NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

TA (AT) (Competition) No. 03 of 2017
(Old Appeal No. 44/2016)

[Under Section 53-B of the Competition Act 2002 against order dated 14.07.2016 passed by the Competition Commission of India in Combination Registration No. C-2015/07/289]

IN THE MATTER OF:

M/s. Eli Lilly and Company
Lilly Corporate Centre,
Indianapolis, Indiana
United States of America **... Appellant**

Versus

Competition Commission of India,
Through its Secretary
The Hindustan Times House,
18-20, Kasturba Gandhi Marg,
New Delhi – 110 001. **... Respondent**

Present:
For Appellant : **Mr. Amit Sibal, Senior Advocate with Mr. Manas Kr. Chaudhari, Mr. Pranjal Prateek, Mr. Aman Singh Baroka and Mr. Saksham Dhingra, Advocates**

For 1st Respondent: **Mr. Naveen R. Nath and Mr. Abhimanyu Verma, Advocates**
Ms. Bulbuli Richang, DD

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal is submitted by M/s Eli Lilly and Company under Section 53B (1) and (2) of the Competition Act, 2002 (for short, 'the **Act'**). It arises

from a Decision of the Competition Commission of India (the "**Commission**") concluding that the Appellant did not notify its acquisition of Novartis Animal Health in India ("**NAH India**"), a business with sales of only INR 93.0 crores and assets of only INR 36.2 crores.

2. The Appellant, an innovation-driven pharmaceutical company based in the United States, agreed to acquire the global animal health business of Novartis AG, a pharmaceutical company based in Switzerland. The Stock and Asset Purchase Agreement ("SAPA") covering the global portion of the transaction was dated 22.04.2014. It was publicly announced and notified under the merger control laws in several jurisdictions around the world, including the United States and the European Union. The transaction was cleared in each jurisdiction and closed on 01.01.2015.

3. The acquisition of NAH India was handled separately, with a separate binding agreement called the Slump Sale Agreement dated 03.12.2014 between the Parties' Indian subsidiaries. The Parties notified this transaction on 10.11.2014 to the Indian Foreign Investment Promotion Board ("FIBP").

4. The Parties did not notify the Indian transaction to the Commission because it was covered by the then-applicable De Minimis Exemption to the filing requirements of the Competition Act, as set forth in Ministry of Corporate Affairs' Notification dated 04.03.2011 and corrigendum dated 27.05.2011.

5. The De Minimis Exemption applied to acquisitions of enterprises whose sales in India were not more than INR 750 crores or whose Indian assets were

valued not more than INR 250 crores. The exemption was enacted because the Act's initial filing thresholds applied only to parties' "combined' sales or assets in India, and therefore could catch transactions where the business being acquired had minor activities in India.

6. The acquisition of NAH India met both standards for the De Minimis Exemption. As shown above, its sales and assets were only a small fraction of the exemption's low thresholds.

7. Nevertheless, the Commission issued a letter on 08.04.2015, a year and a half after the global transaction was announced, asking why it was not notified in India. The Appellant responded by letter dated 07.05.2015 providing the facts showing that the transaction was covered by the De Minimis Exemption. The Appellant did not receive a response but understood from subsequent informal discussions that the CCI was not yet convinced. The Appellant, therefore, decided to notify the transaction voluntarily, while reserving its position that the transaction was exempt, in an effort to speed the process, ensure a timely closing, and provide the pertinent facts showing that the transaction raised no possible competition law concern.

8. The Commission subsequently concluded, by letter dated 06.08.2015, that the transaction was reportable, although without stating the reasons. Four months later, on 03.12.2015, the Commission cleared the transaction as raising no possible competition law concerns in India. The Parties thereupon closed the transaction in India on 31.12.2015.

9. The Commission then issued Show Cause Notice on 14.12.2015 requesting the Appellant to show cause why it should not be penalized for (a)

notifying the transaction in India late, and (b) closing outside India before receiving approval for the acquisition of NAH India. The Appellant responded by letter dated 29.12.2015 reaffirming that the transaction was covered by the De Minimis Exemption. A hearing was held at Appellant's request on 21.04.2016.

10. On 14.07.2016, the CCI issued the impugned Order. The Order asserts that the thresholds of the De Minimis Exemption did not apply to the business being acquired, NAH India, but rather to the target's parent, Novartis India Limited. The sole basis for the conclusion was that the parent was "incorporated' and NAH India was not. The impugned Order contended that the Competition Act limited the relevant target "enterprise" to only incorporated entities, even though the Act expressly lists a broad range of such entities to include "an association of persons or a body of individuals, whether incorporated or not, in India or outside India," a "company," a "firm," an "individual," a "family' and so on. Yet the impugned Order cites no other statute, regulation, guideline or precedent for its position. The CCI imposed a penalty of INR 1 crore.

STAND OF THE APPELLANT

11. Learned counsel for the Appellant submitted that the impugned order was erroneous for the following reasons :

a. The Impugned Order incorrectly applied the thresholds of the De Minimis Exception to the target's parent company merely because the target was not incorporated. The Act applies the threshold to the

"person or enterprise" being acquired, and it expressly defines "enterprise" broadly to include both incorporated and non-incorporated businesses. The impugned Order rests its conclusion on a "plain reading" of the Act, which in fact leads to the opposite result.

b. The impugned Order's interpretation cannot be correct because it would remove the filing requirements of the Act from a wide range of acquisitions (including the present transaction). The filing requirements apply only to "combinations," which are defined as the acquisition of an "enterprise." The impugned Order's overly narrow interpretation of "enterprise" therefore, would exclude potentially anticompetitive acquisitions merely because of the target's legal structure. Nothing in the Act allows this arbitrary result to the detriment of Indian consumers.

c. Far from citing any precedent or other legal support, the interpretation by the Impugned Order contradicts Supreme Court precedent interpreting directly analogous language in the Income Tax Act, 1961.

d. Moreover, there is every reason to believe that Indian law is intended to be consistent with merger notification regimes around the world who follow the recommended best practices of the International Competition Network (the ICN) (of which India is an active member). They apply revenue thresholds to the business being acquired, not its parent, and nothing in the Act states otherwise.

e. The present transaction satisfied the De Minimis Exemption even under the flawed approach of the Impugned Order, because the turnover of the target's parent fell below the exemption's threshold of INR 750 crores. The threshold could be exceeded only by improperly including a business that the parent recently had sold, an approach found nowhere in the Act, contrary to the exemption's purchase, and equally contrary to the approach taken around the world.

f. The Impugned Order similarly erred in finding that the transaction had closed prior to receiving clearance when, in fact, the acquisition of NAH India was delayed until after the clearance. Only the transaction outside India had closed, which had no possible effect in India. The response that, under those circumstances, then "there has been a delay' in filing past the statutory deadline is inadequate because the impugned Order makes clear that its large fine was not imposed for merely missing a filing deadline.

g. Finally, the imposition of a fine in this case was contrary to basic principles of due process, notice and fairness. It rests on an interpretation of the Act that is both strained and unpublished, wholly internal to the Commission, and found nowhere in the Act, regulation, guideline or precedent. Basic principles of notice prohibit a fine in these circumstances, particularly on a company who publicly announced the transaction several times long before hearing from the Commission , filed notifications in several jurisdictions around the world (including

the FIBP in India), and whose transaction ultimately was found to raise no possible competition concern in India. The Impugned Order responds only that the CCI has "discretion" to issue fines, but that discretion is not absolute.

Stand of the Commission

12. Learned counsel for the Commission submitted that exemption Notification No. S.O. 482 (E) dated 4th March, 2011 is not applicable to the Appellant. Further according to the learned counsel for the Commission whether both the parties to the combination would be exempt and constitute "person or enterprise who or which proposes to enter into a combination" in terms of Section 6(2) of the Act. According to the learned counsel for the Commission, the person or enterprise to the Combination who/ which stands to gain in terms of dominance in the relevant market so as to result in "appreciable adverse effect on competition' will be the person or enterprise who is liable for the consequence of failure to get the combination approved. Obviously the party surrendering market share or withdrawing from the competition in the market place has not obtained any advantage and is not liable for action under the Act. In the judgment reported above also the penal consequences initiated was against the acquiring enterprise. This principle is followed universally. The whole object of the Competition law is that a person or Enterprise, must seek approval before entering into a Combination which could have appreciable adverse impact on Competition in the relevant market. It cannot be said, that a Person or enterprise surrendering his market rights or share can be held liable since his action does

not bring him any advantage as to market share enjoyed by him prior to entering into the Combination.

13. Therefore, the liability of the failure to comply with the requirement of Section 6(2) has to be by the person or enterprise which is the beneficiary in terms of acquiring a status of "appreciable adverse effect on competition" meaning thereby a greater competitive edge in the relevant market. Further the Proposer under Section 6 has necessarily got to be the acquirer if read along with Section 5. Section 5(c) also deals with mergers/amalgamation also. There is nothing to suggest that other forms of acquisitions have to be treated differently for the purpose of Section 6 of the Act. Thus what applies in the case of Mergers/amalgamation applies to every kind of acquisition affecting Competition in the market place.

14. In the instant case the Commission has imposed a very nominal penalty amounting to approximately 0.00009% of the worldwide assets of the parties as on 31.12.2013. The said penalty cannot be termed as disproportionate or unconscionable so as to warrant interference by this Hon'ble Tribunal.

15. Section 5 of the Act is limited to the enterprises and the matter of merger, amalgamation and acquisition, if it comes within threshold of value of assets, as mentioned therein, which reads as follows:

> *"**5. Combination.—** The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if—*

(a) any acquisition where—

(i) the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly have,—

(A) either, in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or

(B) [in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or]

(ii) the group, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have,—

(A) either in India, the assets of the value of more than rupees four thou sand crores or turnover more than rupees twelve thousand crores; or

(B) [in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or]

(b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, if—

(i) the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control jointly have,—

(A) either in India, the assets of the value of more than rupees one

thousand crores or turnover more than rupees three thousand crores; or

(B) [in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or]

(ii) the group, to which enterprise whose control has been acquired, or is being acquired, would belong after the acquisition, jointly have or would jointly have,—

(A) either in India, the assets of the value of more than rupees four thou sand crores or turnover more than rupees twelve thousand crores or

(B) [in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five

hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or]

(c) any merger or amalgamation in which—

(i) the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have,—

(A) either in India, the assets of the value of more than rupees one thou sand crores or turnover more than rupees three thousand crores; or

(B) [in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or]

(ii) the group, to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, would belong after the merger or the

amalgamation, as the case may be, have or would have,—

(A) either in India, the assets of the value of more than rupees four-thou sand crores or turnover more than rupees twelve thousand crores; or

(B) [in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees Fifteen Hundred Crores in India

Explanation.— *For the purposes of this section,—*

(a) "control" includes controlling the affairs or management by—

(i) one or more enterprises, either jointly or singly, over another enterprise or group;

(ii) one or more groups, either jointly or singly, over another group or enterprise;

(b) "group" means two or more enterprises which, directly or indirectly, are in a position to —

(i) exercise twenty-six per cent or more of the voting rights in the other enterprise; or

(ii) appoint more than fifty per cent of the members of the board of directors in the other enterprise; or

(iii) control the management or affairs of the other enterprise;

(c) the value of assets shall be determined by taking the book value of the assets as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout- design or similar other commercial rights, if any, referred to in sub-section (5) of section 3."

16. From the said provision, it is clear that in all such combinations which do not come within the meaning of Section 5 of the Competition Act, 2002, there is no need of obtaining any approval of the Competition Commission of India under Section 6(2) by issuing notice on it.

17. As per Section 54 of the Act, power is vested in the Central Government to exempt by notification from the application of the Act which reads as follows:

> *"54.* ***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 enterprises 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."*

18. The aforesaid clause empowers the Central Government by Notification to exempt any class of enterprises from all or any of the provisions of the proposed legislation for such period as may be specified in that notification.

If any enterprise do not provide notice under Section 6(2) to the Commission, it is open to the Commission to issue show cause notice. However, if the enterprise or enterprises claims exemption of Section 54, before passing an order, the Commission ought to determine the applicability of the exemption under Section 54 of the Act at preliminary or primary stage.

19. The procedural structure of the Act relating to combination, at the first stage, requires formation of a *prima facie* opinion as to whether the combination is likely to cause, or has caused an appreciable adverse effect on competition ("**AAEC**") within the relevant market in India under Section 29 of the Act, and then only at the second stage, the CCI is required to determine whether the combination is likely to have an AAEC. This Tribunal in *Piyush Joshi v. Competition Commission of India (TA (AT) Competition) No. 32 of 2017), has also held that "it is clear that where the 'Commission' is of the prima facie opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India then it is required to issue a notice to show cause to the parties to combination and further required to call for report from the Director General."*

20. In the same vein, the Commission ought to first determine the applicability of exemption under Section 54 before requiring filing of a notice under Section 6(2) of the Act and before commencing any proceedings under Section 43A of the Act. Whether a transaction is exempt under Section 54 of the Act is a pre-condition for the CCI to proceed with further proceedings under Section 43A of the Act, if any?

21. The Central Government in exercise of power under clause (a) of Section 54 of the Act, in public interest, by Notification S.O. 482 (E) dated 4th March, 2011 (as extracted below) exempted an enterprise, whose control, shares, voting rights or assets are being acquired has assets of the value of not more than Rs. 250 crores or turnover of not more than Rs. 750 crores from the provisions of Section 5 of the said Act for a period of five years i.e. upto 3rd March, 2016.

> *"S.O. 482 (E) – In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002 (12 of 2003), the Central Government, in public interest, hereby exempts an enterprise, whose control, shares, voting rights or assets are being acquired has assets of the value of not more than Rs. 250/- crores or turnover of not more than Rs.750/- crores from the provisions of section 5 of the said Act for a period of five years."*

22. Subsequently, by another Notification No. S.O. 674 (E) dated 4th March, 2016 (as extracted below), the Central Government in public interest exempted an enterprise whose control, shares, voting rights or assets are being acquired has either assets of the value of not more than rupees three hundred and fifty crores in India or turnover of not more than rupees one thousand crores in India from the provisions of Section 5 of the Act for a period of five years i.e. up to 3rd March, 2021.

"S.O. 674(E).—In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002 (12 of 2003), the Central Government, in public interest, hereby exempts an enterprise, whose control, shares, voting rights or assets are being acquired has either assets of the value of not more than rupees three hundred and fifty crores in India or turnover of not more than rupees one thousand crores in India from the provisions of section 5 of the said Act for a period of five years from the date of publication of the notification in the official gazette."

23. Subsequently by Notification No. S.O. 988 (E) dated 27th March, 2017, the Central Government, in public interest, exempted the enterprises as follows:

"S.O. 988(E).—In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002 (12 of 2003), the Central Government, in public interest, hereby exempts the enterprises being parties to —

(a) any acquisition referred to in clause (a) of section 5 of the Competition Act;

(b) acquiring of control by a person over an enterprise when such person has already direct

or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, referred to in clause (b) of section 5 of the Competition Act; and

(c) any merger or amalgamation, referred to in clause (c) of section 5 of the Competition Act,

where the value of assets being acquired, taken control of, merged or amalgamated is not more than rupees three hundred and fifty crores in India or turnover of not more than rupees one thousand crores in India, from the provisions of section 5 of the said Act for a period of five years from the date of publication of this notification in the official gazette.

2. Where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, the value of assets of the said portion or division or business and or attributable to it, shall be the relevant assets and turnover to be taken into account for the purpose of calculating the thresholds under section 5 of the Act. The

value of the said portion or division or business shall be determined by taking the book value of the assets as shown, in the audited books of accounts of the enterprise or as per statutory auditor's report where the financial statement have not yet become due to be filed, in the financial year immediately preceding the financial year in which the date of the proposed combination falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout design or similar other commercial rights, if any, referred to in sub-section (5) of section 3. The turnover of the said portion or division or business shall be as certified by the statutory auditor on the basis of the last available audited accounts of the company."

24. The Central Government, Ministry of Corporate Affairs issued 'Press Information Bureau' on 30th March, 2017 and clarified the Notifications dated 4th March, 2011 and 4th March, 2016, which reads as follows:

"Press Information Bureau
Government of India
Ministry of Corporate Affairs

Ministry of Corporate Affairs issues fresh notifications wherein, the Central Government intends to provide clarity on the applicability of the threshold exemption limits to all forms of combinations; Clarity on the methodology to be adopted for calculating the relevant assets and turnover of the target when only a portion or segment or business of one enterprise is being combined with another

The Ministry of Corporate Affairs (MCA) has undertaken a major reform in the regulation of combinations under the Competition Act, bringing India in line with the global practice. The Act which was passed by Parliament in 2002 had initially provided for notice of combinations to be given by enterprises, as per Section 5 of the Act, on a voluntary basis. However, this Section was amended in 2007 making the notice mandatory.

In 2011, in response to concerns expressed by various stake holders, the Government had issued a notification exempting an enterprise, whose control, shares, voting rights or assets are being acquired has either assets of the value of not more than Rs. 250 crores in India or turnover of not more than Rs. 750 crores in

India from the applicability of Section 5 of the Competition Act, 2002, for a period of 5 years. These limits were enhanced to Rs. 350 crores and Rs. 1000 crores, respectively, in March, 2016.

It was, however, noted by the Government that the said notification was being applied to Combinations which resulted only from acquisition but was not extended to Merger/Amalgamation and Acquiring of Control Cases. It was also noted that where only a segment/portion/business of an enterprise was being combined with another enterprise, the relevant assets and turnovers attributable to the target segment/portion/business were not being considered and instead the transferor's total assets and turnover were being considered for determining the applicability of the exemption.

Stakeholders had been voicing their concerns over the issue and in keeping with the Government's principle of Minimum Government and Maximum Governance, the Ministry has issued fresh notifications No. S.O. 988 (E) and No. S.O. 989(E) dated 27.03.2017 wherein, the Central Government intends to provide

(i) Clarity on the applicability of the threshold exemption limits to all forms of combinations as referred under Section 5 of the Act.

(ii) Clarity on the methodology to be adopted for calculating the relevant assets and turnover of the target when only a portion or segment or business of one enterprise is being combined with another.

With the issue of these notifications, combinations falling within the threshold limits would not require to be filed before the Competition Commission of India. The reform is in pursuance of the Government's objective of promoting Ease of Doing Business in the country and is expected to make India a more attractive destination for Foreign Direct Investment. The notification is expected to enable greater freedom to industry in taking legitimate business decisions towards further accelerating India's economic growth."

25. The Commission has failed to appreciate that the Notification dated 04.03.2011 was squarely applicable to the present transaction on the basis of an erroneous interpretation which is contrary to the intention of the exemption as expressed by the Government itself vide a notification *dated 27.03.2017 ("Subsequent Notification") and Press Release dated 30.03.2017.*

26. The intention behind the Notification dated 04.03.2011 issued by the Central Government under Section 54 of the Act was to exempt certain transactions due to their small size. The intention of the Government is made clear by the Press Release dated 30.03.2017 where it is stated that "*combinations falling within the threshold limits would not require to be filed before the Competition Commission of India. The reform is in pursuance of the Government's objective of promoting Ease of Doing Business in the country and is expected to make India a more attractive destination for Foreign Direct Investment. The notification is expected to enable greater freedom to industry in taking legitimate business decisions towards further accelerating India's economic growth.*"

27. This makes it clear that the Central Government did not wish that the CCI interfere in acquisition of an enterprise that was *de minimis* or acquisition of assets that were *de minimis*.

28. For the purpose of the calculation of assets and turnover what is being acquired is relevant, as the assets/turnover of what is left over with the sellers after the acquisition will have no role to play in the context of the business conducted by the purchaser post-acquisition.

29. In the present case, the 'Stock and Asset Purchase Agreement' covering the global portion of the transaction dated 22nd April, 2014 was publicly announced and notified under the merger control laws in several jurisdictions around the world, including the United States and the European Union. The transaction was cleared in each jurisdiction and closed on 1st January, 2015.

30. The acquisition of 'Novartis Animal Health in India' (**NAH India**) was handled separately, with a separate binding agreement – "Slum Sale Agreement" dated 3rd December, 2014 between the parties Indian subsidiaries and the parties notified this transaction on 10th November, 2014 to the Indian Foreign Investment Promotion Board. The Appellant has specifically pleaded and not denied by the Respondent that the sale of 'NAH India' as business of human health and animal health. The Appellant has acquired only the business of 'animal health'. In this background, the Appellant has rightly taken the plea that for the purpose of counting the business the amount being acquired should be taken as assets value of the animal health of the 'Novartis India Limited' and not the total value of the assets which includes the human health (human health + animal health). The Commission has failed to appreciate the aforesaid position and not deliberated on the issue.

31. Since the turn over attributed to the business acquired was Rs.93.9 Crores and the value of the assets being acquired was Rs. 36.2 Crores, the 'enterprise's' acquired assets of the value being more than Rs. 250 Crores or turn over not more than Rs. 750 crores, we hold that the Appellant is exempted from the provision of Section 5 of the Act and was not required to notify in terms of Section 6(2) of the Act.

32. Further, Section 6(2) of the Act states that "….*any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission…".* In the present transaction, the Appellant and Novartis AG entered into an agreement, further supplemented by a subsequent India related Slump Sale Agreement. Therefore, in the present case one of the

parties cannot be stated to have proposed the combination and the effect of exempting the target asset would result in the applicability of the exemption under the Notification to both the parties based on Section 6(2) of the Act. The delegated legislation, namely *The Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011* which states that in case of an acquisition, the obligation to file the notice is with the acquirer is contrary to the express statutory provision and the intent thereof.

33. The Commission having failed to appreciate the aforesaid position and in view of our finding as recorded above, we set aside the impugned order dated 14th July, 2016 and allow the appeal. However, in the facts and circumstances of the case, there is no order as to costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

New Delhi

12th March, 2020

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