Kluwer Competition Law Blog

Retrospective Application of Section 54 Notifications Under Competition Law: An Indian Law Perspective

Nishant Pande, Karan Trehan (NALSAR University of Law) · Thursday, July 5th, 2018

Abstract

There has been a recent case of ITC/Johnson & Johnson (decided on 11th December, 2017) surrounding the retrospective application of the law/notifications issued by the Indian competition authorities, where the Competition Commission ruled against the possibility of retrospective application of a De Minimis notification.

It is pertinent to note that the issue has not been adequately deliberated upon in the reasoning of the concerned judgment and as a result, there are lacunas left in addressing this question. This article aims to address the issue and present a case in favour of the retrospective application of such notification on the basis of the jurisprudence surrounding the interpretation of Statutes.

Introduction

Competition Law aims to promote and sustain the competition in the market by regulating the enterprises operating therein. The market landscape is ever-changing and growing rapidly with advancement in terms of technology and practices that encourage profit, productivity and competition. This ever-changing business environment requires the law to be effectively attuned to the market dynamics in order to maintain the prevailing competition.

The Indian Competition Act, 2002 ["**The Act**"] is a relatively newer piece of legislation with some of the important provisions coming into force as late as the year 2011. However, the flexible nature of the current act has enabled it to potently curb anti-competitive agreements, prevent abuse of dominance and regulate mergers and acquisitions in comparison to the erstwhile Monopolies and Restrictive Trade Practices Act, 1969 ["**MRTP Act**"].

Law

Section 54 of the Act is one such enabling provision which grants the power to issue notifications to the Central Government in order to exempt the applicability of the provisions of the Competition Act. The Section reads as follows:

"Power to exempt.—The Central Government may, by notification, exempt from the application of this Act, or any provision thereof, and for such period as it may specify in such notification—

(a) any class of enterprise if such exemption is necessary in the interest of security of the State or public interest;

(b) any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries;

(c) any enterprise which performs a sovereign function on behalf of the Central Government or a State Government: Provided that in case an enterprise is engaged in any activity including the activity relatable to the sovereign functions of the Government, the Central Government may grant exemption only in respect of activity relatable to the sovereign functions."

Time and again various important notifications pertaining to matters like exemption to reconstitute and amalgamate nationalized banks from the application of Sections 5 and 6 of the Act[1], increase in the threshold of value of assets and turnover for the applicability of Section 5[2], exemption to Vessel Sharing Agreements from the application of the provisions of Section 3 of the Act[3] have been issued to bring changes in the law and structure it in accordance with the changing market dynamics.

Issue

There has been a recent controversy regarding the possibility of "*retrospective application of the notifications issued under the said Section*". This question came before the Competition Commission of India ["**CCI**"] in *ITC Limited/Johnson & Johnson**[4]***, where the Commission ruled against the retrospective application of the *De Minimis* Notification[5].

The Case

The case was pertaining to the acquisition of 'Savlon' and 'Shower to Shower' trademarks ["**Transaction**"] by ITC Limited ["**Acquirer**"] from the Johnson & Johnson Group. The allegation was with respect to the failure in notifying the commission about the aforementioned transactions under Section 6(2) of the Act.

The first question which came before the Hon'ble Commission was with respect to the acquisition of trademarks and *whether this amounts to an acquisition of assets in terms of Section 5(a) of the Act and a combination, which is notifiable under Section 6(2) if the prescribed jurisdictional thresholds are met*?

Section 5 of the Act prescribes the minimum thresholds after which an acquisition, merger or amalgamation amounts to a **combination**, which thereafter required to be notified to the CCI under Section 6(2) of the Act. The Commission while dealing with the aforementioned question held that the acquisition in the present case amounted to a combination and was notifiable.

The next and the *relevant* question was with respect to the retrospective application of new *De*

Minimis notification issued by the Central Government under Section 54. The CCI, in its order, ruled against the possibility of retrospective application and observed that:

"the said notification seeks to substantively change not only the manner in which the value of assets and turnover (of the target entity) is determined for the purpose of Section 5 of the Act but also the principle for determining the applicability of De Minimis Exemption itself. The very fact that the said notification has a lifespan of only 5 years strengthens the view that it is not clarificatory in nature and hence, do not have retrospective application". [**Emphasis Supplied]**

It is pertinent to note that the CCI limited the scope of its judgment only to the fact that the notification brought about a substantive change in rights and liabilities incurred. Furthermore, the jurisprudence relied upon was also confined to this very aspect of the notification.

Had the notification been conferred retrospective application, not only the acquisition in the present case, but also other acquisitions in transit would have fallen outside the definition of a combination. As a result, they would have been exempted from the requirement of notifying under Section 6(2).

The narrow approach adopted by the Commission has significant implications owing to the wide scope of Section 54 and the effect of notifications issued under it on public interest.

Analysis

Retrospective application implies that the particular law is applicable for a period prior to the period of its coming into force. The question of conferring retrospective application to a statute is generally decided on the basis of the wording of the particular statute.[6] If the statute's wording reveals that it is clarificatory in nature, that is, that it does not alter the substantive rights and liabilities which have already incurred, it can be retrospectively applied. On the flipside, if the statute brings about a substantive change in the law, it is presumed to not have a retrospective effect.[7]

However, it is pertinent to note that there is no invariable rule dictating that a statute can be retrospectively applied only when its wording provides for such a construction.[8] A particular law can also be conferred retrospective application when the intention of the Legislature mandates so[9] and in such cases. the court is duty bound to honour this intention.[10] This intention has to be read inasmuch as ***the external manifestations of purpose***[11] and ***the reasons behind its enactment***[12].

The Legislature, whilst exercising its powers under Section 54 of the Competition Act, 2002, has favoured a lenient approach towards enterprises entering combinations. This is evident from the changes in law hereinafter enumerated:

1. A Twofold increase in thresholds under section 5 of the Competition Act[13],
2. An increase from 15% to 25% of the threshold for the exemption from notification under Item 1, Schedule 1[14],
3. Introduction of the '*de minimis*' exemption[15] and the subsequent increase in the value of assets of target enterprise from 250 crores to 350 crores[16],
4. Increase in time-limit for notifying proposed combination from 7 days to 30 days[17], and

5. Ensuing discontinuation of the want of notice for a proposed combination.[18]

According to the notification, the relevant assets and turnover of only the part(s) of the target enterprise which is being acquired instead of the whole of the target enterprise are to be now considered for the Section 5 threshold while applying the '*de minimis*' exemption[19].

All the changes illustrated above clearly depict the external manifestation of the legislative intent, which is increasingly inclined towards bestowing leniency to the enterprises entering into combinations. Thus, the benevolent effect derived from the retrospective application of the notification can be read into the intention of the legislation behind the notification.

Moreover, in cases where a legislation confers benefit on some persons without detriment to other persons, and where conferring such benefits appears to be the object of the legislators[20], there is a presumption that such a legislation warrants retrospective application[21]. If the current notification is retrospectively applied, the enterprises which were caught midway in their transactions at the time of the passing of the notification will be clearly benefitting from it without a detriment to any other enterprise or person.

Conclusion

In light of the above factors which are, *firstly*, the intention of the legislature and *secondly*, the fact that the current notification conferred benefit to a number of enterprises without being detriment to others, it can be certainly concluded that the notification can be retrospectively applied.

This reasoning can further be extended and applied in cases of the similar nature, i.e., where the factors such as the wording, intention and conferment of benefit by it warrant a retrospective application.

---

[1] S.O. 2828(E) MCA notification dated 30th August, 2017. http://www.mca.gov.in/Ministry/pdf/Notification_31082017.pdf.

[2] S.O. 675(E) MCA notification dated 4th March, 2016. https://www.cci.gov.in/sites/default/files/notification/SO%20673%28E%29-674%28E%29-675%28E%29.pdf.

[3] S.O. 3641(E) MCA notification dated 11th December, 2013. http://www.mca.gov.in/Ministry/pdf/so3641_11122013.pdf.

[4] *ITC Limited/Johnson and Johnson*, Combination Registration No. C-2017/02/485, order dated 11th December, 2017 https://www.cci.gov.in/sites/default/files/Notice_order_document/Order%20under%20Section%2043A.pdf.

[5] S.O. 988(E) MCA notification dated 27th March, 2017.

https://www.cci.gov.in/sites/default/files/notification/S.O.%20988%20%28E%29%20and%20S.O.%20989%28E%29.pdf.

[6] Union of India v. Raghubir Singh, AIR 1989 S.C. 1933.

[7] Union of India and Others v. IndusInd Bank Limited and Others, (2016) 9 SCC 720.

[8] Mithilesh Kumari v. Prem Behari Khare, AIR 1989 S.C. 1247.

[9] J. P. Bansal v. State of Rajasthan, AIR 2003 S.C. 1405.

[10] *Id.*

[11] United Bank of India, Calcutta v. Abhijit Tea Co. Pvt. Ltd., AIR 2000 S.C. 2957.

[12] Utkal Contractors and Joinery Pvt. Ltd. v. State of Orissa, AIR 1987 S.C. 1454.

[13] *Supra* note 2.

[14] The Competition Commission of India (Procedure in regard to the transaction of business relation to combinations) Amendment Regulations, 2012, No. 1, Acts of Parliament, 2012.

[15] S.O. 479(E) MCA notification dated 4th March 2011. http://cci.gov.in/sites/default/files/notification/SO479%28E%29%2C480%28E%29%2C481%28E%29%2C482%28E%29240611.pdf.

[16] *Supra* note 2.

[17] The Competition (Amendment) Act, 2007, No. 39, Acts of Parliament, 2007.

[18] S.O. 2039(E) MCA notification dated 29th June 2017. http://cci.gov.in/sites/default/files/notification/S.O.%202039%20%28E%29%20-%2029th%20June%202017.pdf.

[19] *Supra* note 5.

[20] L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Company Limited, (1994) 1 A.C. 486.

[21] Commissioner of Income Tax v. Vatika Township Private Limited, (2015) 1 S.C.C. 1.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.

This entry was posted on Thursday, July 5th, 2018 at 12:00 pm and is filed under De minimis, India, Source: OECD

“>Mergers
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.