while being subjected to examination by the DG, stated or admitted anything of the sort as alleged by the Commission. The applicant, which is Kerala domiciled, had made its bid offer only for the states of Kerala and Tamil Nadu. The price quoted by the applicant for the state of Tamil Nadu was arrived at after adding cost of freight to the manufacturing cost and was the highest of all bids. Thus there is no evidence at all against the Applicant except that of identical price with some other suppliers in its home state of Kerala. The factors given by the Commission itself to prove cartel behaviour on the part of the bidders in addition to the identity of price do not at all apply to the case of the Applicant.

(q) It is most respectfully submitted that there are very strong *prima facie* mitigating factors/circumstances in favour of the Applicant which would warrant leniency for the Applicant. The Applicant has never been held guilty of or even charged with any anti-competitive practices. The Applicant is too small a player to influence the decision of the other bidders who are very large operators as compared to the Applicant.

(r) The net worth of the Applicant is very small and there are large unabsorbed losses on the Balance Sheet of the Applicant which are being carried forward. The proposed penalty is too heavy and harsh for the Applicant to bear and such penalty would cause erosion of almost 50% of the net worth of the Applicant thus turning it into a potentially sick company under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985. This would endanger the future of more than one hundred direct employees and their families besides many more persons who are indirectly employed for the Applicant.

(s) The applicant has faithfully complied with every order passed by the Commission and also by the Hon'ble Tribunal in all respects and therefore deserves the lenient treatment from the Commission and more so in view of the fact that the Applicant has not indulged in any unlawful activity against the provisions of the Competition Act, 2002 as demonstrated above.

(t) Penalty is related to and levied up to maximum of 10 percent of the average turnover of three last preceding financial years. It may be any amount up to that extent, depending on the gravity and the duration of the infringement. The purpose of penalty is not punishment, but deterrence and to discourage violation and thus to make the competition law more effective. The Commission must take into consideration not only the particular circumstances of the case but also the context in which infringement occurs and must ensure that its action has the necessary deterrent effect. As far as the Applicant is concerned, it is a very small operator who was awarded less than One percent of the total quantity of cylinders procured by IOC and which was less than 25% of its installed capacity. It is respectfully submitted that the Applicant could not be expected to have made any extraordinary financial gains out of any such alleged cartel arrangement.

(u) In assessing gravity of infringement, regard must be had to large number of factors, the nature and importance of which vary according to the type of the infringement in question and the particular circumstances of the case.

(v) Gravity and duration are the two important factors. In assessing gravity, account must be taken of the nature of the infringement, its actual impact on the market and size of the relevant geographic market. If the trade restrictions are of vertical in nature with a limited market impact affecting limited part of area, the infringement is minor. It is grave if it has wider market impact and effects in extensive area. It is still graver, if trade restrictions are horizontal such as price cartel / or market sharing quotas. On the basis of gravity, the amount of penalty is first decided then increased on what has been the duration of infringement. It is submitted that given the size of the operation of the Applicant, any amount of penalty would cause a financial hardship to the Applicant and under all circumstances act as a strong detriment.

91. In view of the submissions made above, it was submitted that in view of very strong mitigating factors/circumstances existing in favour of the applicant, the Commission may be pleased to exonerate the Applicant from imposition of any penalty or alternatively consider imposing a nominal penalty on the Applicant.

Submissions of the opposite party No. 31

92. The counsel appearing for the party made orals submissions and also filed annual returns of the answering opposite party under the cover of letter dated 14.03.2014.

Submissions of the opposite party No. 33

93. After making general submissions, the following mitigating factors were pleaded:

(a) ECP Industries Ltd. was not the member of LPG Cylinder Manufacturers Association.

(b) ECP Industries Ltd. has not attended the alleged meeting at Mumbai on 01.03.2010 and 02.03.2010.

(c) ECP Industries Ltd has never used the common agent for submission of alleged tenders. Mr. Shridhar was the sole agent of ECP Industries Ltd., who directly submitted the tender in IOCL Mumbai Office.

(d) ECP industries belongs to the category of Small Scale Industry (SSI Unit).

(e) During the past 3 years ECP has made meagre net profit to the extent of 1-2 % of net sales only. This is very low for any industry norms and financial institutions expectations, as the financial institutions expect a minimum net profit of 5-6% post tax on sales.

(f) ECP's term loan had to be rephased by the financial institution twice in the last 10 years because of weak economic performance and uncertainty of orders and low capacity utilization.

(g) It is pertinent to mention here that ECP Industries is providing employment to 243 workmen including Regular, Casual, Trainee and Contractual workmen. In case penalty is levied on ECP, this will result to ultimate closure of the unit thereby creating unemployment for such a large number of workers.

(h) Inability to Pay: ECP is not in a financial position to pay the huge penalty of INR 1,50,49,366.00 as it is likely to be wiped out of the market. (*Excel Crop Care Ltd & Ors.* v. *Competition Commission of India* and EU Guidelines on the Method of Setting Fines, 2006).

(i) Very first competition law violation on the part of ECP Industries Ltd. (M/s *Gulf Oil Corporation Ltd & Ors.* v. *Competition Commission of India*).

(j) Nascent stage of competition jurisdiction in India (*MDD Medical Systems India Private Limited & Ors.* v. *Competition Commission of India & Ors*.).

(k) Uninterrupted supplies were always made by ECP Industries Ltd. to IOCL (*M/s Gulf Oil Corporation Ltd & Ors.* v. *Competition Commission of India*).

(l) ECP Industries Ltd. is not the perpetrator or ring leader of alleged cartel. (EU Guidelines on the method of setting fines, 2006 and International Competition

Network - Setting of Fines for Cartels in ICN Jurisdictions).

(m) ECP Industries ltd has effectively cooperated with the DG and Commission outside the scope of any Leniency Notice and beyond its legal obligation to do so. (EU Guidelines on the method of setting fines, 2006 and International Competition Network - Setting of Fines For Cartels In ICN Jurisdictions)

(n) CCI has failed to apply consistent applications in various cartel cases for levying the penalties. CCI has adopted varying standards for imposing penalties on companies allegedly involved in a cartel. In early cases, the CCI imposed a token penalty of only Rs. 1 lakh. In subsequent cases, the Commission has imposed penalty ranging from 3% of the turnover to 10% of the turnover. The Commission, in any of these cases, did not provide any indication as to why 3% of the turnover was chosen in one case as opposed to 10% of the turnover in another case.

(o) It is interesting to note that, recently, CCI in Ref. Case filed by by *Shri B P Khare, Principal Chief Engineer, South Eastern Railway, Kolkata.* v. *M/s Orissa Concrete and Allied Industries Ltd. & Ors*. found 29 opposite parties indulging in the act of cartelization including bid rigging under section 3(3) (d) of the Act but did not impose any penalty on the grounds of lack of awareness of law and the parties being small and micro enterprises.

<u>Submissions of the opposite party Nos. 34, 35 and 36</u>

94. The counsel appearing for these parties made similar submissions. It was submitted that while passing an order on penalty, all relevant facts of the case as to the gravity and duration of the offence, the degree of corporation, the knowledge and intention of the parties, the size of the enterprise have to be considered. In assessing gravity, account must be taken of the nature of the

infringement, its actual impact on the market and size of the relevant geographic market.

95. It was also submitted that the impugned order was passed on the basis that there was a meeting of the LPG Cylinder Manufacturers in Hotel Sahara before the date of the filing of the tenders, the manufacturers appointed six common agents for submitting their tenders and identical rates were quoted by the manufactures in different circles. It was pointed out by the answering opposite party that it is not a member of LPG GAS Cylinder Manufactures Association (the answering opposite party No. 36 was, however stated to be member of the Association), nor did it attend the meeting at Hotel Sahara or appoint any common agent for submitting bids.

96. It is the case of the answering party that for assessing gravity of the offense the following aspects needs to be considered:

(i) Final prices are not quoted prices but negotiated and fixed by the IOC. When IOC has the discretion to decide pricing and in the absence of any collusion or even an allegation, prices could not have been manipulated through a cartel.

(ii) The tender makes it clear that IOC is not bound by the lowest offer and can reject without assigning any reasons.

(iii) IOC reserves their right to negotiate.

(iv) IOC has the right to call for fresh tender.

(v) The Hon'ble Tribunal, on an earlier occasion, has already held IOC to be in a 'dominant position'.

Submissions of the opposite party No. 38

97. Shri Manan Verma, Advocate for the answering party stated that it had filed an appeal before the Hon'ble Supreme Court against the order of the Tribunal dated 20.12.2013. He also argued on the matter of penalty. A copy of the paper book of appeal before the Supreme Court was filed.

Submissions of the opposite party No. 43

98. It was submitted on behalf of the answering party that its total turnover was taken into account from all of its products including different types of cylinders supplied to all customers including private companies. It was also submitted that the cylinder market is having glut due to over capacities and it is virtually a buyers' market. The applicant has been operating at a capacity utilization of 60% and due to this reason has incurred actual losses in 5 years out of the last 8 years.

99. Further, it was stated that the financial condition of the applicant is very precarious. It shall not be able to bear the burden of the penalty without seriously affecting its working. The applicant bid for three States *viz*. Karnataka, Tamil Nadu and Kerala and was not given any order for Kerala. It has been the grievance of the applicant that the manufacturers from other regions having tax benefits (backward/ tribal area) quote cut throat prices in their area to garner more orders. The quotation of supply price made by the applicant in the previous years as submitted by them to the DG in reply to their interrogations show that there was not even an increase of 4% in the prices from that of the previous year inspite of the fact that the industrial cost price index and the consumer price index had risen more than 7% during the same time.

100. Lastly, it was submitted that the theories and principles of law of antitrust or anti-competitive practices as applied in the advanced western economies cannot and should not be copied and applied to our country since we have totally

different economic conditions. The market dynamics are totally different in our country. The western system of *laissez faire* cannot be applied to our condition where both labour and capital are not elastic enough to afford open opportunities to the entrepreneur. It has been the endeavour of the Government and its instrumentalities like IOCL to nurture the market in such a manner that sufficient number of suppliers are left in the fray otherwise the market shall become more uncompetitive if the marginal players are sidelined or are financially emasculated and become inoperative.

101. The Commission has perused the submissions made by the appearing parties. The Commission has also heard the counsel appearing for the parties.

102. At the outset, the Commission observes that the order of the Hon'ble Appellate Tribunal dated 20.12.2013 confirmed the findings of the Commission regarding breach of the provisions of section 3(3)(d) of the Act, yet the matter was remanded to the Commission on the question of penalties.

103. It would be apposite to notice the relevant observations from the aforesaid order of the Hon'ble Tribunal and the same are noted below:

> *Ordinarily, it was for the learned counsel appearing for the CCI to address the question of penalties. It is unfortunate, that the learned counsel did not choose to argue that question, as some of the learned counsel candidly admitted that they did not address the CCI on the question of penalty. Some other counsel canvassed the argument that CCI should have separately heard them on the question of penalty after the conclusion of the verdict of guilty. We do not think such a course was possible particularly in view of the latest position in the regulation on the question of penalty. We would not ordinarily permit the question of penalty to be raised for the first time before us, however, in*

this case, there are as many as 44 parties involved. Considering the number of parties and stakes involved and all the other relevant considerations, we feel it will be better, if the parties are given one more opportunity to address on the question about penalties to the CCI, so that the CCI could give an active consideration, while deciding the penalties. It would be, therefore, better if the matter is remanded to the CCI on the question of penalties. The parties are therefore, directed to report to the CCI on or before 1st February, 2014, where after the CCI will proceed to hear the parties and decide upon the penalties within three months that is before 1st May, 2014.

104. Notwithstanding the limited remit of the present proceedings in light of the remand order, some of the parties tried to re-agitate the issues touching the merits of the case. It may be noted that the order of the Commission has been confirmed by the Hon'ble Tribunal on the issue of contravention of the provisions of the Act and, as such, it is not open to the parties to invite the Commission to revisit those findings.

105. Having said that, the Commission has bestowed its thoughtful consideration on the various pleas raised by the parties in their respective submissions on the issue of penalties.

106. The Commission would like to preface the present order by observing that procurement has always been one of the vital functions of Governments all over the world. Both the Central Government as well as state governments/ PSUs have been spending huge amount of taxpayers' money on public procurement. However, procurements by Governments are beset with allegations of inefficiency, quantitative and qualitative compromises.

107. The present case is symptomatic of collusion by the suppliers in public procurement. The public sector oil marketing companies require cylinders which they supply to the consumers of the domestic gas users after the process of bottling. In the instant matter, on a careful consideration of the material on record, the Commission reached the conclusion that the parties contravened the provisions of section 3(3)(d) of the Act, which finding, as noted above, was affirmed by the Hon'ble Appellate Tribunal.

108. Before adverting to the various pleas including the mitigating factors canvassed by the parties, it is necessary to first deal with a pure legal plea raised by some of the parties.

109. A plea was raised by the counsel appearing for some of the parties by posing a question *i.e.* whether an agreement referred to in section 3, entered into by a cartel, lends itself to penalty under the "main clause" or under the "proviso" of clause (b) of section 27? Elaborating, it was contended that the legislature has provided in the main clause of section 27(b) a range of penalty which the Commission may pass in cases where any agreement is in contravention of the provisions of section 3, on the other hand, the legislature has specifically taken out "the agreement referred to in section 3, when entered into by a cartel" from the ambit of the "main clause" and provided a specific and more severe penalty therefor in the "proviso" to section 27 (b). Any such agreement can render any member of the cartel liable to only the penalty under the "proviso" and not under the "main clause" of section 27(b), contends the counsel.

110. It was argued that the fixation of the minimum quantum of penalty provided in the "proviso", in clear contrast with the fixation of the maximum quantum of penalty provided in the "main clause", also indicates that the case of any agreement referred to in section 3 being entered into by a cartel, has to be penalized more severely under the "proviso" and not under the "main clause".

This view is supported by the fact that the collusive conduct of the cartel falls in the pernicious category of offences and therefore, the legislature has not provided any flexibility in the minimum quantum of penalty for it in the proviso.

111. It was canvassed that the fact that the legislature has segregated the cases of agreements referred to in section 3, when entered into by a cartel, for more stringent penal action than the other infringements, is clearly borne out by the language of the "main clause" and the "proviso" in section 27(b). While the "main clause" provides for the imposition of a penalty with a ceiling of ten percent of the average turnover for the last three preceding financial years, with a discretion to the Commission to fix the quantum of penalty at any point below the ceiling, the "proviso" lays down a "floor" of ten percent of the turnover for each year of the continuance of the agreement, below which, the Commission does not have any discretion to fix the penalty.

112. It was sought to be suggested that the non-existence of any option for the Commission to select between the "main clause" and the "proviso" for the purpose of imposing the penalty is extremely clear from the following facts:

(a) The quantum of penalty provided in the "main clause" is different from the quantum of penalty provided in the "proviso".

(b) The legislature has not provided any guidance to the Commission, either in section 27, or in any other provision of the Act, to make a rational choice between the "main clause" and the "proviso".

(c) Such unguided and unbridled discretion is never bestowed upon any authority by the Parliament. Even if such unguided discretion is bestowed mistakenly by the legislature, it is struck down by the courts, being unconstitutional, as in the case of *State of West Bengal* v. *Anwar Ali Sarkar* (AIR 1952 SC 75).

113. It was further contended that "proviso" is used to remove special cases from the general enactment and provide for them specially. The real nature of proviso has been explained in numerous court rulings, which support the contention of the applicant. In this regard, reliance was placed upon the following cases: *Kedarnath Jute Manufacturing Co. Ltd.* v. *Commercial Tax Officer*, AIR 1966 SC 12; *Mullins* v. *Treasure of Survey*, (1880) 5 QBD 170, referred to in *Shah Bhojraj Kuverji Oil Mills and Ginning Factory* v. *Subhash Chandra Yograj Sinha*, AIR 1961 SC 1596; *Calcutta Tramways Co. Ltd. v. Corporation of Calcutta*, AIR 1965 SC 1728; *Maulvi Hussein Haji Abraham Umarji* v. *State of Gujarat*, AIR 2004 SC 3946; *Haryana State Co-operative Land Development Bank Ltd. v. Haryana State Co-operative Land Development Bank Employees Union*, (2004) 1 SCC 574; *Madras and Southern Maharatta Rly. Co. Ltd.* v. *Bezwada Municipality* AIR 1944 PC 71; *CIT, Mysore etc.* v. *Indo Mercantile Bank Ltd*., AIR 1959 SC 713; *S. Sundaram Pillai* v. *P. Pattabiraman* AIR 1985 SC 582; *Haryana State Co-operative Land Development Bank Ltd.* v. *Haryana State Co-operative Land Development Bank Employees Union*, (2004) 1 SCC 574; *Shah Bhojraj Kuverji Oil Mills and Ginning Factory* v. *Subhash Chandra Yograj Sinha*, AIR 1961 SC 1596; *CIT, Mysore etc.* v. *Indo Mercantile Bank Ltd*.; AIR 1959 SC 713; *Ram Narain Sons Ltd.* v. *Assistant Commissioner of Sales Tax,* AIR 1955 SC 765; *Govt. of the Province of Bombay* v. *Hormusji Manekji*, AIR 1947 PC 200; *S. Gurmej Singh* v. *S. Pratap Singh Kairon*, AIR 1960 SC 122; *CIT, Mysore*, *etc.* v. *Indo Mercantile Bank Ltd*., AIR 1959 SC 713; *A.G.* v. *Chelsea Waterworks Co*., 94 ER 716.

114. Accordingly, it was argued that the answering parties can be liable for penalty only in accordance with the "proviso" to section 27(b) of the Act and not in accordance with the provisions in the "main clause" of section 27(b) of the Act.

115. The Commission has very carefully examined the plea urged by the counsel. For the reasons stated below, the Commission is unable to persuade itself to agree with the submission.

116. It would be apposite to quote the provisions incorporated in section 27(b) of the Act as it stands today:

> *Orders by Commission after inquiry into agreements or abuse of dominant position*
>
> *Section 27. Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it <u>may</u> pass all or any of the following orders, namely:-*
>
> *(b) Impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:*
>
> *Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission <u>may</u> impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent. of its turnover for each year of the continuance of such agreement, whichever is higher.*

117. Thus, it could be noticed from the opening part of the provisions contained in section 27 of the Act that the levy of penalty is not mandatory and

the Commission has been conferred with the discretion to impose the same in appropriate cases depending upon the gravity and seriousness of the contraventions. In this backdrop *i.e.* when the levy of penalty itself is not mandatory, the contention raised by the opposite parties to the effect that in case of anti-competitive agreements entered into by cartels, the members thereof can be proceeded against only in accordance with the provisions contained in the proviso to section 27(b) of the Act may be examined.

118. In this connection, it would be appropriate to notice the proviso as it stood prior to the amendments effected therein by the Competition (Amendment) Act, 2007 and for the felicity of reference, the same is quoted below:

> *Provided that in case any agreement referred to in section 3 has been entered into by any cartel, the Commission shall impose upon each producer, seller, distributor, trade or service provider included in that cartel, a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or ten per cent. of the average of the turnover of the cartel for the last preceding three financial years, whichever is higher.*

119. From a plain reading of the proviso as it stands today and particularly in the light of amendments effected therein through the Competition (Amendment) Act, 2007, it is evident that the legislature has made an enabling provision whereby the Commission was conferred with the discretion to invoke the proviso in an appropriate case. To accede to the submission made by the counsel would not only run contrary to the plain language of the statute but would also stultify the legislative intent which was further made evident through the changes effected in 2007. The Commission also notes that there can be no quibble with the propositions laid down in the judgments cited by the counsel, however, in

light of the statutory position obtaining, the same are of no avail and assistance to the counsel.

120. The Commission notes that when the imposition of penalty itself is not mandatory, it is futile for the opposite parties to contend that the same has to be calculated in a particular manner.

121. In view of the above stated position, it is not necessary to dilate any further on this aspect and the plea being devoid of any force, the same is hereby rejected.

122. Various pleas were pressed in mitigation. Few of them may be catalogued as follows:

(i) Section 3 of the Act came into force on 20.05.2009 *i.e*. only a few months prior to March, 2010, when the offence of cartelization and bid-rigging took place. Therefore, the nascent stage of competition jurisdiction should be one of the factors to be taken into consideration while inflicting penalties.

(ii) First time contravention. No evidence of past similar conduct.

(iii) The contract for supply of 14.2 kg LPG cylinders was in the direction of fulfilling an important national objective *viz*. weaning away the consumers from polluting fuels and from using firewood in rural areas, reducing forest cover. No complaint on record either about any delayed supply or any deficiency in the quality of cylinders supplied to IOCL.

(iv) Few firms submitted that they are willing to give undertakings to the Commission for implementing a competition compliance programme as a part of corporate governance.

(v) Cost of production is substantial of the total cost. No unreasonable profit earned. Procurement of all raw material including pricing is regulated.

(vi) No freedom to the bidders to determine the sale prices as IOCL negotiates the final prices with the bidders by offering counter rates.

(vii) Demand-side collective monopsony of PSU-OMCs in buying 14.2 Kg cylinders.

(viii) There is no direct evidence to establish cartelization and bid rigging.

123. The Commission has very carefully examined these pleas. It was contended by the parties that there is no direct evidence to establish contravention by the firms in rigging the bids. The plea is misconceived besides being inconsequential. Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret and for the associated documentation to be reduced to a minimum. Even if the Commission discovers evidence explicitly showing unlawful conduct between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of the existence of an agreement.

124. Resultantly, a contravention may be found based on indirect evidence and no contravening party can be permitted to raise such plea in mitigation.

125. A lot was made of the fact that input costs are regulated and final prices are determined consequent upon negotiations. The Commission is of opinion that

this plea is devoid of any force in as much as regulated environment can hardly be pleaded by the firms to seek mitigation as it gives them no license to indulge in anti-competitive activities.

126. The nascent stage of competition jurisdiction was also taken as a plea to seek leniency. Besides, it was also pleaded that this being the first instance of contravention, a lenient view may be taken.

127. The Commission is of opinion that these pleas may have some merit and will be given due account while quantifying penalties by not imposing maximum penalties as prescribed under the law.

128. Another plea which was also vehemently taken before the Commission was that the firms are small scale industries and as such any penalty imposed upon them would ruin their financials besides driving them to closure.

129. To support the plea, reliance was placed upon an order of the Commission in Ref. Case No. 05 of 2011 filed by Shri B P Khare, Principal Chief Engineer, South Eastern Railway, Kolkata against M/s Orissa Concrete and Allied Industries Ltd. and others wherein the Commission did give due considerations to the facts that opposite parties therein were small & medium enterprises and there was lack of awareness amongst the alleged bidders thereby resulting into no penalty against the bidders in spite of the fact that the substantive findings of bid rigging were held against them.

130. Before examining the pleas, the Commission deems it appropriate to clarify its holding in *M/s Orissa Concrete and Allied Industries Ltd*. (*supra*). In the said order, it was observed by the Commission as follows:

> *As regards penalty under section 27 of the Act, the Commission notes that there are circumstances in this case which require the*

issue of penalty to be looked into somewhat differently. The facts as projected in the present reference reveal a complete lack of awareness by the opposite parties which are small and micro enterprises. The replies of many of these parties are effectively incriminating in nature. Further, none of these parties quoted for more than 50% quantity which was a requirement under the tender. Thus, right in the beginning the offers made by these parties were not in accordance with the requirement of the tender and hence they could not have got supplies as per the tender conditions. Moreover, the bid given by these parties was not the lowest and so they could not have been awarded the contract.

131. From a plain reading of the above, it would appear that there were myriad considerations which weighed with the Commission in not imposing penalty upon the infringing firms. It is evident that being small and micro enterprises *per se* was not a consideration before the Commission in adopting such course.

132. Thus, it is futile for the parties here to quote the said order out of context and in isolation in the facts of the present case. At the same time, the Commission is of opinion that though size of the enterprise in itself may not be a decisive factor while quantifying the penalty, it may be taken among other things as a mitigating factor while considering the issue of penalty.

133. Another plea which was advanced by some of the parties was based on the multi-product nature of the business and issue of relevant turnover.

134. In this connection, reliance was placed upon the decisions of the Hon'ble Tribunal in various matters. The following paragraph of the remand order was cited:

57.We also do not find any reason, why the CCI has chosen to inflict the penalty at 7%. We have considered question of necessity of reasons in MDD Medical Systems India Pvt. Ltd. v. Foundation for Common Cause & Ors. (Appeal No.93 of 2012). In the aforementioned decision of MDD's case, where the CCI fixed the penalty at 5% of the average turnover, relying on a reported decision in Hindustan Steel Ltd. vs. State of Orissa reported in AIR 1970 SC 253 wherein it was observed "if there is discretion, authority is bound to take into account aggravating or mitigating circumstances and exercise discretion laid down under the law, judicially", we had held that the Hon'ble Supreme Court has always insisted upon the reason and that in the absence of reason, the discretion tends to become arbitrary. We had also relied on the judgment of the Hon'ble Supreme Court in Kranti Associates Pvt. Ltd. & Anr. v. Sh. Masood Ahmed Khan & Ors. reported in (2010) 9 SCC 496. MDD was also a case of cartelization. In another judgment dated 29.10.2013 in M/s. Excel Crop Care Limited v. Competition Commission of India & Ors. (Appeal No.79 of 2012), we had relied on some observations made in Southern Pipeline Contractors & Anr. v. The Competition Commission. We had also referred to the guidelines by the European Union (EU) and Office of the Fair Trade (OFT). We had quoted the five EU guidelines, where it was provided that is appropriate for the Commission to refer to the value of the sales of goods or services to which the infringement related. We had also referred to the OFT guidelines to the same effect and we had commented upon the factor of a relevant turnover. Ultimately, we had held that where a particular concern is a multi-commodity company, the relevant turnover should be considered and not the total turnover.

135. The opposite parties would further submit that in the present case, the relevant turnover is that which has been obtained by the opposite parties from the alleged acts of infringement/violation of section 3 of the Act, and hence would be restricted to the income obtained from the 14.2 kg LPG cylinder tender in question. In this regard, the opposite parties relied on the judgement of the Hon'ble Tribunal in *Excel Crop Care limited* v. *Competition Commission of India*, where accepting the arguments set forth in paras 43 and 55, the Hon'ble Tribunal in Para 62 established the concept of 'relevant market'. The relevant paras read as under:

> *43........The learned counsel and more particularly Shri Ravinder Narain for United Phosphorus Limited argued that the CCI at least in its case should not have considered the overall turnover and should have restricted itself to the relevant turn over. Meaning thereby that the CCI should have only considered the turnover of the business of manufacturing ALP tablets. Shri Ravinder Narain pointed out that the appellant, United Phosphorous Ltd., is a multi-product company where the turnover of ALP tablets was insignificant. He points out that while the total turnover for the year 2009 was Rs. 2,738.98 Crores and the total turnover of ALP tablets including all domestic and export sales was Rs. 84.99 crores and the total turnover of ALP in that year for the domestic market was a mere Rs. 23.33 crores. He also asserts that insofar as the total amount of supplies of ALP to FCI in the year 2009-10 was concerned it was merely Rs. 8.49 crores which was merely 0.3% of the total turnover of the company. He wonders as to how the exorbitant penalty of Rs.252.44 crores be imposed against the appellant in respect of the supply of ALP tablets to FCI for a total price of Rs. 8.49 crores in the year 2009-10. Shri Ravinder Narain also brought to our notice a decision of the Competition Appeal Court of South Africa in the case of Southern Pipeline Contractors &*

anr. vs. The Competition Commission and pointed out that Section 59 of the Competition Act of 1998 of South Africa provided for maximum penalty of 10% of the annual turnover in that. He relied on subsection (2) of the Act. He then invited our attention to paragraphs 51 to 53 of the judgment which dealt with the question as to what should be the relevant turnover to determine the appropriate amount of penalty to be imposed. It was held by that Tribunal that the appropriate amount of penalty had to be determined keeping into consideration the damage caused and the profits which accrue from the cartel activity. The Tribunal had used the words 'affected turnover' in these paragraphs. It is pointed out by Shri Ravinder Narain that the Tribunal determined the amount of penalty on the basis of these guidelines issued by the European Union (EU) and The Office of Fair Trade (OFT). He pointed out that the concerned company Southern Pipeline contractors was a multi-product company and the affected turnover was comparatively small. He, therefore, urged that the CCI should have also adopted the same policy. The learned counsel also pointed out that Section 27(b) of the Act is completely silent regarding any specific factors to be taken into consideration or the methodology to be adopted for imposition of penalty.

55...... He also relied on the decision in the case of Southern Pipeline Contractors Conrite Walls (Pty) Ltd. and the Competition Commission (Case No.105/CAC/Dec 10) (106/CAC/Dec 10) – Page 27:

> *[51.] "The concept of 'turnover' is not defined in the Act and is only referred to in Section 59(2), being annual turnover. There is thus some uncertainty as to*

the precise meaning of 'turnover'. However, section 59(3) refers on more than one occasion to 'the contravention', in particular, in dealing with the nature, duration, gravity and extent 'of the contravention', the loss or damage suffered as a result of the 'contravention' the market circumstances in which 'the contravention' took place and the level of profit derived from 'the contravention'. Thus there is a legislative link between the damage caused and the profits which accrue from the cartel activity. The inquiry, in terms of section 59 (30, appears to envisage that consideration be given to the benefits which accrue from the contravention: that is to amount to affected turnover. By using the baseline of affected turnover, the implications of the doctrine of proportionality that is between the nature of the offence and benefit derived therefrom, the interests of the consumer community and the legitimate interests of the offender can be taken more carefully into account and appropriately calibrated."

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62. All the learned counsels very seriously canvass the question of "relevant turn over". The argument that the appellants, United Phosphorous Ltd. and M/s. Excel Crop Limited, are the multi-product companies was not seriously disputed by Shri Balaji Subramanian, learned counsel for the CCI. We have no reason not to accept that factor. As regards the arguments based on EU and OFT guidelines, we are of the opinion that those guidelines are undoubtedly relevant in arriving at the issue of deciding upon the turn over. However, those guidelines cannot be treated as be all and end all in the matter and would have to be considered in the light of the facts of each case. We, however, *accept the contention that in the circumstances of this case the relevant turn over should be considered in case of the two appellants who are multi product companies. To that extent we generally agree with the sentiment expressed in the relied upon judgment of the South African Tribunal in the case of Southern Pipeline Contractors & Anr. vs. The Competition Commission.*

136. The Commission has perused the said orders of the Hon'ble Tribunal. The parties while taking the plea of relevant turnover have sought to confine the same to the restricted turnover relatable to the revenue generated from the sale of 14.2 Kg cylinders to IOCL. The argument is totally misconceived. Nowhere in its orders, the Hon'ble Tribunal sought to confine the concept of relevant turnover to such a restricted levels. Moreover, the order was delivered in the context of multi-commodity firms. In the present case, the parties except pleading themselves to be multi-commodity firms have not disclosed their portfolio of products. If the firms have generated some revenue by sale of scrap or through other incidental or ancillary activities, the same would not convert them into a multi-product company. A by-product (like scrap *etc.*) is not a different product and as such the orders cited before the Commission rendered in the context of multi-product firm are of little assistance to the parties.

137. It was also argued by some of the parties that provisions of section 27 of the Act are discretionary and enabling and hence it is not mandatory or necessary for the Commissions to impose penalty in each and every case. The Commission notes that the instant case emanates out of public procurement and as such it is a fit case to impose penalties upon the infringing parties. Any collusion in rigging tenders in public procurement costs exchequer on account of anti-competitive bids besides resulting in higher cost to end-consumers for whom a cylinder is a necessary input for their daily requirements. This itself is a compelling factor for

the Commission to not only impose penalty but to view the contravention seriously.

138. Considering the totality of facts and circumstances of the present case as noted above including the mitigating factors as pleaded by the parties, the Commission notes that the mitigating factors were duly accounted for as found necessary in the original order by not imposing the maximum penalty as envisaged under the law. For the reasons stated earlier, the Commission is of opinion that the said factors do not warrant any further reduction in the penalty imposed and accordingly, the Commission upholds the penalty as imposed *vide* the original order dated 24.02.2012 upon the parties to these remand proceedings except M/s Confidence Petroleum India Ltd.

139. So far as the answering applicant/ party *i.e*. M/s Confidence Petroleum India Ltd. is concerned, certain peculiar facts may be noticed.

140. It was pointed out that M/s Hans Gas Appliances Pvt. Ltd. and M/s Khara Gas Equipments Pvt. Ltd. merged with M/s Confidence Petroleum India Ltd. by an order dated 18.09.2009 of the High Court of Bombay. However, as the BIS, CCOE [Chief Controller of Explosive] and other licenses (pending for change of name) were in the name of M/s Hans Gas Appliances Pvt. Ltd. and M/s Khara Gas Equipments Pvt. Ltd., the tenders were filed in their individual names and orders were placed on them but the turnover in their names were included in the turnover of M/s Confidence Petroleum India Ltd. Further, as the appointed date of merger was 01.04.2007, the turnover of the companies *i.e.* M/s Hans Gas Appliances Pvt. Ltd. and M/s Khara Gas Equipment Pvt. Ltd. are recorded in the books of M/s Confidence Petroleum India Ltd. w.e.f. 01.04.2007 and are consolidated. It was further pointed out that M/s Andhra Cylinders (a unit of M/s Envy Cylinder Pvt. Ltd.) is a 100% subsidiary of M/s Confidence Petroleum India Ltd. and as such the turnover of M/s Andhra Cylinder is taken as the

turnover of M/s Confidence Petroleum India Ltd. in the consolidated accounts under the Companies Act, 1956.

141. The grievance of M/s Confidence Petroleum India Ltd. is that turnover of M/s Hans Gas Appliances Pvt. Ltd. was taken twice in as much as it also stood in the turnover of M/s Confidence Petroleum India Ltd. A sheet highlighting the error in computation of turnover in original order has been placed on record alongwith the corrected figures after excluding the duplication. Based upon this, an average turnover of Rs. 1797930363/- has been worked out by the answering applicant/ party *i.e.* M/s Confidence Petroleum India Ltd. Accordingly, this figure is taken on record and a penalty @ 7% of this average turnover *i.e.* Rs. 125855125.41 is imposed upon this party.

142. The Commission directs the opposite parties to deposit the penalty amount within 60 days of receipt of this order. It is, however, made clear that if any of the parties has deposited any amount towards penalty before the Appellate Tribunal, the same shall stand excluded from the penalty imposed.

143. It is ordered accordingly.

144. The Secretary is directed to inform the parties accordingly.

(Ashok Chawla)
Chairperson

(Anurag Goel)
Member

(M. L. Tayal)
Member

New Delhi
Date: 06/08/2014

(S. L. Bunker)
Member