

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
MUMBAI**

WEST ZONAL BENCH - COURT NO. 1

**Customs Appeal No. 87758 of 2017**

(Arising out of Order-in-Original No. 12/KVSS(12) ADG(ADJ.)/DRI, MUMBAI/2017-18 dated 22.08.2017 passed by Additional Director General, DRI (Adjudication), Mumbai)

**Commissioner of Customs (Import),**  
NS-III, Jawaharlal Nehru  
Customs House, Post-Sheva,  
Taluka-Uran, Dist.-Raigad,  
Mharashtra-400707

**...Appellant**

VERSUS

**(1) M/s. Adani Power Maharashtra Ltd.**  
Adani House, Mithakhali Circle, Navrangpura,  
Ahmedabad-380009.

**...Respondent**

**(2) M/s. Adani Power Rajasthan Ltd.,**  
Adani House, Mithakhali Circle, Navrangpura,  
Ahmedabad-380009.

**(3) M/s. Electrogen Infra FZE,**  
SAIF Plus, R4, 38/A, SAIF Zone,  
P.O.Box 122528, Sharjah, UAE.

**(4) Shri Vinod Shantilal Shah alias Vinod  
Shantilal Adani,**  
SAIF Plus, R4, 38/A, SAIF Zone,  
P.O.Box 122528, Sharjah, UAE.

**(5) Shri Jatin Shah,**  
SAIF Plus, R4, 38/A, SAIF Zone,  
P.O.Box 122528, Sharjah, UAE.

**(6) Shri Moreshwar Vasant Rabade,**  
SAIF Plus, R4, 38/A, SAIF Zone,  
P.O.Box 122528, Sharjah, UAE.

**APPEARANCE:**

Shri PRV Ramanan, Special Counsel of the Department  
Shri Vikram Nankani, Senior Advocate, Shri Jitendra Motwani and Ms. Shilpi  
Jain, Advocates for the Respondent

**CORAM:**

**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT  
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)**

**Date of Hearing: 14.02.2022  
Date of Decision: 18.07.2022**

**FINAL ORDER No. A/85641/2022****JUSTICE DILIP GUPTA:**

This Customs Appeal has been filed by the Department to assail the order dated 22.08.2017 passed by the Additional Director General DRI, (Adjudication)<sup>1</sup> by which the proceeding initiated against **M/s. Adani Power Maharashtra Ltd.<sup>2</sup>, M/s. Adani Power Rajasthan Ltd.<sup>3</sup>** and four others by a show cause notice dated 15.05.2014 has been dropped.

2. The issue involved in this appeal relates to the allegation of over-valuation of the goods imported by APML and APRL for setting up power projects at Tiroda in the State of Maharashtra and Kawai in the State of Rajasthan. The department alleges that though the power sector projects carry NIL rate of duty and the goods were imported directly to India, but the documents were routed through an intermediary entity created by APML and APRL for the purpose of raising invoices with inflated prices.

3. To appreciate the issues involved in this appeal, it would be necessary to first take note of some important factual aspects pertaining to APML and APRL.

**APML**

4. APML is a 100% subsidiary of Adani Power Limited and is engaged in operating Thermal Power Plants. There was an acute shortage of power in the State of Maharashtra and in order to overcome this deficit of approximately 27.4% and meet the future

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1. **the adjudication authority**  
2. **APML**  
3. **APRL**

requirements, the Government of Maharashtra encouraged private sector to set up power generating stations without the requirement of a license under The Electricity Act, 2003. APML was one such company that came forward to set up power generation plants in the State of Maharashtra. It acquired land in village Tiroda in the State of Maharashtra to develop a green field Thermal Power Plant. This power plant was originally envisaged to be of 1980 MW capacity, but the capacity was later on increased to 3300 MW. The project was to be implemented in three phases consisting of 5 Units. Phase I was for a total capacity of 2 x 660 MW, and Phase II was for a capacity of 1 x 660 MW. While Phase I consisted of Units 1 and 2, Phase II consisted of Unit 3. Phase III consisted of Units 4 and 5, each of 1 x 660 MW. The aggregate capacity of the entire plant, therefore, comes to 3300 MW. The dispute in the present appeal relates to the imports made by APML for Phase III.

5. It needs to be noted that prior to undertaking the project, APML had prepared project reports through M/s. SBI Capital Market Limited, which reports were approved by the lenders. The original per MW cost worked out for Phase I of the project was Rs. 4.97 crores and Rs. 4.10 crores and Rs. 4.76 crores for Phases II and III respectively.

6. Though, as noted above, the present appeal deals with the imports made by APML for the Phase III (Units 4 & 5), it would be useful to note certain facts relating to imports made for the purpose of setting up Phases I & II of the Thermal Power Plant consisting of Units 1, 2 & 3.

7. APML had entered into four Power Purchase Agreements<sup>4</sup> on long term basis with the Maharashtra State Electricity Distribution Company Limited<sup>5</sup>. The bids made by APML were accepted through a tariff based competitive bidding process, on the basis of which the following PPA were signed:

Quantum	Date of PPA
1320MW	08.09.2008
1200MW	31.03.2010
125MW	09.10.2010
440MW	06.02.2013

8. It is stated that APML started the process of procuring equipment and machinery on a single turnkey engineering, procurement and construction<sup>6</sup> basis for setting up Units 1, 2 and 3. A 'turnkey' basis is a fixed price schedule-intensive engineering, procurement, and construction contract. It is typically used in the construction of single-purpose projects, such as energy plants in which the contractor agrees to a wide variety of responsibilities, including the duties to provide for the design, engineering, procurement, and construction of the facility; to prepare start-up procedures; to conduct performance tests; to create operating manuals; and to train people to operate the facility.

9. Accordingly, APML invited tenders based on guidelines relating to International Competitive Bidding for setting up of the Thermal Power Plant, including design, procurement and commissioning thereof. It is further stated that at the time when APML floated the tender for sourcing of Boiler-Turbine-Generator<sup>7</sup>, no credible local

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4. PPA  
5. MSEDCL  
6. EPC  
7. BTG

supplier/manufacturer having a facility to manufacture/ supply the same was available and so APML had to invite global bids to source the BTG and related equipments from reputed foreign manufacturer/supplier. A Notice Inviting Tender was, therefore, issued on 08.01.2008. The bid of M/s. Sichuan Machinery & Equipment Export and Import Co. Limited, China<sup>8</sup> was found to be the lowest and most competitive and so the same was accepted and consequently APML entered into a contract with SCMEC on 28.11.2008 for supply of BTG and related equipments at a lumpsum value of USD 999.90 Million. Thereafter, APML applied for registration of the entire contract under Chapter Heading 98.01 of the Customs Tariff Act, 1985<sup>9</sup> as the same was in relation to setting up of mega power project. This registration of the contract allowed the imported goods to be cleared under NIL rate of duty. The entire contract for supply of BTG equipment and machinery for Phases I & II (Units 1, 2 & 3) entered between APML & SCMEC was registered on 06.01.2010 with the Customs House at Nhava Sheva in terms of Regulation Nos.4 and 5 of the Project Import Regulations, 1986<sup>10</sup>.

10. After the registration of the contract with respect to Unit 1 & 2, an essentiality Certificate dated 18.12.2009 addressed to the Commissioner of Customs, Nhava Sheva, was issued by the Principal Secretary, Energy Department, Maharashtra specifying the goods which were required to be imported by APML for the project. Likewise, an essentiality Certificate for Unit 3 was issued on 01.06.2010 by the Principal Secretary giving details of the goods required to be imported. The goods were, thereafter, imported and

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**8. SCMEC**  
**9. Tariff Act**  
**10. PIR**

allowed to be cleared under Chapter Heading 98.01 of the Tariff Act under a registered contract dated 28.02.2008 entered between APML and SCMEC.

11. On similar basis, APML issued a Notice Inviting Tender in respect of the design, engineering, supply, erection, testing and commissioning of equipment and machinery on a turnkey EPC basis for Phase-III (Units 4 and 5) of the Thermal Power Plant on 07.09.2009.

12. Three bids qualified and the details of the bids that were received are as follows:

Name of the Bidder	Bid Amount
M/s. SP Long Yuan Power Technology & Engineering Co. Limited, China	USD 1296 Million
M/ China National Electric Equipment Corporation, China	USD 1249 Million
M/s. Sichuan Machinery & Equipments FZE, Sharjah	USD 1202 Million

13. The bids were evaluated by APML and it is stated that the bid dated 21.10.2009 of the consortium led by M/s. Sichuan Machinery & Equipments FZE, Sharjah<sup>11</sup> was found to be the lowest and competitive. The bid documents submitted to APML in this appeal also reveal that the total bid amount of SME led consortium was USD 1.2 Billion covering BTG supply, BTG services as well as Balance of Plant<sup>12</sup> supply and services. The contract dated 05.11.2009 entered between APML and SME reveals that contract for USD 736 Million was towards supply of BTG alone and the balance amount was divided at the instance of SME into BTG services, BOP supply and services. This

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**11. SME**  
**12. BOP**

supply contract was also registered by APML under Chapter Heading 98.01 of the Tariff Act read with the relevant provisions of the PIR.

14. The entire contract entered between APML and SME for Phase III (Units 4 and 5) was registered with the Commissioner of Customs, Nhava Sheva on 06.01.2010. The essentiality Certificates for Units 4 and 5 were granted on 01.06.2010 and 30.09.2010 respectively by the Principal Secretary. These Certificates describe the equipments that were to be imported.

15. In the meantime the name of SME was changed to M/s. Electrogen Infra FZE, UAE<sup>13</sup> with effect from 04.01.2010. It needs to be noted that EIF became a 100% subsidiary of M/s. Electrogen Infra Holding Private Limited, Mauritius<sup>14</sup> w.e.f. 29.03.2010.

16. Upon import of the goods under the said supply contract dated 05.11.2009, APML filed Bills of Entry which were assessed provisionally and subject to reconciliation of the contract registered under the 2009 Regulations for Phase III (Units 4 & 5).

17. The total project cost on the date of financial closure of Phase III was Rs.6,290 crores per MW, as the cost per MW was Rs. 4.76 crores. According to APML, the project cost was in consonance with the Central Electricity Regulatory Commission (Terms and Condition of the Tariff) Regulation, 2009<sup>15</sup> and to support this connection, reliance has been placed on an order dated 04.06.2012 passed by the Central Electricity Regulatory Commission<sup>16</sup>. Annexure-II of the Order provides the benchmark fixed for the per MW cost in setting up a similar power project at Rs.5.01 crores for two Units and Rs.5.37 crores for one Unit.

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- 13. EIF**  
**14. EIH**  
**15. 2009 Regulation**  
**16. CERC**

### **APRL**

18. APRL is also a subsidiary of Adani Power Limited. The State of Rajasthan was also facing acute power shortage and in order to overcome this deficit power shortage of approximately 12.7% and to meet the future requirements, the Government of Rajasthan encouraged private sector participation in power generation, transmission and distribution. The private sector was encouraged to set up power generating stations without the requirement of a license under The Electricity Act, 2003. APRL was one such company that came forward for setting up a power generating plant in Rajasthan. It acquired land in village Kawai in the State of Rajasthan to set up a green field Thermal Power Plant of 1320 MW capacity (2 x 660 MW).

19. APRL entered into PPA on long term basis with Rajasthan Rajya Vidhyut Prasaran Nigam Limited<sup>17</sup> on behalf of the Distribution Companies of Rajasthan. The bids made by APRL were accepted through tariff based competitive bidding process, on the basis of which a 1200 MW PPA was signed on 28.01.2010.

20. APRL started the process of procuring equipment and machinery on a single turnkey EPC basis for setting up of the Thermal Power Plant. It has been stated that at the time of floating the tender for sourcing of BTG and related equipment, no local supplier/manufacturer having the relevant credentials and facility to manufacture/supply the same was available and so APRL invited global bids to source the BTG and its equipments from foreign manufacturer/supplier. Tenders were, therefore, invited based on

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**17. RRVPNL**

guidelines relating to international competitive bidding for setting up of the Thermal Power Plant including design, procurement and commissioning thereof. The Notice Inviting Tender was issued on 05.10.2009. Three bids qualified and all the bids were evaluated. The details of these bids are as follows:

Name of the Bidder	Bid Amount
M/s. Sichuan Machinery & Equipment FZE, Sharjah	USD 1206 Million
M/s. SEPCO III Electric Power Construction Corporation, China	USD 1471 Million
M/s. Guangdong Electric Power Design Institute, China]	USD 1490.57 Million

21. After evaluation, the bid dated 19.11.2009 of the consortium led by SME (later known as EIF) was found to be the lowest. From the bid documents submitted by APRL in this appeal, it appears that the total bid amount of SME led consortium was USD 1.2 Billion covering BTG supply, BTG services as well as BOP supply and services. It also transpires from the supply contract dated 02.04.2010 entered between APRL and EIF that out of the total bid amount, the contract for USD 790 Million was awarded to EIF towards supply of BTG and related equipment. The balance amount was divided, at the instance of EIF, into BTG services, BOP supply and services. The contract was thereafter registered under Chapter Heading 98.01 of the Tariff Act to seek the benefit of NIL rate of duty. An essentiality certificate dated 01.06.2010 was issued by the Principal Secretary certifying the goods that were to be imported by APRL for the project. Consequently, the goods were imported on the basis of a registered contract dated 02.04.2010 entered between APRL and EIF.

22. The total project cost on the date of financial closure was Rs.7,030 crores since the per MW cost was stated to be Rs.5.33 crores. According to APRL, the project cost was in consonance with the 2009 Regulations and to support this contention reliance was placed on an order dated 04.06.2012 passed by the CERC that provides the benchmark fixed for the per MW cost in setting up a similar power project at Rs. 5.01 crores for two units.

### **SHOW CAUSE NOTICE**

23. An investigation was, however, initiated by the Department of Revenue Intelligence regarding the goods imported by APML and APRL. The investigation for APML was carried out only with respect to Units 4 and 5 of Phase III. Post investigation, a common show cause notice dated 15.05.2014 was issued by the Additional Director General, Department of Revenue Intelligence, Mumbai. The show cause notice alleges that EIF and APML/APRL were related entities for the reason that EIF was owned and controlled by Vinod Shantilal Adani (also known as Vinod Shantilal Shah) through EIH and Vinod Shantilal Adani was also a shareholder of Adani Enterprises Limited, which in turn owned and controlled APML and APRL through its subsidiary Adani Power Limited. The show cause notice also alleges that APML, APRL, EIF and other respondents conspired to siphon off foreign exchange abroad for the benefit of their related entities. It further alleges that APML and APRL had imported goods by declaring values which they knew were not true and these imports were effected contrary to the prohibition imposed in rules 11 and 14 of the Foreign Trade (Regulation) Rules, 1993<sup>18</sup>, thus rendering the goods liable for confiscation under sections 111(d) and 111(m) of the

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**18. Foreign Trade Rules**

Customs Act 1962<sup>19</sup>. Consequently, the show cause notice called upon the respondents to show cause as to why the declared value in respect of the goods imported by APML and APRL should not be rejected under rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules 2007<sup>20</sup> and should not be redetermined under rules 4/9 read with section 14 of the Customs Act.

24. The relevant portions of the show cause notice are reproduced below:

**“17.0 SUMMARY OF INVESTIGATION**

From the foregoing investigation, it appears that:-

**17.1** APML, APRL & EIF, various related entities of Adani Group; Shri Vinod Shantilal Adani; Shri Jatin Shah & Shri Moreshwar Vasant Rabade of EIF and others have conspired between themselves to execute the planned conspiracy of siphoning off foreign exchange abroad to and for the benefit of their related entity. APML and APRL appear to have indulged in Trade Based Money Laundering by trade mis-pricing by routing invoice through an intermediary invoicing agent (EIF) in the UAE-a front company of the Adani Group run and controlled by one of the Adani brothers and assisted by ex-employees of the Adani Group. EIF in UAE appears to have been created as a front for siphoning off of money under the guise of outward remittances for over-valued imports, by indulging in invoice inflating.

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**17.3** The relationship between EIF and APML and APRL has been established during the investigation. EIF is owned and controlled by Shri Vinod Shantilal Adani @ Vinod Shantilal Shah through M/s Electrogen Infra Holding Pvt. Ltd., Mauritius. Shri Vinod Adani is shareholder in flag ship company of Adani Group viz. Adani Enterprises Limited (AEL). AEL owns and controls APML and APRL through its subsidiary company M/s Adani Power Limited.

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**19. Customs Act**  
**20. the Valuation Rules**

**17.4** Investigation in the present case has clearly revealed that while the critical BTG and its auxiliaries from SEC were sourced and shipped directly to India, the OEM invoices were routed through the above EIF i.e. the intermediary invoicing agent for inflating the value as a part of modus-operandi to siphon off money from India. SEC is a world-renowned supplier of BTG. It is also an undisputed fact that BTG are key components of a power plant and constitute a substantial portion of the cost of the power plant in terms of the aggregate value of equipment required for setting up the power plant. As stated earlier, EIF had entered into four contracts with SEC (the OEM for BTG) for supply of BTG and its auxiliaries, as summarised below:-

S. No.	Agreement Date	Brief of scope of supplies covered by agreement	Executing parties	Consideration amount as per agreement (USD)	Purpose
1.	15.07.2009	Steam Generator (boiler) and Auxiliaries 2x660 MW Power Project at Tiroda, Maharashtra	EIF/SME and SEC	97465318	For supply to APML's power project at Tiroda in Maharashtra
2.	15.07.2009	Turbine, Generator and its Auxiliaries 2x660 MW Power Project at Tiroda, Maharashtra	EIF/SME and SEC	81509682	For supply to APML's power project at Tiroda in Maharashtra
			<b>(1+2)</b>	<b>178,975,000</b>	<b>Total for APML power project</b>
3.	06.11.2009	Steam Generator (boiler) and Auxiliaries 2x660 MW Power Project at Tiroda, Maharashtra	EIF/SME and SEC	97465318	For supply to APML's power project at Tiroda in Maharashtra
4.	06.11.2009	Turbine, Generator and its Auxiliaries 2x660 MW Power Project at Tiroda, Maharashtra	EIF/SME and SEC	82679682+addition of 7920000 after amendment	For supply to APRL's power project at kawai in Rajasthan
			<b>(3+4)</b>	<b>188,065,000</b>	<b>Total for APRL power project</b>
			<b>Grand Total</b>	<b>367,040,000</b>	

**17.5** The aggregate value of all the contracts between EIF and SEC (as detailed above) put together work out to **USD 367,040,000**. Investigation has brought out the fact that goods shipped by SEC to APML and APRL were invoiced by EIF, the UAE based intermediary invoicing agent to APML and APRL. Investigation have been able to clearly identify consignments shipped by SEC to APML and APRL, which were cleared on the strength of EIF's invoices by APML and APRL upon importation in India on the basis of

combined analysis of invoice numbers & dates, shippers/exporters as appearing in the Bills of Lading/COO certificates and AORs/ORTTs showing the name of SEC as the beneficiary.

The aggregate value of shipments invoiced by EIF to APML and APRL, wherein the actual shipper is SEC works out to USD 633,562,594 (APML:USD 307147429.72 + APRL:USD-326415164). Analysis of the outward remittances through AORs/ORTTs to SEC made from the accounts of EIF held with Axis Bank and Bank of Baroda has revealed a total outflow of USD 335,732,220 for consignments shipped to APML and APRL on the basis of invoice numbers appearing on the AORs/ORTTs made by EIF (which were found to match with invoice numbers of invoices raised by EIF on APML and APRL) to the Banks requesting for outward remittances through SWIFT mode. The extent of value inflation is summarised at Table-24 which is repeated below:-

**(Table-24)**

**Extent of Overvaluation i.r.o of supplies made by SEC**

Sr. No.	Aggregate value of EIF invoices raised on APML and APRL where the actual supplier is Shanghai Electric Group Co. Ltd., China in USD	Aggregate value of remittance made by EIF to Shanghai Electric Group company for supplies to APML & APRL (USD- based on AORs/ORITs)	Difference (B-C)	Variation (B) as % of (C)
(A)	(B)	(C)	(D)	(E)
1.	633,562,594	335,732,220	297,830,374	189%

It is evident from above that against the aggregate payments of USD 335,732,220 paid by EIF to SEC for shipments made to APML & APRL, EIF appears to have raised back-to-back invoices with inflated price aggregating to USD 633,562,594 thereby leading to an inflation of nearly 189% over the OEM invoice-value (amounts actually remitted to SEC by EIF).

**17.6** Similarly in case of supplies by two OEMs (Shanghai Shantra Trading Co. Limited, Shanghai, China and Reynold Power Transmission Limited) as per invoices raised by said OEMs on EIF with the corresponding back-to-back invoice of EIF on APML & APRL are as Table -11, *ibid*, which is repeated below-

Sr. No.	OEM invoice raised on EIF		Invoice raised by EIF on APML/APRL		Difference (USD)	(F) as % of (C)
A	B	C	D	E	F	G
A	Inv.No./date	Value (USD)	Inv.No./date	Value (USD)		
1.	10SDMS01G1 60 DE dt. 26.01.2011	1647395	10SDMS01G1 60 DE dt. 26.01.2011 (on APML)	3294790	1674395	100%
2.	10SDMS01G1 80 IN dt. 04.05.2011 (Shanghai Shantra)	1647395	10SDMS01G1 80 IN dt. 04.05.2011 (on APRL)	3294790	1674395	100%
3.	50582 dt.25.06.2013 (Reynold Transmission)	85041.22 (equivalent of GBP 54279.68 converted to USD)	500582 dt. 25.06.2013 (on APML)	230550	145509	171%

The inflation to the extent of 100% and 171% in case of shipments by two OEMs also corroborates the fact the EIF has resorted to value inflation in the invoices raised by it on APML and APRL.

**17.7** Thus, the declared values in the impugned 301 & 262 consignments imported by APML & APRL respectively totally amounting to **Rs. 3469,07,79,940/-CIF** and **Rs. 3692,65,37,178/--CIF** respectively, declared on the basis of inflated invoice prices in invoices of the intermediary EIF, do not represent the actual value of the goods as has been brought out by the investigation. The overall overvaluation to the extent of **Rs. 3974,12,13,183/- CIF** is summarised in Table below:-

**Table-32**

**Proportionate distribution of over-valuation between APML & APRL  
(Figures in Rs.)**

Sr. No.	Name of the importer	Declared CIF in Rs. Based on EIF invoices raised on APML & APRL	Remittances made by EIF to OEM (Rs.)	Difference in Rs. (C-D)
A	B	C	D	E
1.	<b>APML</b>	<b>34690779941</b>	<b>15574421785</b>	<b>19116358156</b>
2.	<b>APRL</b>	<b>36926537178</b>	<b>16301682151</b>	<b>20624855027</b>
	<b>Total</b>	<b>7161,73,17,119</b>	<b>3187,61,03,936</b>	<b>3974,12,13,183</b>

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**17.10** In the guise of import of power sector machinery and equipment, APML and APRL, the two entities of Adani Enterprises Limited appear to have indulged in over-valuation of impugned imported goods. The actual value of

the imported goods is **Rs. 3187,61,03,936/-**, whereas the same have been invoiced at **Rs. 7161, 73,17,119/-**, thus leading to an over-valuation **Rs. 3974,12,13,183/-** which appears to have been siphoned off abroad through EIF, an intermediary at UAE, which is controlled and managed by Shri Vinod Shantilal Adani @ Vinod Shantilal Shah, one of the promoters of Adani Enterprises Limited (flagship company of the Adani Group)."

### **REPLY TO SHOW CAUSE NOTICE**

25. APML and APRL filed separate replies dated 25.11.2016 to the aforesaid show cause notice. Apart from stating that the documents obtained from the banks which formed the basis for issuance of the show cause notice were not admissible in evidence as they had been obtained contrary to the provisions of law, submissions on merits were also made. The reply states that the Notice Inviting Tender and the contract entered with the successful bidder would prove beyond reasonable doubts that the power project covered supply of goods and services. It was, therefore, required to be dealt with as an EPC and the respondents were not concerned with prices of individual equipments and machineries. The reply also states that the department had not disputed the value of the goods imported for setting up Phases I and II of Thermal Power Plant (Units 1, 2 & 3) and that the prices of the goods imported for Phases I & II were comparable with the prices for imports made for Phase III. The allegation made in the show cause notice that APML & EIF were related parties was also denied. The relationship between APRL and the consortium led by EIF was also denied and it was also stated that in any case the relationship, even if it was assumed to be correct, had not influenced the price. It has further been stated that the contract was awarded to the EIF led consortium by following the International

Competitive Bidding route and the two Notices Inviting Tender were published in national newspapers having wide circulations with bids being open to all eligible bidders of foreign countries. The redetermination of the value under rule 4 of the Valuation Rules was stated to be erroneous and the show cause notice had also ignored the contemporaneous data provided by the respondents which clearly depict that the value was comparable with the MW per unit cost of other projects undertaken by the competitors.

### **ORDER**

26. The adjudicating authority, on an analysis of the allegations made in the show cause notice and the reply filed by the APML/APRL, dropped the proceedings initiated by the show cause notice dated 15.05.2014. The adjudicating authority found that the relationship alleged between APML and EIF could not be established and even though the relationship between APRL and EIF was found to be established but the same had not influenced the price of the imported goods. The adjudicating authority also noticed that the contract between EIF and APML/APRL was a lumpsum contract wherein EIF was responsible for the entire gamut of activities as against the individual supply contracts between the Original Equipment Manufacturers and EIF, which was for supply of goods alone. The adjudicating authority, therefore, concluded that such individual stand alone contracts cannot be compared with the EPC contract that had several other factors built in it affecting various elements thereof namely the cash flow and the risks undertaken by the parties, which could potentially result in liabilities well beyond the total contractual payment over a period of time and also the fact that the obligation subsisted even after the supply was completed. The adjudicating

authority also found that the terms and condition of the contract between EIF and APML/ APRL were far more stringent than the contracts between the Original Equipment Manufacturers and EIF, which led to an upward escalation in the price. The adjudicating authority, in such circumstances, concluded that the conditions such as extended warranty being a part of the condition of sale was a part of the contract between APML/APRL and EIF and further that the extra money involved in giving the extended warranty became the part of the value of goods thereby adding to the cost of imports. The adjudicating authority also concluded that the contract between APML/APRL and EIF encompassed all the factors of an EPC contract. The adjudicating authority also considered that the project cost was comparatively lower when the cost per MW of APML/APRL was compared with other projects of super critical technology. In so far as the Phase III project of APML is concerned, the adjudicating authority also accepted the submission of the respondents that the same was comparable with the earlier contract for the Phase I & Phase II entered into with SCMEC, though this was not the sole criteria for deciding the value of the imported goods.

27. The relevant portions of the order passed by the adjudicating authority are reproduced below:

"5.1 I would like to examine in detail the main issue involved in the SCN as to whether the value declared by M/s APML & M/s APRL be rejected in terms of Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 read with Section 14 of the Customs Act, 1962 and the same may be redetermined as per Rule 4/9 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 read with Section 14 of the Customs Act, 1962.

5.1.1.10 Thus, I find that it was alleged in the show cause notice that for every transaction there were two invoices - i.e. one from OEM to M/s EIF and, the other from EIF to APML/APRL which was grossly inflated and did not appear to be bonafide for the reason that -

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5.1.3 Thus on perusal of the SCN and the various replies filed by the noticees (APML & APRL) I find that one of the main allegations in the SCN is that Adani group companies and EIF were related to each other through Shri Vinod Shantilal Shah @ Vinod Shantilal Adani in terms of Rule 2(2) of the CVR, 2007. **Thus, I have to examine as to whether the two entities viz. APML/APRL and EIF were related and if related, whether the relationship influenced the price of the imported goods.** I find that EIF was initially registered in SAIF Zone, Sharjah, UAE on 07.07.2009 as M/s Sichuan Machinery & Equipments FZE with its sole promoter and shareholder Mr. Nasser Ali Shaban Ahli, a UAE. The ownership of EIF was subsequently transferred to Electrogen Infra Holding Pvt. Ltd., Mauritius on 29.03.2010. I find that Shri Vinod Shantilal Adani was the sole 100% shareholder and Director of EIH from 12.01.2010. In effect, therefore, he was the owner of EIF from 29.03.2010. I find that the show cause notice has alleged that APML/APRL was related to EIF under section 2(2) of the CVR, 2007. I find that the show cause notice is silent on the specific sub-section under which the said two parties were related.

Rule 2(2)(iv) - any person directly or indirectly owns, controls or holds five percent or more of the outstanding voting stock or shares of both of them;

Rule 2(2)(viii) - they are members of the same family.`

5.1.3.1 Thus, to establish relationship one of the above conditions needs to be satisfied. I will discuss the same for each noticee individually.

5.1.3.1.1 In the case of Adani Power Maharashtra Ltd. (APML) I find that the contract between APML and EIF (erstwhile SME) was signed on 05.11.2009 after following the elaborate process of Global Tendering and evaluation of bids. Thus, I find that during the period of signing of the contract, EIF was still owned by Shri Nasser Ali Shaban Ahli, a UAE

national. Therefore, I find that the condition prescribed in Rule 2(2)(i) i.e. they are officers or directors of one another's businesses is not fulfilled since Shri Vinod Shantilal Jain alias Adani was not a Director of EIF during the relevant time. Similarly, I find that for Rule 2(2)(iv) to be satisfied Shri Vinod Shantilal Adani needs to own or control five percent or more of the outstanding voting stock or shares of both APML and EIF during the relevant time. I find that he was one of the promoters and shareholders of AEL. As per the declarations filed with the market regulators Shri Vinod Shantilal Adani held 8.27% of the shares of AEL. However, Shri Vinod Shantilal Adani became a Director of EIF only on 29.03.2010 by virtue of it becoming a subsidiary of EIH. Thus, I find that the condition stipulated in Rule 2(2)(iv) is also not satisfied. Further, I find that the third condition as per Rule 2(2)(viii) i.e. they are members of the same family is also not satisfied since at the time of the signing of the contract, Shri Nasser Ali Shaban Ahli, a UAE national was the Director of EIF. **Thus, I find that the two entities i.e. APML and EIF were not related in terms of Rule 2(2) of the CVR, 2007 on the date of the signing of the contract.**

- 5.1.3.1.2 As regards APRL I find that the contract between APRL and EIF was signed on 02.04.2010 i.e. after Shri Vinod Shantilal Adani became a Director of EIF on 29.03.2010 by virtue of it becoming a subsidiary of EIH. On going through the provisions of Rule 2(2) of the CVR, 2007, with respect to Rule 2(2)(i). I find that Shri Vinod Shantilal Adani was a director of EIF by virtue of it becoming a subsidiary of EIH, as regards Adani group of companies he was only one of the promoters and shareholders in flagship company of the Adani group viz. M/s Adani Enterprises Ltd. which is evident from contents of copy of a letter dated September 13, 2012 signed by him and addressed to, inter-alia, the Bombay Stock Exchange Limited and the National Stock Exchange of India Limited regarding disclosure under Regulation 31 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. **Thus, I find that the conditions of Rule 2(2)(i) were not fulfilled since they are not officers or Directors of one another's businesses.** As already mentioned above I find that Rule 2(2)(iv) stipulates that any person directly or indirectly owns,

controls or holds five percent or more of the outstanding voting stock or shares of both of them then the entities are related. I find that during the relevant time i.e. when the contract was signed Shri Vinod Shantilal Adani owned 100% of the shares of EIF by virtue of being the sole Director of EIH, its holding company. Further, I find that as discussed supra he was one of the promoters and shareholders of AEL. As per the declarations filed with the market regulators Shri Vinod Shantilal Adani held 8.27% of the shares of AEL. **Thus, I find that the two entities were related by virtue of the provisions of Rule 2(2)(iv) of the CVR, 2007 on the date of signing of the contract.**

- 5.1.3.3 Further I find that it was also alleged in the SCN that several ex-employees of Adani Group viz. Shri Jatin Shah & Shri Moreshwar Vasant Rabade joined EIF to manage its operations, and that in fact Shri Jatin Shah was made an authorised signatory in Sichuan Machinery & Equipments FZE even before it was acquired by Shri Vinod Shantilal Shah @ Adani. I find that the allegation is a matter of conjecture because the only way Shri Jatin Shah could be related would be by way Rule 2(2)(i) i.e. where they are officers or Directors of one another's businesses. I find that in the show cause notice it is mentioned that Shri Jatin Shah worked for various entities of Adani group before resigning in August, 2009. It is mentioned that Shri Jatin Shah resigned on 19.08.2009 and the same was accepted by M/s Adani Power Ltd. on the same day while communicating to him that he would stand relieved from the services of the company with effect from 31.08.2009. Thus, I find that from 01st September, 2009 he was a free agent and being a professional was free to accept employment from anybody. Further, as regards Shri M.V. Rabade, it was alleged that he had signed the contract between EIF and APML as Director on behalf of APML and that he was also a Director of EIF which obliterated the distinction between the two companies. However Rule 2(2)(i) requires the person be officer or Director of each others business at the relevant time which is not the case here. I find that the SCN itself mentions that Shri Moreshwar Vasant Rabade (Director of Electrogen Infra FZE UAE at one point of time) had signed the said agreement for and on behalf of M/s Adani Power Maharashtra Limited. Thus, it is not alleged in the SCN

that he was Director/ officer in EIF and APML at the same time. Thus I do not agree with the contention in the show cause notice.

5.1.3.12 I further find that the SCN mentions that the intermediary EIF was remitting the payments to its OEM through its two accounts held by them in Axis Bank and Bank of Baroda by way of Outward Remittances by way of Telegraphic Transfer (ORTT) using SWIFT Network. I find that it was alleged that the payments made by APML/APRL to EIF against the back to back invoices raised by it. I was in excess by 180% to 190% the aggregate remittances made by EIF to its OEMs thereby leading to allegation of gross over-valuation of the goods at the time of import by APML/APRL.

5.1.3.12.1 **I find that the contract between APML/APRL and EIF was a lumpsum contract whereas the payment terms in the contracts between EIF and the OEMs was consignment based i.e. whenever a particular payment was due because of the OEM reaching a target, EIF released the payment through ORTT.** I find that in some of the remittances (for eg. ORTT 0202310 & ORTT 0453410), in the column for purpose of remittance the remarks 'ADVANCE AGST CONTRACT' is mentioned. Thus, some of the payments made by EIF to its OEM through those ORTT's were advance payments. Furthermore I find that in majority of the ORTT the multiple invoice numbers were mentioned without any breakup of the invoice wise value. Therefore, in order to find out the true and correct picture of the remittances made, it is essential to compare the remittances made through ORTT against the actual invoices raised by the OEMs. I find that the department had been able to find only three invoices of the OEMs. **Thus I find that the allegation made in the SCN was based on extrapolation of the available data and thus was a conjecture and not based on any hard evidence. Therefore I am not in agreement with the allegation made in the SCN.**

5.1.3.13.1 **Further, I find that the other terms and conditions of the contract between EIF and APML/APRL are also much more stringent than the terms and conditions between OEM and EIF.** xxxxxxxxx

5.1.3.18.7 **Thus, I find that the goods in question were eligible for benefit under Project Import since it was meant for Power Plant. Further I find that the sponsoring authority is the Secretary (Energy) of Maharashtra and Rajasthan which was in line with the requirement of Regulation 7 of the PIR, 1986. Lastly the said contracts were registered with the relevant Customs authorities under Project Imports under Regulation 5 of the PIR, 1986.** Further I find that as per requirement the noticee has filed the Reconciliation statement with the relevant customs authorities where the Project Import contract was registered and BG was executed. Thus, I find that all the requirement of the Project Imports have been followed by the noticee. Thus, as per the PIR, 1986 it is the contract as a whole which needs to be assessed on completion of the contract and not the individual consignments. To avoid numerous assessments requiring splitting of value for all the machineries brought under a single project contract and to provide for single assessment at a lower/nil duty, project imports had been brought under a separate tariff heading **It, therefore, followed that comparison of value of goods covered by each and every individual consignment was impermissible and unjustified in law because the SCN has not challenged the validity of the contract between APML/APRL and EIF. Nevertheless, I find that the contract had been allotted to EIF on the basis of International Competitive Bidding wherein the said bid was found not only to be in order by a technical evaluation team but was also found to be the lowest.**

5.1.3.19 **In view of the above discussions I am of the opinion that:**

- (i) the two entities viz. APRL and EIF were not related during the relevant period;**
- (ii) APRL and EIF may be considered as related during the relevant period, but the price was not affected by the relationship because the contract entered into between them was on the basis of International Competitive Bidding (ICB), and**
- (iii) all the payment made as a condition of sale of the imported goods by the importer to the**

**seller are includable in the assessable value since the goods were imported under PIR against EPC contract.**

Thus, I find that the value declared by the notices is correct and proper."

**(emphasis supplied)**

### **SUBMISSIONS**

28. Shri P.R.V. Ramanan, learned special counsel appearing for the department made the following submissions:

- (i)** The adjudicating authority has given contradictory findings with regard to the relationship between EIF and APML/APRL. In paragraph 5.1.3.3 of the impugned order the adjudicating authority has found that APRL and EIF are related whereas in paragraph 5.1.3.19 it has been recorded that APRL and EIF were not related parties during the relevant period. Again, in paragraph 5.1.3.19 (i) and (ii) the adjudicating authority concluded that APRL and EIF can be considered as related;
- (ii)** The finding recorded by the adjudicating authority that the show cause notice did not challenge the validity of the invoices issued by EIF and also the validity of the contracts between EIF and APML/APRL is not correct as the show cause notice had alleged that the transaction between APML/APRL were sham transactions and that EIF was only a front of Adani Group, which acted merely as an intermediary invoicing agent for inflation of value;
- (iii)** The adjudicating authority accepted the contentions of the respondent without critically examining the manner in which the International Competitive Bidding was conducted. It is apparent that the whole International Competitive Bidding process was undertaken as part of a plan to provide the cloak of legality and transparency to

an otherwise fraudulent act. It is evident that SME/EIF and APML/APRL were working in tandem as part of the plan. The adjudicating authority ignored the facts evident from the record and came to a conclusion that APML and APRL had selected a vendor after following a fair, bonafide, transparent and independent International Competitive Bidding process;

- (iv)** The adjudicating authority held that the contracts were EPC contract without critically examining the nature of the contract;
- (v)** The adjudicating authority could not have ignored that the so-called EPC contracts and other paper documentations were tailor-made to give the transaction a colour of a bonafide transaction, which was otherwise a sham transaction;
- (vi)** The adjudicating authority erred in holding that in case of Project Import, valuation of each and every consignment is not permissible and valuation has to be done at project level;
- (vii)** The adjudicating authority erred in concluding that the transactions between APRL/APML and EIF were at arm's length as per the assessment orders passed by the Income Tax Authority;
- (viii)** Neither the respondents nor the adjudicating authority advanced any tangible data or valid basis to justify gross over-valuation at the hands of an intermediary invoicing agent who apparently did nothing except value inflation; and
- (ix)** The adjudicating authority erred in holding that the relevant time/date for determining the relationship between the parties was the date of contract and not the actual date of import.

29. Shri Vikram Nankani, assisted by Shri Jitendra Motwani and Ms. Shilpi Jain, made the following submissions:

- (i)** The whole transaction is based on genuine international competitive bidding process. In fact the notice inviting tender was published in various newspapers and as the bid was for turnkey project at lumpsum amount, APML/ APRL were not concerned with the break-up of individual items or services. The show cause notice also does not allege the validity and/or correctness of the tendering and/or bidding process;
- (ii)** The contract price is at par with statutory norms and peer projects. The contract value at which the contract was awarded to EIF is comparable to the value of the previous contract dated 28.02.2008 that was awarded to SCMEC. The value of the disputed supply contract for Phase-III is USD 736 million, which is comparable to the value of the contract dated 28.02.2008 with SCMEC for Phases I & II which is USD 999.90 million. Phase I and II covered three Units whereas Phase III covers two Units. Thus, the pro rata price of the contract dated 28.02.2008 for two units works out to USD 666 million, as against USD 736 million under the contract dated 05.11.2009. The price difference of around USD 70 million is due to market price escalation during these twenty months;
- (iii)** The entire investigation is incomplete and inconsistent. The allegation of overvaluation is based on half-baked information received from the banks in relation to EIF;
- (iv)** The documents adduced by the department from foreign banks were obtained contrary to the provisions of law and hence inadmissible as evidence. The allegations raised in the show cause notice are based on photocopies of documents allegedly recovered from overseas banks or overseas branches of Indian banks. The said documents are not authenticated and have not

been proved under section 139(ii) of the Customs Act;

- (v)** APRL and EIF are not related party. In any event, the alleged relationship has not influenced the price. Even the revenue has not specified under which clause of rule 2(2) of Valuation Rules the relationship has been alleged;
- (vi)** The bank account entries do not prove over-valuation. The entries set out in Tables 13 and 15 of the show cause notice do not correlate to the supplies made by EIF to APML/APRL;
- (vii)** The proposed rejection of the transaction value and the proposed re-determination is not tenable in law;
- (viii)** In terms of PIR, the contract as a whole has to be assessed and not individual consignments of goods;
- (ix)** The contract between APML/APRL and EIF cannot be compared with contract between EIF and the Original Equipment Manufacturers. The Revenue committed an error in alleging that the contract between APML/APRL and EIF is not an EPC contract;
- (x)** The Deputy Commissioner of Income Tax had issued show cause notice for the financial Year 2012-13 & 2013-14 on the basis of alleged over-valuation but after considering the submissions of APML/APRL, the Income Tax authorities found no overvaluation in the prices of equipment imported by APML/APRL from EIF;
- (xi)** There is no contradiction in the findings of the adjudicating authority since it is apparent that the adjudicating authority in paragraph 5.1.3.19 of the order had by mistake mentioned 'APRL' instead of 'APML', because in the subsequent paragraph the relationship between APRL and EIF has been considered;

- (xii) The issue on merits was settled in favor of APML/APRL in the decision of the Tribunal in **Knowledge Infrastructure Systems Private Limited vs. Additional Director General D.R.I.**<sup>21</sup>. This fact is admitted to the Revenue, as can be seen from the submissions made by the Revenue in the early hearing application;
- (xiii) The respondent is eligible for refund of the excess duty, if any, paid by it;
- (xiv) The imported goods are not liable for confiscation in terms of section 111(d) and (m) of the Customs Act. Further, no penalty is imposable on the respondents under sections 112 and 114AA of Customs Act; and
- (xv) The Revenue has not contested the findings on confiscation and penalty.

30. The submissions advanced by the learned special counsel for the appellant and the learned senior counsel for the respondents have been considered and they shall be examined under different heads.

#### **CONTRADICTORY FINDINGS**

31. The first issue that needs to be addressed is whether contradictory findings have been recorded by the adjudicating authority in the order dated 22.08.2017. This submission of learned special counsel appearing for the department is based on the findings recorded in paragraphs 5.1.3.1.1 and 5.1.3.1.2 on the one hand of the order dated 22.08.2017 and paragraph 5.1.3.19 of the said order on the other hand. While examining whether APML and EIF were related, the adjudicating authority held in paragraph 5.1.3.1.1 that they were not related. While examining the relationship between APRL and EIF, the adjudicating authority observed in paragraph

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21. 2019 (366) E.L.T. A95 (Tri.-Mumbai)

5.1.3.1.2 that though APRL and EIF were related but the said relationship had not influenced the price. After having recorded such findings, the adjudicating authority summed up the discussion in paragraph 5.1.3.19 in the following manner:

“5.1.3.19 In view of the above discussions I am of the opinion that:

(i) the two entities viz. APRL and EIF were not related during the relevant period;

(ii) APRL and EIF may be considered as related during the relevant period, but the price was not affected by the relationship because the contract entered into between them was on the basis of International Competitive Bidding (ICB), and

(iii) all the payment made as a condition of sale of the imported goods by the importer to the seller are includable in the assessable value since the goods were imported under PIR against EPC contract.”

32. A conjoint reading of all the aforesaid paragraphs leaves no manner of doubt that while summing up the discussion, the adjudicating authority wrongly mentioned 'APRL' instead of 'APML' in paragraph 5.1.3.19 (i). This is also clear from the fact that the relationship between APML and EIF has not be summed up and the relationship between APRL and EIF has been dealt with in paragraph 5.1.3.19(ii). This correction will bring paragraph 5.1.3.19(i) in conformity with the findings recorded in paragraph 5.1.3.1.1. In paragraph 5.1.3.19 (ii), the adjudicating authority dealt with the relationship between APRL and EIF and this is in conformity with the findings recorded in paragraph 5.1.3.1.2. The department has unnecessarily made an attempt to capitalize on this typographical error that has crept in paragraph 5.1.3.19 (i) of the order. If the

typographical error is recognized, there would be no inconsistency between the finding recorded in earlier paragraph and the subsequent paragraph.

### **RELATIONSHIP**

33. To support case of overvaluation, the department alleges that APML/APRL and EIF are related and in this connection the following two factors have been highlighted.

**(a)** APML and APRL are 100% subsidiary of Adani Power Limited and Mr. Vinod Shantilal Shah holds more than 8% shares in Adani Enterprises Limited. At the same time Mr. Vinod Shantilal Shah is 100% owner of the EIH, of which EIF became 100% subsidiary on 29.03.2010. Therefore APML/APRL and EIF are related through Vinod Shantilal Shah.

**(b)** Mr. Jatin Shah worked with various entities of Adani Group till August 2009 and thereafter was the authorised signatory of the EIF. This shows that Jatin Shah was handling the affairs of EIF at the behest of Adani Group. Further, one of the employees of APML namely Mr. M V Rabade has signed the contract on behalf of both APML and EIF.

34. It is seen that the contract between APML and EIF was signed on 05.11.2009 pursuant to a bid submitted on 21.10.2009. Vinod Shantilal Shah became shareholder of EIF only on 29.03.2010 and, therefore, the contract awarded to EIF was by way of an independent process without being influenced by any relationship.

35. The contract between APRL and EIF was signed on 02.04.2010, which was four days after Vinod Shantilal Shah became a shareholder of EIF. However, what is important to notice is that the bid for APRL was submitted by EIF much earlier on 19.11.2009. Even if it is

assumed that there was a relationship between APRL and EIF, the transaction value cannot be questioned unless the department is able to prove that the relationship has influenced the price. The evidence that has been led on behalf of the respondents in the form of contemporaneous data showing the per unit MW price of other projects undertaken by the competitors is similar to or higher than per unit MW cost of APML and APRL. This establishes there was no overvaluation as would be apparent from the following chart:

Project	Technology	Project Year	Capacity	Unit Size	Cost (Rs. Crs.)	Cost Per MW (Rs. Crs.)
APML (Phase-III)	Super Critical	2009	1320	660*2	6,290	4.76
Indiabulls-Sophia Power	Super Critical	2009	1320	660*2	6888	5.22
GMR Chattisgarh (without Mega Power Status)	Super Critical	2010	1320	660*2	8200	6.21
JPL Dumka Jharkhand	Super Critical	2010	1320	660*2	7224	5.47
Jaypee-Prayagraj	Super Critical	2009	1980	660*3	10780	5.44
Moser Baer	Super Critical	2010	1200	NA	6240	5.2
Jindal India Powertech Ltd.	Super Critical	2009	660	NA	3160	5.27
APRL	Super Critical	2010	1320	660*2	7,030	5.33

36. This apart, the per MW capax for APML/APRL was less than the benchmark fixed cost for per MW capax in setting up green field power project determined by CERC. As noticed above, CERC had fixed per unit MW price of green field power project at Rs. 5.01 crores, whereas per MW cost for APML and APRL was Rs. 4.76 crores and Rs. 4.53 crores respectively, excluding the soft cost and other development cost. Thus, the per MW capax cost of APML and APRL

was lower than the benchmark MW capax determined by CERC. It has also been found as a fact in the impugned order that the relationship had not influenced the price and this finding, as noticed above, does not suffer from any error.

37. With regards to Jatin Shah being an employee of both Adani Group and EIF, it is an undisputed position that Jatin Shah left the Adani Group on 19.08.2009. Thereafter he could join any organization and he decided to join EIF. At no point in time he was holding a position in Adani Group and EIF at that same time. Further, rule 2 (2) of the Valuation Rules, that defines the term 'related person' does not provide for a situation by which two parties can be treated as related just because one company has employed an employee of another company and both the companies have entered into an agreement for a particular transaction at a later date.

38. Merely because M V Rabade signed the contract both on behalf of APML and EIF will not have any bearing on the relationship aspect. It is not in dispute that M V Rabade signed the contract on behalf of APML in the capacity of a Director and he signed the contract on behalf of EIF as an authorised representative. The authorization given to M V Rabade by EIF has not been challenged in the show cause notice and as such this will not advance the case of the department on the relationship aspect between APML/APRL and EIF. Even otherwise, there is no variation in the ultimate price paid by APML/APRL to EIF from the agreed contractual price and these contracts were arrived at through international competitive bidding process.

39. Learned senior counsel appearing for the respondents also contended that the show cause notice should have disclosed the

particular clause of rule 2 (2) of the Valuation Rules that would be attracted for establishing the relationship between APRL and EIF, but it failed to so disclose. It would, therefore, not be open to the appellant to make any submission about the alleged relationship. In support of this submission, learned senior counsel placed reliance on the decisions of the Supreme Court in **Amrit Foods Co. Ltd. vs. Commissioner of C. Ex., Meerut-I**<sup>22</sup> and **Commissioner of Central Excise, Nagpur vs. Ballarpur Industries Ltd**<sup>23</sup>. Learned senior counsel for the respondent also submitted that when clause (v) of rule 2 (2) was not mentioned in the show cause notice for establishing the relationship, it is not open to the appellant to place reliance on this rule to establish that the relationship stood established.

40. In view of the aforesaid judgments of the Supreme Court in **Amrit Foods** and **Ballarpur Industries**, there is substance in this submission made by the learned senior counsel for the respondent.

### **TENDER PROCESS**

41. Much emphasis has been placed by the learned special counsel appearing for the department on the manner in which the contract was awarded to EIF. In this connection, it needs to be noted that the contract was awarded on the basis of international competitive bidding process. The notice inviting tender was published in various national and regional news-papers having wide circulation and the notices were also sent to twenty seven Consulates/Embassies. The tender was for setting up of a thermal power plant on EPC basis and the lowest bidder was awarded the contract.

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22. 2003 (190) E.L.T. 433 (S.C.)

23. 2007 (215) E.L.T. 489 (S.C.)

42. It also transpires from the tender notice that the scope of work was very wide and included design, engineering, manufacturing, procurement, packing & forwarding, supply, transportation, receipt, unloading, installation, erection, testing, commissioning, and performance guarantee test. Detailed scope was contained in the technical specification Vol. II of the bid document. The qualification of the bidder is contained in paragraphs 6.1 and 6.2 of the tender document and they are reproduced:

“6.1 The Bidder should meet the qualifying requirement stipulated hereunder:

If the Bidder is not a Manufacturer of Boiler and Turbine Generator Sets, he should have sourced the Boiler or Turbine Generator Sets from the Manufacturers who have supplied at least 2 nos of Boiler and Turbine Generator Sets of Minimum 300 MW Capacity which should be in Operation for a period of 2 years at the time of Bid Submission.

OR

If the Bidder is a Manufacturer of Boiler and Turbine Generator Sets, he should have supplied at least 2 nos of Boiler and Turbine Generator Sets of Minimum 300 MW Capacity which should be in Operation for at least 2 years at the time of Bid submission.

6.2 If the Bidder does not fulfils the condition stipulated in clause 6.1 above, in such case, he may form a Joint Venture or Consortium with one or more Bidder/Bidders who must meet the qualifying requirement for the components they are designated to perform. In respect of Joint Venture or Consortium, the Bidders are requested to follow the conditions indicated in respective clauses of Conditions of Contract, section-2 of GCC of Bidding Document.”

43. Three bids were received for **APML** project. The consortium led by SMEs submitted their bid on 21.10.2009. Two other bidders had also bid. The bidding was done by following the ICB guidelines and the bid by the consortium led by SME was found to be the lowest. The total bid amount of SME was USD 1.2 Billion covering BTG supply, BTG services as well as BOP supply and services. Out of the total bid price, contract for USD 736 Million was awarded to SME on 05.11.2009 towards the supply of BTG alone. Learned senior counsel for the respondent stated that the balance amount was divided at the instance of SME into BTG services, BOP supply and services. As required by the consortium, the remaining three contracts were entered into with other consortium members. The exchange rate of the two contracts which were awarded in INR resulted in reduction of bid price to USD 1.13 Billion, which was the final bid price.

44. **APRL** invited tenders based on ICB guidelines for setting up of the Thermal Power Plant including design, procurement and commissioning thereof for the said power plant. This notice inviting tender was issued on 05.11.2009. The bid by SME was found to be the lowest. The total bid amount of SME was USD 1.2 Billion covering BTG supply, BTG services as well as BOP supply and services. The name of SME was changed to EIF with effect from 04.01.2010. With effect from 29.03.2010 EIF became a 100% subsidiary of M/s. Electrogen Infra Holding Pvt. Ltd., Mauritius (EIH). EIF thereafter requested for forming of a consortium and the same was accepted. The bid submitted by the three bidders were evaluated and it was recommended that consortium led by EIF, then known as SME, should be awarded the contract. Out of the total bid price, contract for USD 790 Million was awarded on 02.04.2010 to EIF towards

supply of BTG alone. The balance amount was divided, at the instance of EIF, into BTG services, BOP supply and services. As required by the consortium led by EIF, the balance two contracts were entered into with other consortium members.

45. On behalf of the department it was submitted that it was a sham transaction and elaborating this submission, learned special counsel for the appellant pointed out that SME/EIF had signed contracts with the original equipment manufacturers even before they submitted the bid. The learned senior counsel for the respondent, however, submitted since that entire contract was awarded by meticulously following the ICB process, the department cannot allege that it was a sham process.

46. Merely because the successful bidder had entered into an agreement with one of the original equipment manufacturer prior to submission of bid cannot be a reason to hold that the entire ICB process was a sham. The department has not raised doubts on the bids received by APML and APRL from other independent parties pursuant to the ICB process. It was for the department to have established its case and substantiated it by producing evidence.

47. The submission of the department can also be rejected for the reason that the project cost of the competitors for the similar project during the same time was comparable to the project cost of APML and APRL. This apart, it has been found that the per MW capex for both APML and APRL are within the benchmark fixed by CERC. Further, the contract value at which the contract was awarded by APML to EIF was comparable to the value of previous contract dated 28.02.2008 awarded to SCMEC for Units 1, 2 and 3 (Phases I and II). The awarding of the contract has not been disputed by the revenue.

The department is, therefore, not correct in asserting that the ICB Process was a sham.

48. The department, in order to support its claim that the transaction was a sham transaction and more in the nature of tender fixing, has also placed reliance upon the letter of credit having being opened by APML and APRL in favour of EIF. The said action of opening the letter of credit cannot in any manner establish that the transaction was a sham transaction or that there was over-valuation. The adjudicating authority correctly appreciated that the letter of credit was opened by APML and APRL in favour of EIF in terms of Annexure-2 of the contract dated 05.11.2009 and was in relation to the payments to be made to EIF for purchase of BTG. The submission that the letters of credit were opened as EIF was an intermediary invoicing agent is without any basis as the amount mentioned in the letters of credit were payable only on submission of shipping documents showing clearance of BTG consignments.

49. There is also force in the submission of the learned senior counsel for the respondent that a belated challenge to the genuineness of the ICB process at the stage of appeal should not be entertained as this was not even a charge in the show cause notice. It is seen that the department had not at the stage of show cause notice questioned the ICB process followed by the respondent before awarding the contract to consortium led by SME/EIF. In **Commissioner of C. Ex., Nagpur vs. Ballarpur Industries**<sup>24</sup> the Supreme Court held that show cause notice is the foundation of a matter and the department cannot travel beyond its contents.

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24. 2007 (215) E.L.T. 489 (S.C.)

**DOCUMENTS NOT ADMISSIBLE AS EVIDENCE**

50. The case of the department as regards over-valuation is based on certain documents received from the UAE branches of Axis Bank, ICICI Bank and Bank of Baroda. The onus to prove over-valuation was on the Revenue, which burden was required to be discharged with cogent evidence. The department, therefore, had to establish the allegation on the basis of documents which were admissible as evidence. The documents obtained by the Department of Revenue Intelligence can be categorized into three categories. The first is in connection with the three consignments where back-to-back documents are available with respect to transaction between Original Equipment Manufacturers & EIF and EIF & APML/APRL and with respect to this category, the value is sought to be re-determined based on the invoice of the Original Equipment Manufacturers. The second is with respect to the six consignments where AORs/ORTTs were received from Bank of Baroda. Table-21 to the show cause notice indicates that the amount remitted by APRL to EIF and also the amount remitted by EIF to Original Equipment Manufacturers. With respect to these six consignments, rule 4 of the Valuation Rules has been invoked to re-determine the value, basis the amount remitted by EIF to Original Equipment Manufacturers. The third is with respect to the balance imports (299 for APML and 255 for APRL), where the Original Equipment Manufacturers invoices are not available. The value of such individual consignments has been determined under rule 9 of the Valuation Rules by reducing the declared value by 2.2 times of the transaction value. The same has been done on the basis of the aggregate outward remittance of invoice value made by EIF to the Original Equipment Manufacturers.

51. The respondents disputed these documents before the adjudicating authority on the ground that the same had been obtained contrary to the Trade Agreement signed between UAE and India on 22.09.1993 and, therefore, could not be admitted as evidence. The admissibility of the said documents was also questioned in terms of the provisions of sections 138C (4) and 139 (ii) of the Customs Act.

52. To appreciate this contention, it would be necessary to reproduce section 138C of the Customs Act and it is as follows:

**"Section 138C-** Admissibility of micro films, facsimile copies of documents and computer print outs as documents and as evidence. **(1)** Notwithstanding anything contained in any other law for the time being in force,-

- (a) a micro film of a document or the reproduction of the image or images embodied in such micro film (whether enlarged or not); or
- (b) a facsimile copy of a documents; or
- (c) a statement contained in a document and included in a printed material produced by a computer (hereinafter referred to as a "computer print out").

**(2)** The conditions referred to in sub-section (1) in respect of a computer print out shall be the following namely:-

- (a) the computer print out containing the statement was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer,
- (b) during the said period, there was regularly supplied to the computer in the ordinary course of

the said activities, information of the kind contained in the statement or of the kind from which the information so contained is derived;

- (c) throughout the material part of the said period, the computer was operating properly or, if not, then any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of the contents; and
- (d) the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of the said activities.

**(3)** Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether -

- (a) by a combination of computers operating over that period; or
- (b) by different computers operating in succession over that period; or
- (c) by different combinations of computers operating in succession over that period; or
- (d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combination of computers,

all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

**(4)** In any proceedings under this Act and the rules made thereunder where it is desired to give a statement in evidence by virtue of this section, a

certificate doing any of the following things, that is to say, -

- (a) identifying the document containing the statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer,
- (c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to be to the best of the knowledge and belief of the person stating it.

**(5)** For the purposes of this section, -

- (a) Information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;
- (b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

- (c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation - For the purposes of this section,-

- (a) "computer" means any device that receives, stores and processes data, applying stipulated processes to the information and supplying results of these processes; and
- (b) any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process."

53. A bare perusal at the aforesaid provision reveals that a computer print-out is admissible as direct evidence under the Customs Act if the condition mentioned in sub-section (2) is satisfied. Section 138 C (4) deals with cases where any document is required to be produced as an evidence in proceedings under the Customs Act and the Rules framed thereunder. It specifically mandates production of a certificate containing the following:

- (i) Identifying the document containing the statement and describing the manner in which it was produced;
- (ii) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer,
- (iii) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

to be provided by a person occupying a responsible position in relation to the operation of the device in question or the management of the relevant activities shall be evidence of any matter which is stated therein.

54. The Customs Act contains a specific provision that describes the manner in which the admissibility of computer print outs will be accepted as evidence in proceedings initiated under the Customs Act. When law requires a thing to be done in a particular manner it should be done in that manner alone. The Department had obtained the documents from foreign branches of the Indian banks, but the conditions prescribed under section 138 C (4) of the Customs Act were not fulfilled as the certificate giving the details was not produced.

55. The learned special counsel appearing for the department submitted that none of the documents were print outs retrieved from either the data contained in the computer maintained by banks or EIF or APML and APRL since the banks had furnished the documents in response to the letters issued by the Department of Revenue Intelligence.

56. The entire case of the department in the show cause notice relates to data obtained from the banks. It is not the case of the department that the said data was hand written or typed. The said data provided by the foreign branches was admittedly stored in electronic form and print outs of the same were furnished by the foreign banks. The banks may have given these documents at the behest of the investigating authority, but they were print outs of some electronic record. Nothing prevented the investigating authority from seeking the certificate as required under section 138C (4) of the Customs Act from the person responsible at the bank who was handling such electronic medium for storage of the said documents. The documents annexed to the appeal do not bear any signature nor do they bear a proper seal or signature of the issuing authority. The

onus was on the department to prove the correctness and the authenticity of the same. A perusal of the documents relied upon in the show cause notice show that the ORTTs/AORs and the invoices, which form the basis of the re-determination of the transaction value, have not been signed nor attested. In relation some documents, though a seal is appended, but they do not contain signatures. Similarly, few documents other than ORTTs, bear initials without the name and designation of person signing the document. In such a situation obtaining a certificate under section 138C (4) of the Customs Act was extremely necessary to prove the authenticity of the documents but the same has not been done.

57. In this connection, would be relevant to refer to the observations of the Supreme Court in **Anvar P. V. vs. P. K. Basheer**<sup>25</sup> wherein the Supreme Court, in respect of section 65B of the Evidence Act which is pari materia to the provisions of section 138C (4) of the Customs Act, held that evidence relating to electronic record shall not be admitted in evidence unless the requirement of section 65B of the Evidence Act is fulfilled. Paragraph 22 of the said judgment is relevant and the same is reproduced:

"22. The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Section 59 and 65A dealing with the admissibility of electronic record. Section 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by

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25. AIR 2015 SC 180

Section 65A and 65B. to that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in Navjot Sandhu case (supra), does not laydown the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is admissible.”

58. The aforesaid judgment of Supreme Court was followed by the Supreme Court in **Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal & others**<sup>26</sup>. The Supreme Court held in paragraph 72 of the judgment that if the original device is not produced, then electronic record can be produced in accordance with section 65B (1) of the Evidence Act together with requisite certificate under section 65B (4). The relevant portion of the judgment is reproduced below:

- “(a) Anvar P.V. (supra), as clarified by us hereinabove, is the law declared by this Court on Section 65B of the Evidence Act. The judgment in Tomaso Bruno (supra), being per incuriam, does not lay down the law correctly. Also, the judgment in SLP (Crl.) No. 9431 of 2011 reported as Shafhi Mohammad (supra) and the judgment dated 03.04.2018 reported as (2018) 5 SCC 311, do not lay down the law correctly and are therefore overruled.
- (b) The clarification referred to above is that the required certificate under Section 65B (4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and

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26. AIR 2020 SC 4908

proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information contained in such electronic record can be in accordance with Section 65B(1), together with the requisite certificate under Section 65B(4). The last sentence in Anvar P.V. (supra) which reads as ".. if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act..." is thus clarified; it is to be read without the words "under Section 62 of the Evidence Act,..." With this clarification, the law stated in paragraph 24 of Anvar P.V. (supra) does not need to be revisited."s

59. The Mumbai Bench of the Tribunal in **Agarvanshi Aluminium Ltd. vs. Commissioner of Customs (I), Nhava Sheva<sup>27</sup>**, where the issue was with respect to section 138C (4) of the Customs Act, also observed:

"12. .... it is clear that for admissibility of computer printout there are certain conditions have been imposed in the said section. Admittedly condition 4C of the said section has not been complied with and in the case of Premier Instruments & Controls (supra) this Tribunal relied on the case of International Computer Ribbon Corporation - 2004 (165) E.L.T. 186 (Tri.-Chennai) wherein this Tribunal has held that "computer printout were relied on by the Adjudicating Authority for recording a finding of clandestine manufacture and clearance of excisable goods. It was found by the Tribunal that printouts were neither authenticated nor recovered under Mahazar... The Tribunal rejected the printouts... Nothing contained in the printout generated by the PC can be admitted as evidence." In this case also, we find that the parallel situation as to the decision of Premier Instruments & Controls (supra).

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**27. 2014 (299) E.L.T. 83 (Tri.-Mum)**

13. Therefore, the printout generated from the PC seized cannot be admitted into evidence for non-fulfillment of statutory condition of Section 138C of the Customs Act, 1962.”

60. Thus, as the provisions of section 138C (4) of the Customs Act have not been satisfied for the reason that the certificate prescribed therein has not been furnished, the documents obtained by Department of Revenue Intelligence from various banks outside India cannot be admitted as evidence. Reliance cannot, therefore, be placed on these documents for this reason.

61. The learned senior counsel for the respondents also made submissions with regard to non-fulfillment of the provisions of section 139 (ii) of the Customs Act. It is the case of the respondents that the presumption under section 139 (ii) of the Customs Act would not be available as the authenticity of documents have been challenged. Under section 139 (ii) of the Customs Act, where any document has been received from any place outside India during the course of investigation under the Customs Act and such document is tendered as evidence, then unless it is proved to the contrary, the contents of the documents will be taken to be true, basis the signature in the case of the document executed or attested. In the present case it is seen that the ORTTs/AORs and the invoices which form the basis of redetermination of the transaction value have not been signed or attested. The documents that are neither signed nor authenticated cannot be admitted as evidence.

62. The learned special counsel of the department placed reliance on the purported originals of ORTTs and AORs that are supposedly on record of the banks and copies were furnished to Department of Revenue Intelligence. Further, he has placed reliance on the

statement of Vineet Jain - CEO of Adani Power Limited, who has verified the same. These do not satisfy the requirement of section 139 of the Customs Act. A statement obtained under section 108 of the Customs Act, basis such unauthenticated and unsigned documents, from a person who has neither authored nor received it cannot be a substitute to the requirement of section 138 C (4) of the Customs Act.

63. This is what was stated by the Supreme Court in **Collector of Customs, Bombay vs. East Punjab Traders**<sup>28</sup> wherein it was held that presumption under section 139 (ii) of the Customs Act cannot be raised because the document did not bear any signature. The Supreme Court held that when the authenticity of the photocopies of the documents itself is suspected, the presumption under section 139(ii) of the Customs Act is not available. Paragraph 5 of the judgment is reproduced below:

"5. The single Technical Member, who wrote the minority judgment, however, held the view that it was not essential on the part of the Customs Officer to strictly prove the documents as required by the Evidence Act and that the authenticity of the documents, though copies, could not be doubted as they had been collected by the Collector from foreign sources and could be admitted in evidence by virtue of Section 139(ii) of the Customs Act, 1962 which permits the raising of a presumption in respect of documents received from any place outside Indian in the course of investigation of any offence alleged to have been committed by any person under the Act. The majority points out that these documents, which are photocopies, do not bear the signature either of the exporter, the forwarding agent, the stevedore or the Customs Officer. In fact, they do not bear any signature whatsoever and, therefore, the authenticity of these documents is suspect and it is not possible to presume

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28. (1998) 9 SCC 115

that the originals are duly signed. It is for this reason that the majority did not consider it safe to place reliance on photocopies of copies of the documents recovered by the Customs Officer not from the Customs Department in Japan but from the agencies which are stated to have exported the material in question. It is also found that one of these copies of the alleged declarations bears the seal of the Customs at Kobe and the name of the vessel is shown to be 'Raya Fortune' but the itinerary of that vessel collected at the instance of the Indian Customs shows that the said vessel had never touched Kobe which raises a serious doubt as to how far this document is authentic. The majority raises the question as to how the declaration at Kobe and shipment from Osaka are reconcilable noting that there is no explanation coming forth. The majority feels that the authenticity of the documents itself is suspect. In these circumstances, the presumption to be raised under Section 139 (ii) of the Customs Act could not be raised because the document did not bear any signature, did not come from proper custody and it is difficult to understand why the Indian Customs did not interact with the Japan Customs and obtain authentic copies of the document from the latter. Merely because the Department offered cross-examination of the steamer agency from whom the export declaration had been obtained and the Respondents chose not to avail of that opportunity is no ground for holding that the requirements of Section 139 are satisfied for the purpose of raising the presumption. In order to raise the presumption under the said provision, the basis facts had to be laid. Even though they bear a serial number and stamp of Japan Customs, the fact remains that they are copies of copies and indisputably bear no signature of the exporter, the forwarding agent, the stevedore or the Customs Officer, no signature at all of any of them. The discrepancy in regard to copies bearing the seal of customs at Kobe also raises a serious doubt whether the copies relate to any of the consignments in question. In these circumstances, if the majority was disinclined to place reliance on these documents we find it difficult to hold that it was in error in doing so."

64. This view was also expressed by the Tribunal in **Truwoods Pvt. Ltd. vs. Commissioner**<sup>29</sup> and the Appeal filed before the Supreme Court by the department against the aforesaid decision was dismissed. This decision is reported in **Commissioner of Cus., Visakhapatnam vs. Truwoods Pvt. Ltd**<sup>30</sup>.

65. The documents relied upon by the department are, therefore, inadmissible as evidence as the authenticity of the same has not proved in terms of the provisions of sections 138C (4) and 139 (ii) of the Customs Act.

### **WHETHER THE CONTRACT WAS EPC**

66. Learned special counsel for the department submitted that the contracts were not EPC. However, learned senior counsel for the respondent urged that both APML and APRL had awarded contracts to SME/EIF and the consortiums which were in the nature of EPC. Learned senior counsel submitted that splitting the contract into two separate contracts at the instance of EIF into the supply and service portions of the contract would not change the nature of contract for the reason that the respondent was concerned not just with the supply of the equipments but with the contract as a whole.

67. The submission advanced by the learned senior counsel for the respondent has substance. Merely because, for the sake of convenience and/ or commercial exigencies of the parties, a contract is broken into different sub-parts would not alter and/or change the nature of the contract. SME/EIF and its constituents in the consortium were awarded the contract as their bid was found to be the lowest covering BTG supply, BTG service as well as BOP supply and service.

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29. 2005 (186) E.L.T. 135 (Tribunal)

30. 2016 (331) E.L.T. 15 (S.C.)

68. In relation to APML, it is submitted that out of the total bid price, contract for USD 736 million was awarded to SME on 05.11.2009 towards supply of BTG alone. The balance amount was divided between the balance consortium members, at the instance of SME into BTG services, BOP supply and services. As required by the consortium, the remaining three contracts were entered into with other consortium members.

69. The relevant clauses of the BTG supply contract in relation to APML are as follows:

“Para IV of the agreement deals with contract price and the same reads as under:

**Para IV: Contract Price**

The lump sum contract price payable under this supply contract by the employer to the supplier shall be United States Dollars 736,000,000/- (United States Dollars Seven Hundred Thirty Six Million only).

- (a) Payment for the supply of Goods shall be made on the basis of dispatch of shipments, in accordance with Annexure 3 hereto.
- (b) The Supplier shall pay all taxes, duties and fees required to be paid by him under this Supply Contract in its country, and the Contract Price shall not be adjusted for any of these costs, except as stated in Sub-clause 13.4 [adjustments for changes in legislation] of the Conditions of the Contract;

The Employer shall pay all taxes, duties and fees under this Supply Contract in his country (India).

**4.0 THE SUPPLIER**

**4.1 Suppliers General Obligation**

The supplier shall be responsible for the basic and detailed design, engineering, procurement, supply,

storage at Port of Loading and marine transportation of the Goods of all equipment and system(s).

The Supplier shall advise the Employer of the shipping schedules of the Goods to the destination Port of Entry as far as possible, transshipment of major items shall be avoided.

The Supplier shall supply the Goods in accordance with the Contract and Goods Industry Practice, and shall remedy any defects in the Goods. When completed the Goods shall be fit for the purposes for which the Goods are intended as defined in the Contract.

The supplier shall, whenever required by the Employer, submits details of the arrangements and methods which the supplier proposes to adopt for the supply of the Goods. No significant alteration to these arrangements and methods shall be made without the prior written consent of the Employer.

The Supplier shall provide at its own costs, training to Employer's staff for operation and maintenance of the Goods at manufacturer's work in China and at a Site, in accordance with Training Schedule as per Appendix B and guidance to Employer's staff on operation and maintenance of the Goods for a period of 12 months from the date of completion of successful performance guarantee tests, the costs of transportation and accommodation of Employer's staff for the purpose of such training shall be borne by the Employer.

#### **4.8 Sufficiency of the Contract Price**

The Supplier has satisfied himself as to the correctness and sufficiency of the Contract price.

Unless otherwise stated in the Contract, the Contract Price covers all the supplier's obligations under the Contract including those under Provisional Sums, if any and all things necessary for the Supply of the goods and the remedying of any defects therein.

Clause 7.3 of Annexure 5 deals with inspection of goods which provides that Company Personnel shall at all times during production and manufacture, will be entitled to examine, inspect, measure and test the goods and to check the progress of manufacture of goods.

#### **7.4 Testing**

The Sub-Clause shall apply to all tests specified in the Contract, other than the Tests on Completion and the Tests after Completion.

The Supplier shall provide all apparatus, assistance, documents and other information, electricity, equipment, fuel, consumables, instruments, materials, and suitably and experienced staff, as are necessary to carry out the specified tests efficiently. The Supplier shall agree, with the Employer, the time and place for the specified testing of any Goods.

The assistance and cooperation to be provided by the Supplier to the Employer under this Sub-Clause shall also be similarly provided to any person nominated by the Employer to conduct tests in relation to the Goods.

The Employer may, under Clause 13[Variations and Adjustments], instruct the Supplier to carry out additional tests. If these varied or additional tests show that the tested goods is not in accordance with the Contract, the Costs of carrying out this variation shall be borne by the Supplier, notwithstanding other provisions of the Contract.

The Employer shall give the Supplier not less than 24 hours notice of the Employers intention to attend the tests. If the Employer does not attend at the time and place agreed, the Supplier may proceed with the tests unless otherwise instructed by the Employer, and the tests shall then be deemed to have been made in the Employers presence.

The Supplier shall promptly forward to the Employer duly certified reports of the tests. When the specified

tests have been passed, the Employer shall endorse the Suppliers tests Certificate, or issue a certificate to him, or to that effect. If the Employer has not attended the tests, he shall be deemed to have accepted the readings as accurate.

The Supplier shall inform the Employer at least 3(three) weeks in advance of any performance tests of all major Goods such as, but not limited to, pumps, boiler, burners, heat exchangers, turbines, cubicles, switchgears etc. The notification period for the purposes of this Sub-Clause shall be three weeks.

The tests carried out in accordance with this Sub-Clause shall not relieve and absolve the supplier from its responsibility and obligations under the Contract,

### **7.5 Rejection**

If, as a result of an examination, inspection, measurement, or testing any Good is found to be defective or otherwise not in accordance with the Contract, the Employer may reject the Goods by giving notice to the Supplier, with reasons. The Supplier shall them promptly make good the defect and then ensure that the rejected good comply with the requirements of the Contract.

If the Employer requires the Goods to be retested, the goods shall be repeated under the same terms and conditions. If the Rejection and retesting cause the Employer to incur additional costs, the Supplier shall subject to Sub-Clause 2.3 (Employers Claims) pay these costs to the Employer."

70. The aforesaid clauses of the contract dated 05.11.2009 entered into between APML and EIF demonstrate that the same are part of the EPC awarded in respect of design, engineering, manufacturing, procurement, packing & forwarding, supply, transportation, receipt, unloading, installation, erection, testing, commissioning, and

performance guarantee test of the equipment and machinery required for the power project at a lumpsum price. Thereafter, Essentiality Certificates were granted in respect of Unit 4 on 01.06.2010 and for Unit 5 on 30.09.2010. The entire contract entered between the APML and SME for Phase III (Units 4 and 5) was registered under the same file No. for Phases I and II on 06.11.2010 with the Commissioner of Customs, Nhava Sheva, as prescribed under Regulation Nos. 4 and 5 of the PIR.

71. Pursuant to the said contract dated 05.11.2009, APML imported the said goods. Before import of the first consignment under the said contract dated 05.11.2009, APML registered the same under the PIR and consequently, the said goods were duty assessed under Heading 98.01 of the First Schedule to the Tariff Act. All Bills of Entry were assessed provisionally and subject to reconciliation under PIR. No objection was or has been taken, at any time, during the assessment of each of the Bills of Entry. Further, in respect of imports made for Phase I and II, the reconciliation was submitted in terms of PIR.

72. In relation to APRL, it is stated out of the total contract, contract worth USD 790 million was awarded on 02.04.2010 to EIF towards supply of BTG alone and the balance amount was divided between the consortium members at the instance of EIF, being the lead member, into BTG service and BOP supply and service. A contract was also entered into with the other consortium members for this purpose.

73. The relevant clauses of the supply contract in relation to the Thermal Power Plant set up by APRL are as follows:

"Para IV of the agreement deals with contract price and the same reads as under:

**Para IV: Contract Price**

The lump sum contract price payable under this supply contract by the employer to the supplier shall be United States Dollars 790,000,000/- (United States Dollars Seven Hundred Ninety Million only).

- (a) Payment for the supply of Goods shall be made on the basis of dispatch of shipments, in accordance with Annexure 3 hereto.
- (b) The Supplier shall pay all taxes, duties and fees required to be paid by him under this Supply Contract in its country, and the Contract Price shall not be adjusted for any of these costs, except as stated in Sub-clause 13.4 [adjustments for changes in legislation] of the Conditions of the Contract;

The Employer shall pay all taxes, duties and fees under this Supply Contract in his country (India).

**4.0 THE SUPPLIER**

**4.1 Suppliers General Obligation**

The supplier shall be responsible for the basic and detailed design, engineering, procurement, supply, storage at Port of Loading and marine transportation of the Goods of all equipment and system(s).

The Supplier shall advise the Employer of the shipping schedules of the Goods to the destination Port of Entry as far as possible, transshipment of major items shall be avoided.

The Supplier shall supply the Goods in accordance with the Contract and Goods Industry Practice, and shall remedy any defects in the Goods. When completed the Goods shall be fit for the purposes for which the Goods are intended as defined in the Contract.

The supplier shall, whenever required by the Employer, submits details of the arrangements and methods

which the supplier proposes to adopt for the supply of the Goods. No significant alteration to these arrangements and methods shall be made without the prior written consent of the Employer.

The Supplier shall provide at its own costs, training to Employer's staff for operation and maintenance of the Goods at manufacturer's work in China and at a Site, in accordance with Training Schedule as per Appendix B and guidance to Employer's staff on operation and maintenance of the Goods for a period of 12 months from the date of completion of successful performance guarantee tests, the costs of transportation and accommodation of Employer's staff for the purpose of such training shall be borne by the Employer.

#### **4.8 Sufficiency of the Contract Price**

The Supplier has satisfied himself as to the correctness and sufficiency of the Contract price.

Unless otherwise stated in the Contract, the Contract Price covers all the supplier's obligations under the Contract including those under Provisional Sums, if any and all things necessary for the Supply of the goods and the remedying of any defects therein.

Clause 7.3 of Annexure 5 deals with inspection of goods which provide that Company Personnel shall at all times during production and manufacture, will be entitled to examine, inspect, measure and test the goods and to check the progress of manufacture of goods.

#### **7.4 Testing**

The Sub-Clause shall apply to all tests specified in the Contract, other than the Tests on Completion and the Tests after Completion.

The Supplier shall provide all apparatus, assistance, documents and other information, electricity, equipment, fuel, consumables, instruments, materials, and suitably and experienced staff, as are necessary to carry out the specified tests efficiently. The Supplier

shall agree, with the Employer, the time and place for the specified testing of any Goods.

The assistance and cooperation to be provided by the Supplier to the Employer under this Sub-Clause shall also be similarly provided to any person nominated by the Employer to conduct tests in relation to the Goods.

The Employer may, under Clause 13[Variations and Adjustments], instruct the Supplier to carry out additional tests. If these varied or additional tests show that the tested goods is not in accordance with the Contract, the Costs of carrying out this variation shall be borne by the Supplier, notwithstanding other provisions of the Contract.

The Employer shall give the Supplier not less than 24 hours notice of the Employers intention to attend the tests. If the Employer does not attend at the time and place agreed, the Supplier may proceed with the tests unless otherwise instructed by the Employer, and the tests shall then be deemed to have been made in the Employers presence.

The Supplier shall promptly forward to the Employer duly certified reports of the tests. When the specified tests have been passed, the Employer shall endorse the Suppliers tests Certificate, or issue a certificate to him, or to that effect. If the Employer has not attended the tests, he shall be deemed to have accepted the readings as accurate.

The Supplier shall inform the Employer at least 3(three) weeks in advance of any performance tests of all major Goods such as, but not limited to, pumps, boiler, burners, heat exchangers, turbines, cubicles, switchgears etc. The notification period for the purposes of this Sub-Clause shall be three weeks.

The tests carried out in accordance with this Sub-Clause shall not relieve and absolve the supplier from its responsibility and obligations under the Contract,

### **7.5 Rejection**

If, as a result of an examination, inspection, measurement, or testing any Good is found to be defective or otherwise not in accordance with the Contract, the Employer may reject the Goods by giving notice to the Supplier, with reasons. The Supplier shall then promptly make good the defect and then ensure that the rejected good comply with the requirements of the Contract.

If the Employer requires the Goods to be retested, the goods shall be repeated under the same terms and conditions. If the Rejection and retesting cause the Employer to incur additional costs, the Supplier shall subject to Sub-Clause 2.3 (Employers Claims) pay these costs to the Employer.”

74. The aforesaid clauses of the contract entered into between APRL and EIF would show that the same are a part of EPC job awarded in respect of design, engineering, manufacturing, procurement, packing & forwarding, supply, transportation, receipt, unloading, installation, erection, testing, commissioning, and performance guarantee test of the equipment and machinery required for the respective power projects at a lumpsum price. APRL was concerned only with the said lumpsum price which was for the entire power project and not with the price of individual goods.

75. In terms of General Exemption No. 122 (Serial No. 400 of Notification dated 01.03.2002, which was amended to Serial No. 507 by Notification dated 17.03.2010), goods, equipment and machinery falling under Heading 98.01 of the Customs Tariff and required for setting up a Mega Power Project are allowed to be imported and cleared under Nil rate of duty. In order to obtain the benefit of concessional rate of customs duty for the goods to be imported for the entire contract under the aforesaid Notification, APRL had

submitted an application to the Principal Secretary, Energy Department, Rajasthan. The Principal Secretary, on being satisfied as to the eligibility to avail the benefit of the aforesaid exemption, issued the Essentiality Certificate dated 01.06.2010. The said Essentiality Certificate, addressed by the Principal Secretary to the Commissioner of Customs, Kandla mentions that the list of items to be imported were essentially required for the Project and qualified for concessional rate of duty. On receipt of the Essentiality Certificate, the entire contract for supply of BTG equipment and machinery for the said power project entered between APRL and EIF, was registered on 06.07.2010 with the Customs House at Kandla as prescribed under Regulation Nos. 4 and 5 of the PIR.

76. Pursuant to the said Contract dated 02.04.2010, APRL imported the said goods. Before import of the first consignment under the said Contract dated 02.04.2010, it was registered under PIR and consequently, the said goods were duly assessed under Heading 98.01 of the First Schedule to the Tariff Act. All the Bills of Entry were assessed provisionally at the time of import but this was subject to reconciliation under PIR. The assessment with respect to APRL has been finalized by Order-in-Original dated 21.10.2019 passed by Assistant Commissioner of Customs, Kandla.

77. Learned special counsel for the department vehemently submitted that the contract entered between APML/APRL and EIF was not an EPC contract but was simply a supply contract. In this connection learned special counsel placed reliance on certain clauses of the EPC contract executed between APML & EIF and APRL & EIF to contend that identical provisions relating to the obligation of testing on the part of Original Equipment Manufacturers were also present in

the contract executed between the Original Equipment Manufacturers and EIF. Learned special counsel also submitted that EIF made supplies under the contract, but rest of the activities were required to be carried out by the Original Equipment Manufacturers. Learned special counsel also submitted that the original contract had warranty/defect notification/ extended warranty for 1-2 years and not 10 years and the casting of additional responsibility without increase in the contract price and the purported addendum is an afterthought. It was, accordingly, submitted that the adjudicating authority erred in accepting the submission of the respondents that the contract was an EPC contract.

78. It needs to be noted that the ICB process followed by APML and APRL to award the contract to EIF cannot be faulted. The scope of work mentioned in the EPC contract also clarifies beyond doubt that what was awarded by APML and APRL to SME/EIF was a complete EPC contract which included supply and service components. The entire contract was awarded on a turnkey basis and a lumpsum price was fixed for the entire contract as a whole. The execution of another contract by EIF or any of the consortium partners would, therefore, have no relevance so far as APML and APRL are concerned. It is also not the case of the department that APML and APRL paid any amount over and above the agreed contract value. The said contract was for design, engineering, manufacturing, procurements, packing & forwarding, supply, transportation, receipt, unloading, installation, erection, testing, commission and performance guarantee test and it was not merely a supply contract.

79. What further needs to be noted is that the bid was awarded to a consortium headed by SME/EIF and the scope of work was divided

between the consortium members as per their commercial understanding. The amount received by each consortium member or the amount paid by the consortium members to the vendors or service providers would not be relevant for APML or APRL. Even if it is assumed that the service and/or testing was to be done by the Original Equipment Manufacturers, as has been pointed out, the same will not change the nature of the contract awarded by APML and APRL to SME/EIF in as much as the responsibility to execute the contract would be that of SME/EIF only.

80. In this connection, it would also be useful to reproduce paragraphs 5.1.3.17 to 5.1.3.17.4 of impugned order concerning this issue and they are as follows:

**5.1.3.17** The noticee has submitted that the contract as a whole was an EPC (Engineering, Procurement, and Construction) Contract. The projects were turnkey projects where the scope of work was not only supply of goods but also included designing, installation, civil work and commissioning. While the scope of work was divisible, the price was a lump sum price. The contracts were, therefore, composite in nature with a lump sum price, that it was evident from the PPA agreements entered into by APML/APRL with the respective state electricity bodies that the contract for set up and commissioning of the mega power plants was on EPC basis. Therefore, as per notices Customs today had no ground to question the nature of the contract entered into between APML/APRL with EIF and claim the same to be a simple contract for supply of goods. I find that in the Power Purchase Agreement between Maharashtra State Electricity Distribution Company Ltd. (Procurer and Adani Power Maharashtra Ltd. (Seller) dated 31.03.2010 in Article 3: Conditions Subsequent to be satisfied by Seller/Procurer in condition 3.1.1 (e) it is mentioned that "the seller shall have awarded the Engineering, Procurement and

Construction contract (EPC contract) or main plant contract for boiler, turbine and generator (BTG'), for setting up of the Power Station and shall have given to such contractor on irrevocable NTP and shall have submitted a letter to this effect to the Procurer,". Similarly, I find that vide PPA agreement between Jaipur Vidyut Vitran Nigam Ltd. (Procurer 1), Ajmer Vidyut Vitran Nigam Ltd. (Procurer 2), and Jodhpur Vidyut Vitran Nigam Ltd. (Procurer 3) and Adani Power Rajasthan Ltd. dated 28.01.2010 in Article 3: Conditions Subsequent to be satisfied by Seller/Procurer in condition 3.1.1 (e) it is mentioned that "The seller shall have awarded the Engineering, Procurement and Construction contract (EPC contract) or main plant contract for boiler, turbine and generator (BTG), for setting up of the Power Station and shall have given to such contractor an irrevocable NTP and shall have submitted a letter to this effect to the Procurer. I find that EPC is a particular form of contracting arrangement used in some industries where the EPC Contractor is made responsible for all the activities from design, procurement, construction, to commissioning and handover of the project to the End-User or Owner. Essentially an EPC project is similar to a turnkey project.

**5.1.3.17.1.1** I also find that the contract between APML and Sichuan Machinery & Equipments FZE and APRL and EIF encompasses all the factors of an EPC contract. The relevant portion of the contract at Sr. No. III is reproduced below –

- iii. In consideration of the Supplier agreeing to do the designing, Engineering, procurement and supply of goods an Equipment and remedy any defects therein, in condormity with the provis the provisions of this Contract, the Employer agrees to pay to the Supplier the final contract Price in accordance with Clause IV (Contract Price) hereto. The work shall be executed in accordance with

the Delivery Schedule annexed at Annexure-3.

**5.1.3.17.2** Further, I find that in the contract between APML ana sichuan Machinery & Equipments FZE dated 05.11.2009, in Annexure - 5 i.e. Conditions of Contract, in para 14.0 the details regarding Contract Price and Payment is mentioned wherein in para 14. 1 reads as follows-

"14.1 The Contract Price

The lump sum Contract Price payable under this contract by the Employer to the Supplier shall be United States Dollars 736,000,000 (United States Dollars Seven Hundred Thirty Six million only)."

**5.1.3.17.3** Similarly, I find that in the contract between Adani Power Rajasthan Limited and Electrogen Infra FZE dated 02.04.2010, in Annexure 5 i.e. Conditions of Contract, in para 14.0 the details regarding Contract Price and Payment is mentioned wherein in para 14.1 reads as follows -

"14.1 The Contract Price

The lump sum Contract Price payable under this contract by the Employer to the Supplier shall be United States Dollars 790,000,000 (United States Dollars Seven Hundred Ninety million only)."

**5.1.3.17.4** Thus, I find that in an EPC contract the contractor is responsible for the entire gamut of the contract, i.e. right from detailed engineering design of the project, procuring all the equipment and materials necessary and then to construct and deliver a functioning facility or asset to their clients. Thus, the projects were turnkey projects where the scope of work was not only supply, but also included designing, installation, civil work and commissioning. Therefore, while the scope of work was divisible, the price was a lump sum price as determined from the contract between APML/APRL and EIF. Thus, I find that the

contention of the notice that EIF was merely an intermediary invoicing agent for inflating value does not appear to be correct.”

81. It can, therefore, safely be concluded that APML and APRL had awarded contracts to EIF/SME which were in the nature of EPC.

**WHOLE EFFECT OF CONTRACT /EFFECT OF REGISTRATION UNDER PIR**

82. The adjudicating authority concluded in paragraph 5.1.3.18 of the order as follows:

- “(i) The project cost of the contract between APML/APRL and EIF is within the norm fixed under Annexure II of the order dated 04.06.2012 issued under Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulation, 2009;
- (ii) Further, in terms of Information Memorandum of SBI Capital Markets Limited cost per MW of APRL is competitive when compared with other projects of super critical technology;
- (iii) It is contended by APML / APRL that the value of the current contract in respect of Tiroda project was for Phase III of the project and is comparable with the earlier contract for Phase I & II entered into with Sichuan Machinery and Equipment Import and Export Co. Ltd. China. That no objection as to value of consignment imported in the past for Phase I & II. The argument may be valid, but it cannot be sole criteria for valuation of disputed goods; and
- (iv) All the requirement of the Project Import has been fulfilled by APML and APRL. In terms of Project Import Regulation, the contract has to be assessed as a whole and not the individual consignment. Comparison of value of goods covered by each and every individual consignment is impermissible and unjustified because the show

cause notice has not challenged the contract between APML/APRL and EIF.”

83. The adjudicating authority, in paragraph 5.1.3.18.7 also concluded that the contract as a whole was required to be assessed and not individual consignments.

84. The learned special counsel for the appellant challenged the said finding and submitted that even if the imports are covered by a single contract, the assessment thereof is required to be carried out against individual imports, with the only difference being that all the imports are housed under Tariff Heading 98.01 of the Tariff Act. Learned special counsel also submitted that it may not be necessary to carry out an assessment in respect of classification of each and every product but there is no bar to ascertain the transaction value of each individual import consignment in terms of the Valuation Rules, even though the contract may have been registered under PIR.

85. It would, therefore, be necessary to examine the provisions Chapter 98.01 of the Tariff Act and PIR issued under Chapter 98.01 of the Tariff Act. While Chapter 98.01 deals with imports under project import, regulations 2, 4, 5 & 7 of PIR deal with assessment and clearance, eligibility, registration of contract and finalization of contract. They are as follows:

#### **CHAPTER 98 OF TARIFF ACT**

“Project imports; laboratory chemicals; passengers' baggage, personal importations by air or post; ship stores

#### **NOTES:**

1. This Chapter is to be taken to apply to all goods which satisfy the conditions prescribed therein, even though they may be covered by a more specific heading elsewhere in this Schedule.

2. Heading 9801 is to be taken to apply to all goods which are imported in accordance with the regulations made under section 157 of the Customs Act, 1962 (52 of 1962) and expressions used in this heading shall have the meaning assigned to them in the said regulations.

9801 ALL ITEMS OF MACHINERY INCLUDING PRIME MOVERS, INSTRUMENTS, APPARATUS AND APPLIANCES, CONTROL GEAR AND TRANSMISSION EQUIPMENT, AUXILIARY EQUIPMENT (INCLUDING THOSE REQUIRED FOR RESEARCH AND DEVELOPMENT PURPOSES, TESTING AND QUALITY CONTROL), AS WELL AS ALL COMPONENTS (WHETHER FINISHED OR NOT) OR RAW MATERIALS FOR THE MANUFACTURE OF THE AFORESAID ITEMS AND THEIR COMPONENTS, REQUIRED FOR THE INITIAL SETTING UP OF A UNIT, OR THE SUBSTANTIAL EXPANSION OF AN EXISTING UNIT, OF A SPECIFIED:

#### **"REGULATION"**

**REGULATION 2. Application.** These regulations shall apply for assessment and clearance of the goods falling under heading No. 98.01 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975).

**REGULATION 4. Eligibility.** The assessment under the said heading No. 98.01 shall be available only to those goods which are imported (whether in one or more than one consignment) against one or more specific contracts, which have been registered with the appropriate Custom House in the manner specified in regulation 5 and such contract or contracts has or have been so registered,

(i) before any order is made by the proper officer of customs permitting the clearance of the goods for home consumption;

**REGULATION 5. Registration of Contracts.** Every importer claiming assessment of the goods falling under the said heading No. 98.01, on or before their importation shall apply in writing to the proper officer

at the port where the goods are to be imported or where the duty is to be paid for registration of the contract or contracts, as the case may be:

Provided that in the case of consignments sought to be cleared through a Custom House other than the Custom House at which the contract is registered, the importer shall produce from the Customs House of registration such information as the proper officer may require.

The importer shall apply, as soon as may be, after he has obtained the Import trade control licence wherever required for the import of articles covered by the contract and in case of imports covered by the Open General Licence or imports made by Central Government, any State Government, statutory corporation, public body or Government undertaking run as a joint stock company (hereinafter referred to as "Government Agency") as soon as clearance from the concerned Administrative Ministry or Department, as the case may be, has been obtained.

The application shall specify -

- (a) the location of the plant or project;
- (b) the description of the articles to be manufactured, produced, mined or explored;
- (c) the installed or designed capacity of the plant or project and in the case of substantial expansion of an existing plant or project the installed capacity and the proposed addition thereto;
- (d) such other particulars as may be considered necessary by the proper officer for purposes of assessment under the said heading.

The application shall be accompanied by the original deed of contract together with a true copy thereof, the import trade control licence, wherever required, and an approved list of items from the Directorate General of Technical Development or the concerned sponsoring authority.

The importer shall also furnish such other documents or other particulars as may be required by the proper officer in connection with the registration of contract.

The proper officer shall, on being satisfied that the application in the order register the contract by entering the particulars thereof in a book kept for the purpose, assign a number in token of the registration and communicate that number of the importer and shall also return to the importer all the original documents which are no longer required by him.

**REGULATION 7. Finalisation of contract.** – The importer shall within three months from the - Customs clearance for home consumption of the last consignment of the goods or within such extended period as the proper officer may allow, submit a statement indicating the details of the goods imported together with necessary documents as proof regarding the value and quantity of the goods so imported in terms of this Regulation and any other document that may be required by the proper officer for finalisation of the contract.”

86. Note 2 to Chapter 98 clarifies that Heading 98.01 will apply to all goods which are imported in accordance with the Regulations issued under section 157 of the Customs Act. PIR has been issued by the Central Government in exercise of the powers conferred by section 157 of the Customs Act. Regulation 2 clarifies that the Regulations shall apply to assessment and clearance of goods falling under Heading 98.01 of the Tariff Act. In terms of regulation 4, assessment under Heading 98.01 shall be available only to those goods which are imported in one or more than one consignment against one or more than one specific contract, which has been registered with the appropriate Customs House as specified in regulation 5. Regulation 4 further specifies that the contract should

be registered prior to the clearance of the imported goods for home consumption in terms of regulation 5. The contract under PIR has to be registered in terms of regulation 5 and the details mentioned therein have to be mentioned in the application made for the registration. Regulation 7 provides for the finalization of the contract. An importer has to within three months from the date of clearance for home consumption of the last consignment or within such extended time submit a statement indicating details of goods imported together with the necessary documents as proof regarding value and quantity of goods so imported.

87. A conjoint reading the aforesaid provisions makes it is clear that Heading 98.01 of the Tariff Act shall be available to the goods which are imported under a specific contract registered with the appropriate Customs House under PIR. What is evident from the provisions and requirements of PIR is that it recognises contracts of the nature that APML/APRL had executed with EIF and the other consortium members. Infact, PIR ensures that large infrastructure projects benefit from the duty exemption. As such, it is clear that what is registered is the contract as a whole. When considered in this light, the goods imported for the project become a subject matter of assessment as whole and individual consignments are not required to be separately assessed. It is, therefore, clear that PIR does not deal with import of individual consignment and the assessment of the goods imported for the project have to be dealt with together.

#### **VALUATION**

88. The issue under consideration is whether the value declared by APML and APRL is required to be rejected in terms of rule 12 of the

Valuation Rules read with section 14 of the Customs Act and the same is required to be redetermined under rules 4/9 of the Valuation Rules read with section 14 of the Customs Act.

89. The aforesaid redetermination of the value has been sought by the department on the basis of an allegation that the goods imported by APML and APRL for setting up the Thermal Power Plants were grossly over-valued and basis the said over-valuation, excess money was siphoned off abroad. As per the department, the declared value as against the actual value post redetermination is mentioned in Table 33 of the show cause notice and the same is reproduced below:

**"Table 33**

Importer	No. of Consignment	Declared Value (CIF) (in Rs.)	Actual value (CIF) (as redetermined) (in Rs.)
APML	301	3469,07,79,941	1557,44,21,785
APRL	262	3692,65,37,178	1630,16,82,151
TOTAL	563	7161,73,17,119	3187,61,03,936

90. The adjudicating authority has not found any merit in said allegation made in the show cause notice proposing redetermination of value on various counts and consequently has dropped the proceedings against all the noticees.

91. It is seen that both APML and APRL set up Thermal Power Plants at Tiroda in Maharashtra and Kawai in Rajasthan. The contract was entered into between APML and SME (which is now known as EIF) on 05.11.2009. Similarly, a contract was entered into between APRL and EIF on 02.04.2010. While in both the cases, the case of the respondents is that the contract is EPC, the department contends that the said contracts are not in the nature of EPC but are purely supply

contracts. It has been found as a fact that the contracts are in the nature of EPC.

92. It is the case of APML and APRL that the per MW cost fixed by CERC, by order dated 04.06.2012, for setting up a similar green field power project was 5.01 crore for two Units and Rs. 5.37 crore for one Unit and in comparison, the project cost with respect to APML- Phase III was Rs. 4.76 crore per MW. The status of assessment of the goods imported to set up Units 1, 2 and 3 (Phases I and II) of APML is not in dispute and the present proceedings are only in relation to Units 4 and 5 (Phase-III). The per MW cost of Units 1, 2 and 3 (Phases I and II) of APML are comparable and contemporaneous to the cost of per MW cost of Units 4 and 5 (Phase-III). With respect to APRL, it is seen that the same consisted of two Units of 660 MW each and the per MW cost, excluding the soft cost, is Rs. 4.53 crore, which is lesser than the benchmark price fixed by CERC at Rs. 5.01 crore.

93. The department proceeded to reject the value of imported goods declared by APML and APRL and intended to redetermine it on the basis of the transaction between the supplier namely EIF and Original Equipment Manufacturers. For this purpose, the provisions of rule 12 of Valuation Rules read with section 14 of the Customs Act have been invoked. The following three sets of the documents have been relied upon for this purpose:

- a. Three consignments where back-to-back documents are available;
- b. Six consignments where remittance was made by way of single invoice AORs/ORTTs; and
- c. Other consignments where remittance details are available against multiple invoices.

94. It has been found in the earlier part of this order that the documents on the basis of which redetermination of value has been proposed are inadmissible in evidence. Thus, if the said documents are not admissible in evidence, the department cannot seek redetermination of value on the basis of these documents.

95. Even if the documents are relied upon, it is seen that in relation to the three consignments where there are back-to-back invoices and in six cases where the remittance was made by way of a single invoice AORs/ORTTs, the department alleges that the price paid by EIF to the Original Equipment Manufacturers represents the actual transaction value of the imported goods and the redetermination of the value has been made under rule 4 of the Valuation Rules read with section 14 of the Customs Act. For the balance of over 550 consignments, the value is sought to be redetermined under rule 9 of the Valuation Rules by proportionately reducing the declared value in ratio of inflation i.e. 2.2 times. The said figure of 2.2 inflation has been arrived at by the department by taking the total value of ORTTs by which payments have been made by EIF to Original Equipment Manufacturers as the amount representing actual transaction value and reducing the same with the transaction value declared by APML/APRL. Learned special counsel for the department, therefore, contends that the total transaction value of 563 consignments should be USD 669, 595,215/- instead of USD 1477,934,270/- as declared by APML/APRL.

96. Section 14 of the Customs Act, deals with valuation of goods. It was amended on 10 October 2007, and the amended section is as follows:

**“Section 14. Valuation of goods.** – (1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf:

**Provided** that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf:”

97. The Supreme Court in **Wipro Ltd. vs. Assistant Collector of Customs**<sup>31</sup> noticed that under the unamended provisions of section 14 of the Customs Act, the principle was to find out the valuation of goods “by reference to the value” and it introduced a determining / fictional provision by stipulating that the value of all the goods would be the price at which such or like goods are “ordinarily sold”. However, under the amended provisions, the valuation is based on the “transaction” price namely, the price “actually paid or payable for the goods”. It is in this context, that the Supreme Court observed:

“26) On the aforesaid examination of the scheme contained in the Act as well as in the Rules to arrive at the valuation of the goods, it becomes clear that wherever actual cost of the goods or the services is available, that would be the determinative factor. Only in the absence of actual cost, fictionalised cost is to be adopted. Here again, the scheme gives an ample message that an attempt is to

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**31. 2015 (319) E.L.T. 177 (SC)**

arrive at value of goods or services as well as costs and services which bear almost near resemblance to the actual price of the goods or actual price of costs and services. That is why the sequence goes from the price of identical goods to similar goods and then to deductive value and the best judgment assessment, as a last resort.

27) In the present case, we are concerned with the amount payable for costs and services. Rule 9 which is incorporated in the Valuation Rules and pertains to costs and services also contains the underlying principle which runs through in the length and breadth of the scheme so eloquently. It categorically mentions the exact nature of those costs and services which have to be included like commission and brokerage, costs of containers, cost of packing for labour or material etc. Significantly, Clause (a) of sub-rule (1) of Rule 9 which specifies the aforesaid heads, cost whereof is to be added to the price, again mandates that it is to be "to the extent they are incurred by the buyer". That would clearly mean the actual cost incurred. Likewise, Clause (e) of sub-rule (1) of Rule 9 which deals with other payments again uses the expression "all other payments actually made or to be made as the condition of the sale of imported goods".

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31) In contrast, however, the impugned amendment dated 05.07.1990 has changed the entire basis of inclusion of loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation. Whereas fundamental principle or basis remains unaltered insofar as other two costs, viz., the cost of transportation and the cost of insurance stipulated in clauses (a) and (c) of sub-rule (2) are concerned. In respect of these two costs, provision is retained by specifying that they would be applicable only if the actual cost is not ascertainable. In contrast, there is a complete deviation and departure insofar as loading, unloading and handling charges are concerned. The proviso now stipulates 1% of the free on board value of the goods irrespective of the fact whether actual cost is ascertainable or not. Having referred to the scheme of Section 14 of the Rules in detail above, this cannot be countenanced. This proviso, introduces fiction as far as addition of cost of loading, unloading and handling charges is concerned even in those cases where actual

cost paid on such an account is available and ascertainable. Obviously, it is contrary to the provisions of Section 14 and would clearly be ultravires this provision. We are also of the opinion that when the actual charges paid are available and ascertainable, introducing a fiction for arriving at the purported cost of loading, unloading and handling charges is clearly arbitrary with no nexus with the objectives sought to be achieved. On the contrary, it goes against the objective behind Section 14 namely to accept the actual cost paid or payable and even in the absence thereof to arrive at the cost which is most proximate to the actual cost. Addition of 1% of free on board value is thus, in the circumstance, clearly arbitrary and irrational and would be violative of Article 14 of the Constitution.

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34) In the present case before us, the only justification for stipulating 1% of the F.O.B. value as the cost of loading, unloading and handling charges is that it would help customs authorities to apply the aforesaid rate uniformly. This can be a justification only if the loading, unloading and handling charges are not ascertainable. Where such charges are known and determinable, there is no reason to have such a yardstick. We, therefore, are not impressed with the reason given by the authorities to have such a provision and are of the opinion that the authorities have not been able to satisfy as to how such a provision helps in achieving the object of Section 14 of the Act. It cannot be ignored that this provision as well as Valuation Rules are enacted on the lines of GATT guidelines and the golden thread which runs through is the actual cost principle. Further, the loading, unloading and handling charges are fixed by International Airport Authority.

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36) We are, therefore, of the opinion that impugned amendment, namely, proviso (ii) to sub-rule (2) of Rule 9 introduced vide Notification dated 05.07.1990 is unsustainable and bad in law as it exists in the present form and it has to be read down to mean that this clause would apply only when actual charges referred to in Clause (b) are not ascertainable."

98. The Supreme Court also noticed the change in the principle that had been brought about in section 14(1) of the Customs Act in paragraph 22 judgment and they are as follows:

“22) The underlying principle contained in amended sub-section (1) of Section 14 is to consider transaction value of the goods imported or exported for the purpose of customs duty. Transaction value is stated to be a price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation. Therefore, it is the price which is actually paid or payable for delivery at the time and place of importation, which is to be treated as transaction value. However, this sub-section (1) further makes it clear that the price actually paid or payable for the goods will not be treated as transaction value where the buyer and the seller are related with each other. In such cases, there can be a presumption that the actual price which is paid or payable for such goods is not the true reflection of the value of the goods. This Section also provides that normal price would be the sole consideration for the sale. However, this may be subject to such other conditions which can be specified in the form of Rules made in this behalf.

23) As per the first proviso of the amended Section 14(1), in the transaction value of the imported goods, certain charges are to be added which are in the form of amount paid or payable for costs and services including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner which can be prescribed in the rules. Sub-section (2) of Section 14, which remains the same, is an over-riding provision which empowers the Board to fix tariff values for any class of imported goods or export goods under certain circumstances. We are not concerned with this aspect in the instant case.”

99. Thus, what has to be seen under section 14(1) of the Customs Act, as amended in 2007, is the transaction value of the goods imported or exported for the purpose of customs duty and transaction

value is stated to be the price actually paid or payable for the goods when sold for export to India for delivery at that time and place of importation. Sub-section (1) of section 14 also makes it clear that the price actually paid or payable for the goods will not be treated as “transactional value” where the buyer and the seller are related to each other. As per the first proviso to the amended section 14 (1), certain charges are to be added in the transaction value of the imported goods.

100. It would now be appropriate to examine the relevant provisions of the Valuation Rules. In terms of rule 3, the valuation of the imported goods should be the transaction value adjusted in accordance with provisions of rule 10. Rule 3 further provides for certain cases where the transaction value declared by the importer should not be accepted. Rule 4 states that the transaction value of the imported goods is the value of identical goods. Rule 5 provides that the value of imported goods shall be the transaction value of the similar goods. Rule 6 states that when the value cannot be determined under rules 3, 4 and 5, the value should be determined under rule 7. Rule 7 provides for deductive method of valuation. In terms of rule 8, when value cannot be determined under any of the above rules, the value should be determined basis the computed value. Rule 9 is a residual rule made applicable if the value cannot be determined under the provisions of the preceding rules. Rule 10 deals with certain cost and services which have to be added to the price actually paid or payable for the imported goods. Rule 12 gives power to department to reject the value. Thus, rules 3 to 9 are the rules under which the value of the goods can be redetermined.

101. While rule 3 is a general rule, as the same states that the value of the imported goods shall be treated as transaction value, rule 9 is a residual rule which can be resorted to only if the other rules cannot be applied. It is also important to note that rules 4 to 9 are subject to the provisions of rule 3. This means that if the transaction value of the goods is not doubted, the same will have to be treated as the transaction value under rule 3 read with section 14 of the Customs Act and the provisions of rules 4 to 9 will not be available for the purpose of redetermination.

102. As noticed above, the documents which formed the basis of redetermination have been held to be inadmissible as evidence. Further, the contracts which are in the nature of EPC contract were awarded by APML and APRL to EIF after following the ICB process. SME/EIF was awarded the contract, being the lowest bidder, and the price payable for the entire scope of work, which included the supply and service, was a lumpsum price. The finding of the adjudicating authority that the entire contract registered under PIR has to be assessed as a whole and the department cannot be permitted to look into assessment of individual consignment as this would be contrary to the provisions of Chapter 98.01 of the Tariff Act and PIR has also been upheld.

103. There is, therefore, absolutely no evidence available on record which can doubt the correctness of the transaction value declared by APML/APRL. Therefore, the declared value is required to be accepted under rule 3 of the Valuation Rules read with section 14 of the Customs Act.

104. Even otherwise, the value has to be redetermined under rule 4 by relying upon the value of identical goods. A plain reading of rule 4

would show that it speaks of identical goods imported at or about the same time as the goods being valued, which necessarily means that the identical goods should be goods other than the goods being valued and which are imported at or about the same time as the goods being valued.

105. At the cost of repetition, it needs to be noted that the terms and conditions of the contract between EIF and APML/APRL in respect of exposure to foreign exchange variation, stringent payment terms, higher liquidated damages in case of delay, higher interest on delayed payment, period of warranty than in the contract executed between Original Equipment Manufacturers and EIF has led to an upward escalation in price. The said two contracts cannot, therefore, be treated as comparable.

106. The contention advanced on behalf of the revenue that once information under rule 11 of the Valuation Rules is obtained and it is established that intermediary invoice was grossly inflated in comparison to manufacturer's invoice or other information, there is no option but to reject value under rule 12 of the Valuation Rules. It has been also submitted that the rule does not prescribe the manufacturer's invoice alone as sole document for ascertaining authenticity of the declared value, but also includes any other statement, information, or document. Reliance has been placed on the mechanism provided under rule 11 to doubt the accuracy of declared value and in case there is a reasonable doubt, it permits comparison with manufacturer's invoice or other information.

107. The department has failed to appreciate that for accepting the invoice value of Original Equipment Manufacturers in terms of rule 11 of Valuation Rules, it was necessary to compare the contract between

the Original Equipment Manufacturers and EIF and between APML/APRL and EIF.

108. The contract between APML/APRL & EIF and between EIF & the Original Equipment Manufacturers cannot be treated as a comparable contract by any stretch of imagination. This is for the reason that the contract between APML/APRL and EIF was a turnkey contract, whereas the contract between EIF and Original Equipment Manufacturers was a stand alone contract.

109. This would be apparent from the findings of the adjudicating authority in paragraph 5.1.3.13.1, wherein a comparative chart has been drawn pointing out the difference in warranty and other conditions of the contract between APML/APRL & EIF and SME/EIF & SEC and they are as follows:

Sr. No.	Description	APRL/APML-EIF	SME/EIF-SEC
1.	Scope of Supply	EPC supply contract for BTG	Supply of Steam Generator & Auxiliaries
2.	Incoterms	CFR, Indian Port	FOB, Port of Loading (China)
3.	Price Basis	Lumpsum fixed price	Price based of 1USD=6.8332 RMB and any variation to be compensated by either party at actual.
4.	Payment Terms	(a) 10% advance against ABG of equivalent amount by TT/LC with 30 days (b) 75% prorate by LC against shipment docs (c) 5% Security deposit by LC against TOC (Unit wise) (d) Retention (i) 5% against TOC (Unit wise on submission of PBG of equivalent amount. (ii) 5% retention against PGT (Unit wise) on submission of PGB of equivalent amount	A1) 3 Million USD as part of advance against ABG after signing of Contract. This advance to be adjusted at sr. no.A2.  B) 60% prorate by LC against shipmens docs. C) Retention C1) 5% against TOC (Unit wise) on submission of PBG of equivalent amount. C2) 5% against PGT (Unit wise) on submission of PGB of equivalent amount.
5.	Liquidated Damages	1) LD for delay: 0.5% per week price or	1. LD for Delay: 0.5% per week on the delayed

		<p>part thereof subject to max LD of 19% Contract price.</p> <p>2) LD for shortfall in performance guarantee-</p> <p>a) Gross Electrical Power Output per Generating Unit: If the measured Gross Electrical Power Output (at the Generator terminals) for each Generating Unit falls short of Guarantee Gross Electrical Power Output specified by the Supplier, the Supplier shall be liable to pay damages to the Employer at the rate of USD 1090.00 per KW of shortfall</p> <p>b) Gross Heat Rate per generating Unit: if the measured Gross Heat Rate specified by the Supplier, the Supplier will be liable to pay damages to the Employer at the rate of USD 400,000.00 per kCal/kWhr increase in Gross Unit Heat per Unit</p> <p>c) Auxiliary Power Consumption per Generating Unit: if the measured Auxiliary Power Consumption of each Generating Unit is greater than the Guaranteed Auxiliary Power Consumption specified by the Supplier, the Supplier will be liable to pay damages to the Employer at the rate of USD 4000.00per KW increase in Auxiliary Power Consumption</p>	<p>equipment price, max LD of 10% of respective unit price.</p> <p>2. LD for Shortfall in performance guarantee:</p> <p>a. For every 0.1% decrease in Steam Generator efficiency at 100% TGMCR:USD175,000</p> <p>b. For every 1 Tph shortfall in guaranteed steam output at BMCR USD 50,000</p> <p>If shortfall in efficiency or steam generator is more than 3% of the value guaranteed under PG, Employer has option to reject the equipment. Max LD for shortfall in performance is 5% of respective Unit.</p> <p>Max LD under 1 &amp; 2 shall be 12.5% of Price of respective Unit.</p> <p>Total liability under this Contract shall be 100%</p>
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		<p>per Unit</p> <p>d) The sum of all damages payable by the Supplier for Shortfall in performance will not exceed USD 57,500,000.00 except in the following cases (threshold limit) on breach of which Employer shall have the option to reject the Contractual Plant.</p> <p>i. If the Gross Electrical Power output per Generating Unit of the Contractual Plant falls short below 97.5% of the Guaranteed Gross Electrical Power Output Specified by the Supplier or</p> <p>ii. If the Gross Heat Rate per Generating Unit of the Contractual Plant is greater than 2205 kcal/kWhr or</p> <p>iii. If the percentage of Auxiliary Power Consumption per Generating Unit of the Contractual Plant exceeds by 5% over the Guaranteed Auxiliary Power Consumption per Generating Unit as specified by the Supplier</p>	
		<p>The major difference in LD clause between two contracts is LD calculation (i.e. 0.5% for per week delay) is on complete contract price in case of EIF, whereas it is on delayed equipment price in case of SEC. also, EIF has taken a lumpsum EPC contract from APML/APRL for supply of BTG; however, as evident from the scope of supply of SEC contract EIF have broken the scope in several small contracts. SEC contract mainly covers Steam Turbine, condenser, LP heater, generator &amp; Steam generator and many major items like ESP, critical piping, Coal mills &amp; feeder, BFPs, draft fans, EOTs etc. are missing in the delivery schedule attached with the commercial contract provided under RUD. This indicates that EIF had not given the single back to back contract to SEC but broken the scope in several parts and awarded as separate contracts. Even if one assumes that the LD clauses in those other contracts are similar of this contract, the LD risk gets diluted due to smaller contract values of these each individual</p>	

		contract. E.g. If one of the small package supplier default in delivery, he is liable to pay LD maximum @10% of only undelivered portion of contract price, whereas because of this default, EIF shall be exposed of maximum 10% whole contract value of its single EPC contract.	
6.	Warranty/Defects Notification	One (1) year from the date of TOC As per Addendum I - Ten (10) years from the date of TOC	12 months from the date of TOC to Service Contractor 24 months from after last delivery if issuance of TCC is delayed due to reasons not attributable to Supplier
7.	Interest on delayed Payment	Financing charges on delayed payments shall be at LIBOR+2% per annum	After grace period of 14 days simple interest @ 6% shall be payable on delayed payments

110. A perusal of the terms of the contracts do substantiate the findings of the adjudicating authority that the terms and conditions in respect to the contract between APML/APRL and EIF are much severe in respect of exposure to foreign exchange variation, stringent payment terms, higher liquidated damages in case of delay, higher interest on delayed payments when compared to contract between EIF & Original Equipment Manufacturers.

111. The contract between APML/APRL and EIF is for entire gamut of goods and services and hence cannot be compared with stand alone supply contract with Original Equipment Manufacturers. Invoices issued under two different sets of contractual obligation cannot be compared and relied upon to determine the value. Rule 11, therefore, has no application to the facts of the present case.

112. The revenue has sought to invoke rule 9 by placing reliance on payments made by EIF to different vendors and/or manufacturers of the goods. The said evidence has been held to be not conclusive, as the revenue has considered the payment made through Axis Bank and Bank of Baroda only.

113. This apart, what further needs to be noted is that the value of BTG in relation to Phase I and II (Units 1, 2 and 3) has not been disputed by the department. The said BTG was supplied by SCMEC which is a party unrelated to APML and APRL. The price at which the goods were supplied by SCMEC for Phases I and II are comparable to the price of goods imported for Phase III.

114. The redetermination of the value of the goods under rule 4/9 of the Valuation Rules, cannot, therefore, be sustained and the adjudicating authority committed no illegality in rejecting this allegation made in the show cause notice.

### **INCOMPLETE INVESTIGATION**

115. The department made an attempt to substantiate the overvaluation on the basis of the certain documents. It is the case of the department that the aggregate invoice value of the goods invoiced by EIF to APML and APRL for 301 and 262 consignments respectively was USD 1477,934,270/- as mentioned in Table 20 and 21 of the show cause notice, against which the aggregate invoice value remitted by EIF to various Original Equipment Manufacturers was USD 669,595,215/- as mentioned in the Table 23 of the show cause notice. It is on the basis the difference in these two values, that the department alleged over-valuation to the extent of 220%. Apart from fact that the Original Equipment Manufacturers invoice could not have been treated as transaction value, even the basis of arriving at the figures mentioned in Table 23 (the amount paid by EIF to Original Equipment Manufacturers) is based on the ORTTs received by the Department of Revenue Intelligence from two banks namely

Axis Bank and Bank of Baroda. The department has placed reliance on the following documents:

- (i) Contract between EIF (under its erstwhile name) and Shanghai Electric Corporation (SEC);
- (ii) Outward Remittance Telegraphic Transfers (ORTTs) as evident from the details supplied by the banks;
- (iii) 3 invoices issued by the first vendor in the name of EIF; and
- (iv) 6 consignments where remittance has been made by way of a single invoice.

116. On the basis of these documents, the Revenue has alleged that all supplies were made by EIF on back-to-back basis with invoice number and dates also remaining the same. Consequently, it was submitted that there is an over-valuation since the price indicated in the invoices submitted by APRL/APML are higher than the price indicated in the above documents. While the documents were received from Axis Bank and Bank of Baroda, the relied upon document at page 689 shows the name of Standard Chartered Bank as one of the other banks used by EIF. The same therefore, belies the case of the department that ORTTs and back-to-back invoices received from Bank of Baroda and Axis Bank are complete remittances made by EIF to Original Equipment Manufacturers. Merely because the department could not interrogate or make the Standard Chartered Bank join the investigation cannot be a reason to ignore the possibility of it acting as an active banker on behalf of EIF for the purpose of remitting the amount of Original Equipment Manufacturers. The burden was on the department to prove why the total remittance amount was only through these two banks and no

other bank. It, therefore, follows that the investigation carried out by the revenue was incomplete.

### **CONFISCATION**

117. Another important issue that arises for consideration in this appeal is as to whether the goods can be held liable for confiscation under section 111 (d) and (m) of the Customs Act when there is no case of short levy of duty and assertion that the goods were prohibited in nature. The respondents have relied upon the decision of the Tribunal in **Knowledge Infrastructure Systems Private Limited vs. Additional Director General, D.R.I.**<sup>32</sup>, wherein Tribunal held as follows:

“Confiscation under Section 111 of Customs Act is not an end in itself but has to be in respect of dutiable or prohibited goods barring a few exceptions. Even in case of exception to prohibited/dutiable goods, it is breach of Customs Act which attract confiscation. For confiscation under Section 111(m) *ibid* there is no judicial approval of proposition that goods be held liable for confiscation without nexus with collection of duty and enforcement of prohibitions or without breach of the machinery provisions for safeguard of revenue and prevention of smuggling.”

118. Learned special counsel for the appellant submitted that the decision of the Tribunal in **Knowledge Infrastructure** was delivered without considering the past decisions and properly appreciating the provisions of the Customs Act and this decision is also under challenge before the Supreme Court. It needs to be noted that in early hearing application, the department opposed the prayer for an early hearing for the reason the decision of the Tribunal in **Knowledge Infrastructure** is applicable to the facts of this case.

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119. However, as the allegation of over-valuation has not been established, it is not necessary to examine this aspect.

120. Thus, as none of the contention advanced by the learned special counsel for the appellant have any force, the order dated 22.08.2017 passed by the adjudicating authority dropping the proceedings that were initiated by issuance of a show cause notice dated 15.05.2014 does not call for any interference in this appeal. The appeal is, accordingly, dismissed.

(Order Pronounced on **18.07.2022**)

**(JUSTICE DILIP GUPTA)**  
**PRESIDENT**

**(P. ANJANI KUMAR)**  
**MEMBER (TECHNICAL)**