

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

WEST ZONAL BENCH - COURT NO. 1

CUSTOMS APPEAL NO. 85476 OF 2018

(Arising out of 18/KVSS (18) ADG (ADJ.)/DRI, Mumbai/2017-18 dated 17.10.2017 passed by Additional Director General (Adjudication), DRI Mumbai)

Commissioner of Customs (Import),

NS-III, Jawaharlal Nehru
Customs House, Post-Sheva,
Taluka-Uran, Dist.-Raigad,
Mharashtra-400707

...Appellant

VERSUS

- (1) M/s. Maharashtra Eastern Grid Power Transmission Company Limited (MEGPTCL)**
Adani House, Mithakhali Circle, Navrangpura,
Ahmedabad-380009.
- (2) M/s. PMC Projects (India) Private Limited,**
Registered Office: AIIM,
At Shantigram, Near Vaishnodevi Circle,
SG Highway, Ahmedabad-382421
- (3) M/s. Electrogen Infra FZE,**
SAIF Plus, R4, 38/A, SAIF Zone,
P.O.Box 122528, Sharjah, United Arab Emirates.
- (4) Shri Vinod Shantilal Shah alias
Vinod Shantilal Adani,**
Adani House, Nr Mithakhali Circle,
Navrangpura, Ahmedabad-380009
Gujarat
- (5) Shri Jatin Shah,**
SAIF Plus, R4, 38/A, SAIF Zone,
P.O.Box 122528, Sharjah, United Arab Emirates.
- (6) Shri Mitesh Dani,**
SAIF Plus, R4, 38/A, SAIF Zone,
P.O.Box 122528, Sharjah, United Arab Emirates.
- (7) Shri Mehul Jani,**
SAIF Plus, R4, 38/A, SAIF Zone,
P.O.Box 122528, Sharjah, United Arab Emirates.
- (8) Shri Jaydev Mishra,**
Associate General Manager,
M/S PMC Projects (India) Private Limited,
Registered Office: AIIM,
At Shantigram, Near Vaishnodevi Circle,
SG Highway, Ahmedabad-382421

(9) Shri Dharmesh Parekh,**...Respondents**

Senior Manager,
M/S PMC Projects (India) Private Limited,
Registered Office: AIIM,
At Shantigram, Near Vaishnodevi Circle,
SG Highway, Ahmedabad-382421

APPEARANCE:

Shri PRV Ramanan, Special Counsel of the Department
Shri Vikram Nankani, Senior Advocate, Shri Jaydeep Patel, 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: 04.03.2022
Date of Decision: 11.08.2022

FINAL ORDER NO. A/85692/2022**JUSTICE DILIP GUPTA:**

The Commissioner of Customs (Imports), Maharashtra¹ has filed this appeal to assail the order dated 17.10.2017 passed by the Additional Director General, DRI (Adjudication), Mumbai² by which the proceeding initiated against the respondents by the show cause notice dated 15.05.2014 has been dropped.

2. The main issue in this appeal relates to the allegation of over-valuation of the goods that were imported for the purpose of setting up Transmission Lines and Substations in the State of Maharashtra.

3. The two main respondents in this appeal are Maharashtra Eastern Grid Power Transmission Company Ltd.³, which has been

1. the Commissioner
2. the adjudicating authority
3. MEGPTCL

arrayed as respondent no. 1 and M/s. PMC Projects (India) Pvt. Ltd.⁴, which has been arrayed as respondent no. 2.

FACTS

4. The State of Maharashtra was facing acute power shortage with a deficit of approximately 17.5% and a peak deficit of 4700 MW. In order to overcome this deficit and to meet the future requirements, the Government of Maharashtra encouraged private sector participation in power generation, transmission and distribution. Number of private players came forward and began setting up Thermal Power Generation Plants in the State of Maharashtra. Adani Power Maharashtra Limited⁵ was in the process of setting up a coal based power project at Tiroda in the State of Maharashtra with a generation capacity of 3300 MW. Taking into consideration the huge transmission network requirement for evacuation of power from the power stations, and to implement the setting up of the power station, Maharashtra State Electricity Transmission Company Limited⁶ considered various options such as Build, Operate and Transfer⁷ as well as Build, Own and Operate⁸ through Joint Venture route or Independent Private Transmission Company route. After a detailed study, a new company called MEGPTCL was formed, which is a Special Purpose Vehicle⁹, for the development of 765 KV intra-state transmission system comprising of 2 x 765 KV S/C Tioda – Koradi – Akola – Aurangabad Transmission Lines along with associated Sub-stations and bays for evacuation of

4. PMC
5. APML
6. MSETCL
7. BOT
8. BOO
9. SPV

power from projects in north-eastern Maharashtra. The SPV was proposed to be a Joint Venture company between Adani Enterprises Limited¹⁰ and MSETCL, where AEL proposed to hold 74% equity share and the balance share of 26% with MSETCL.

5. MEGPTCL made an application dated 17.02.2010 to the Maharashtra Electricity Regulatory Commission¹¹ under section 14 of The Electricity Act, 2003. AEL, by its letter dated 01.07.2010, requested MSETCL to convey its no objection to MERC in favour of the proposed Joint Venture, so as to enable MEGPTCL to complete the regulatory process and initiate implementation activity, including the International Competitive Bidding process. The said letter made it clear that on receipt of approval from Government of Maharashtra, MSETCL will take 26% equity in MEGPTCL. MSETCL provided the no objection certificate to MEGPTCL on 02.07.2010, which thereafter opted for the International Competitive Bidding route and issued two separate tenders for the appointment of engineering, procurement and construction ¹² contractors for Transmission Line and Substation packages. A Notice Inviting Tender was issued for Supply, Erection and Testing, and Commissioning of Tiroda-Koradi-III-Akola II-Aurangabad Transmission Line and another Notice Inviting Tender was issued for Design, Supply, Erection and Testing, and Commissioning of Substations, including Auto Transformers and Shunt Reactors associated with Substations at Tiroda, Koradi, Akola and Aurangabad. The tenders were published in the newspapers on 05.08.2010. To

10. AEL
11. MERC
12. EPC

ensure maximum participation in the tender process, notices were also sent to twenty seven embassies for inviting bids.

6. PMC, Electrogen Infra FZE¹³ and Hyundai Heavy Industries formed a consortium to bid for the Substation project and an agreement was entered between the three on 16.08.2010. Similarly, PMC, EIF and Gammon formed a consortium to bid for the transmission project and an agreement was entered between the three on 17.08.2010.

7. In the meantime, MEGPTCL was granted the Transmission License by order dated 14.09.2010 issued by MERC for the development of 765 KV Intra-State Transmission Network in the State of Maharashtra.

8. PMC along with its Consortium Partners emerged as the successful bidder for both the Transmission Line and the Substation project on 21.09.2010, based on the technical evaluation carried out by Price Waterhouse Coopers Pvt. Ltd.

9. Thereafter, MEGPTCL issued a Letter of Intent dated 23.09.2010 to the Consortium comprising PMC, EIF and Gammon India Ltd. for the Supply, Erection and Testing and Commissioning of Tiroda-Koradi-III-Akola II-Aurangabad Transmission Lines. A letter of Intent dated 23.09.2010 was also issued to the Consortium comprising PMC, EIF and Hyundai Heavy Industries for Design, Supply, Erection and Testing and Commissioning of the Substations, including Auto Transformers and Shunt Reactors associated with the Substations at Tiroda, Koradi, Akola and Aurangabad.

13. EIF

10. Two separate Purchase Orders, both dated 27.09.2010, were then placed by MEGPTCL on PMC (lead member of the Consortium) for the Transmission Line and Substation package. To execute the said Purchase Orders, PMC entered into the following agreements:

- a. Agreement dated 28.09.2010 with ABB Limited for supply and service for the Substations;
- b. Agreement No. 415703 dated 01.10.2010 with EIF for supply of transformer, reactor, insulator and OPGW;
- c. In addition to the aforesaid contracts, PMC also entered into contracts with various suppliers / contractors for the local supplies / services: -
 - i) With Apar Industries Ltd., Sterlite Technologies Ltd., Gupta Power Infrastructure Ltd. and JSK Industries Ltd., Gammon India Ltd. for conductors;
 - ii) With Asbesco Industries Ltd. and Tag Corporation Limited for supply of hardware materials; and
 - iii) With UIC Industries Ltd for supply of ground wire.
- d. PMC also entered into contract with A2Z Maintenance and Engineering Services for ETC works, local transportation and local services for transformer and reactor.

11. The role of EIF included procurement of transformers and reactors from Hyundai, insulators from Dalian Insulator Group Company Ltd. and Sediver Insulators (Shanghai) Co. Ltd., and optical fiber ground wire from Suzhou Furukawa Power Optic Cable Co. Ltd. EIF was also responsible for type-testing of the equipments so procured. EIF also undertook the responsibility of giving extended

warranty of 10 years for critical and high value equipments such as transformers and reactors. The role of Hyundai was to supply transformers and reactors to EIF.

12. By a letter dated 03.03.2011, MEGPTCL requested MSETCL to communicate its approval to the various proposals made in the said letter, including nomination of Directors, even though the proposal to form a Joint Venture between AEL and MSETCL was under active consideration of the Government of Maharashtra. A letter was also written by MEGPTCL to MSETCL on 23.09.2010 to take up the issue of approval of the Joint Venture with the Government of Maharashtra at the earliest.

13. In terms of Serial No. 424 of the General Exemption Notification dated 01.03.2002, High Voltage Power Transmission Project equipments were permitted to be cleared under concessional rate of customs duty. Thus, concessional rate of customs duty benefit was available for the 765 KV Auto Transformers, Shunt Reactors, Isolators and Surge Arrestors. In order to obtain the benefit of concessional rate of customs duty for the goods to be imported under the aforesaid Notification, MEGPTCL, based on the request made by PMC, submitted applications to the Principal Secretary, Energy Department, Maharashtra. In its applications, MEGPTCL, inter alia stated that PMC would be importing transformers with accessories and shunt reactors on behalf of MEGPTCL, as an EPC contractor, from EIF and would avail the exemption contemplated under the Notification. The details of some of the applications are as follows:

Date	Particulars
04.09.2011	Application by MEGPTCL to the Energy Department, Government of Maharashtra for issuance of Essentiality Certificate for Import of Transformers with accessories and Shunt reactors with accessories for Tiroda Substation for 2 nos. 765 KV Transmission Network from Tiroda, Koradi, Akola and Aurangabad.
24.09.2011	Application by MEGPTCL to the Energy Department, Government of Maharashtra for issuance of Essentiality Certificate for Import of Transformers with accessories and Shunt reactors with accessories for Akola Substation for 2 nos. 765 KV Transmission Network from Tiroda, Koradi, Akola and Aurangabad.
17.11.2011	Application by MEGPTCL to the Energy Department, Government of Maharashtra for issuance of Essentiality Certificate for Import of Shunt reactors with accessories for Akola Substation for 2 nos. 765 KV Transmission Network from Tiroda, Koradi, Akola and Aurangabad.
17.11.2011	Application by MEGPTCL to the Energy Department, Government of Maharashtra for issuance of Essentiality Certificate for Import of Shunt reactors with accessories for Aurangabad Substation for 2 nos. 765 KV Transmission Network from Tiroda, Koradi, Akola and Aurangabad.
24.01.2012	Application by MEGPTCL to the Energy Department, Government of Maharashtra for issuance of Essentiality Certificate for Import of Shunt reactors with accessories for Karodi Substation for 2 nos. 765 KV Transmission Network from Tiroda, Koradi, Akola and Aurangabad.

14. The Principal Secretary, on being satisfied as to the eligibility to avail the benefit of the aforesaid exemption, issued Essentiality Certificates dated 01.11.2011, 17.11.2011, 23.12.2011, 30.12.2011, 16.02.2010, 16.02.2012, 07.05,2012, 08.05.2012, 25.07.2012. In the said Essentiality Certificates addressed to the Commissioner of Customs, Kandla, the Principal Secretary certified that the goods (mentioned in the list enclosed with the Certificates) to be imported by

MEGPTCL through PMC, were essentially required for the project and qualified for concessional rate of duty.

15. Subsequent to the grant of Essentiality Certificates, MSETCL regretted its inability to participate in the Joint Venture and communicated this fact through a letter dated 27.12.2012. AEL purchased the shares of MSETCL and so MEGPTCL became a wholly owned subsidiary of AEL.

16. The equipments were then imported and cleared by PMC and were dispatched to MEGPTCL as per the contract conditions. Out of the total number of 57 consignments imported by PMC, 26 consignments were cleared on payment of customs duty at the time of assessment under section 14 of the Customs Act, 1962¹⁴ and the balance 31 were cleared at concessional rate of duty under Chapter Heading 98.01 of the Customs Tariff Act, 1975¹⁵ read with Project Import Regulation, 1986¹⁶. It needs to be noted that 2 consignments were imported through Nhava Sheva Port, while the balance 55 consignments were cleared through Mundra Sea Port. All the Bills of Entry relating to 31 consignments, where benefit under PIR was claimed, were assessed provisionally and subject to reconciliation under PIR.

17. It also needs to be noted that there were 4 Original Equipment Manufactures who had shipped the 57 consignments. The names of these four Original Equipment Manufactures, as mentioned in the show cause notice, are (i) Hyundai Heavy Industries Co. Ltd., South Korea (Hyundai), (ii) Dalian Insulator Group Co. Ltd., China (Dalian), (iii)

14. the Customs Act

15. the Tariff Act

16. PIR

Sediver Insulator (Shanghai) Co. Ltd., China (Sediver) and (iv) Suzhou Furukawa Power Optic Cable Co. Ltd., China (Suzhou).

18. The break-up of the shipments, as mentioned in the show cause notice, is as follows:

Sr. No.	Name of the OEM (shipper)	Brief Description of goods	No. of shipments (B/Es)	Port of Import Clearance	Type of clearance (Project Imp. 98.01 or merit)
1.	Hyundai	Auto Transformers, Shunt reactors & mandatory spares	31	Mundra (30) N. Sheva (1)	Concessional rate under Heading 98.01
2.	Dalian	Disc Insulators	9	Mundra (8) N. Sheva (1)	Merit Rate
3.	Sediver	Toughened Glass Disc Insulator	8	Mundra	Merit Rate
4.	Suzhou	OPGW with 8 Fibre with fitting & accessories	9	Mundra	Merit Rate
			57		

19. A common investigation was, however, initiated by the Directorate of Revenue Intelligence in relation to the goods imported by PMC. The Directorate believed that the goods imported for setting up of Transmission Line and Substation project were grossly overvalued and that the actual importer of goods was MEGPTCL and not PMC. During the course of investigation, documents were resumed by the Directorate of Revenue Intelligence, namely copies of contracts, invoices raised by Original Equipment Manufactures on EIF, Bills of Lading and details of remittances from the following sources:

- i) Axis Bank, Dubai International Financial Centre (DIFC) Branch in Dubai;
- ii) Bank of Baroda, Dubai Main Branch; and
- iii) ICICI Bank Limited, Dubai International Financial Centre (DIFC) Branch

SHOW CAUSE NOTICE

20. Post conclusion of the investigation, a show cause notice dated 15.05.2014 was issued to the respondents calling upon them to show cause:

A

Goods imported through Mundra Port (55 consignments)

(I) PMC, the importer on record (as per the Bills of Entry) and MEGPTCL (the owners of the imported goods) should show cause as to why:

- i) The declared value in respect of the equipments and machinery imported under 55 Bills of Entry having cumulative declared value of Rs. 19,82,42,342/-, should not be rejected under the provisions of rule 12 of the Valuation (Determination of Value of Export Goods) Rules, 2007¹⁷ read with section 14 of the Customs Act, 1962¹⁸ and should not be re-determined cumulatively at Rs. 390, 15, 34, 182/- (CIF) on the basis of actual transaction value available in the Original Equipment Manufactures invoice prices in terms of rule 4 of the Valuation Rules read with section 14 of the Customs Act;

17. the Valuation Rules

18. the Customs Act

- ii)** Goods covered by 55 Bills of Entry, having aggregate declared value of Rs. 1867,24,06,746/- (CIF) imported and cleared in pursuance of Agreement dated 01.10.2010 by PMC, for and on behalf of the owner M/s. MEGPTCL, seized under order dated 14.05.2014 issued under the proviso to section 110(1) of the Customs Act should not be confiscated under section 111(d) and section 111(m) of the Customs Act;
 - iii)** Penalty under section 112(a) and (b) of the Customs Act should not be imposed on each one of them in relation to the above goods; and
 - iv)** Penalty under section 114AA of the Customs Act should not be imposed on them.
- (II) EIF, Vinod Shantilal Adani, Jatin Shah, Mitesh Dani and Mehul Jani should show cause as to why penalty under section 112 (a) and (b) and section 114 AA of the Customs Act should not be imposed on each one of them in relation to the goods imported under the 55 Bills of Entry.
- (III) Jaydev Mishra, Associate General Manager, and Dharmesh Parekh, Senior Manager, both employees of PMC, should show cause as to why penalty under section 112 (a) and (b) and section 114AA of the Customs Act should not be imposed on each one of them in relation to goods imported under the 55 Bills of Entry.

B**Goods imported through Nhava Sheva Port (2 consignments)**

(I) PMC, the importer on record (as per Bills of Entry) and MEGPTCL (who are the owner of imported goods) should show cause as to why :-

- (i) The declared value in respect of the equipment and machinery imported under the 2 Bills of Entry having cumulative declared value of Rs. 19,82,42,342/- should not be rejected under the provisions of rule 12 of the Valuation Rules read with section 14 of the Customs Act and should not be re-determined cumulatively as Rs.3,06,42,423/- CIF on the basis of actual transaction value available in the Original Equipment Manufactures invoice price in terms of rule 4 of the Valuation Rules read with section 14 of the Customs Act;
- (ii) Goods covered by the 2 Bills of Entry, having aggregate declared value of Rs. 19,82,42,342/-(CIF) imported and cleared in pursuance of Agreement dated 01.10.2010 by PMC for and on behalf of the owner MEGPTCL, seized under Order dated 14.05.2014 issued under the proviso to section 110(1) of the Customs Act be not confiscated under section 111(d) and section 111(m) of the Customs Act;
- (iii) Penalty under section 112 (a) and (b) of the Customs Act should not be imposed on each of them in relation to goods imported under the 2 Bills of Entry; and

- (iv) Penalty under section 114AA of the Customs Act should not be imposed on them.
- (II) EIF, Vinod Shantilal Adani, Jatin Shah, Mitesh Dani, Mehul Jani should show cause as to why penalty under section 112 (a) and (b) and section 114 AA of the Customs Act should not be imposed on each one of them in relation to the goods imported under the 2 Bills of Entry; and
- (III) Jaydev Mishra, Associate General Manager, and Dharmesh Parekh, Senior Manager (both employees of PMC) should show cause as to why penalty under section 112 (a) and (b) and section 114AA of the Customs Act should not be imposed on each one of them in relation to above goods imported under the 2 Bills of Entry.

21. The gist of the allegations contained in the show cause notice are as follows:

- (i) The respondents had conspired to siphon off money abroad by resorting to over-valuation of goods imported for projects subject to low or nil rate of customs duty, so that the burden of duty on the over-valued amount i.e. cost of fund transfer is minimal;
- (ii) MEGPTCL engaged the services of a closely related party EIF to arrange for procurement from various Original Equipment Manufactures for eventual supply to PMC (another firm controlled by Adani Group);
- (iii) EIF, a front for PMC and MEGPTCL, acted as an intermediary invoicing agent to inflate the invoice value in

procurement of equipment and machinery required for installation in the transmission line system from respective South Korean and Chinese Original Equipment Manufactures;

- (iv)** Though the goods were shipped directly to PMC/MEGPTCL in India by the overseas suppliers who were Original Equipment Manufactures, but for enabling inflation of invoices, it was made to appear on paper as if the goods were being supplied by EIF;
- (v)** Accordingly, back-to-back contracts were signed between PMC (the contractor for MEGPTCL) and EIF on the one hand, and EIF and the 4 Original Equipment Manufactures on the other;
- (vi)** Back-to-back contracts executed by EIF with the Original Equipment Manufactures were signed in India by Dharmesh Parekh (an employee of PMC). This clearly shows that the said supply contracts were planned, conceived and executed in India by the same set of persons. Thus, the entire transaction was a sham transaction;
- (vii)** EIF proceeded to raise inflated invoices from time to time on PMC under the contract dated 01.10.2010 and the inflation was to the tune of about 400% of Original Equipment Manufactures value;
- (viii)** For every procurement invoice raised on EIF by the respective Original Equipment Manufacture, EIF in turn arranged to raise and issue a back-to-back invoice on

PMC, wherein it inflated the price and invoiced the goods at inflated prices;

- (ix) PMC handled, on behalf of MEGPTCL, the importation and clearance of the goods on the strength of the inflated invoices, showing prices which did not represent the actual value of the goods;
- (x) Since the goods were directly shipped from the ports in South Korea and China and utilized directly for the purpose of installation in the Transmission System, there appears to have been no value-addition to the goods at any point of time from the time of their shipment from the overseas ports till their installation in India;
- (xi) EIF on its part, therefore, actively connived with MEGPTCL and PMC by arranging to raise invoices with inflated prices, being fully aware that the price charged in its invoices had been grossly over-valued and did not represent actual values of the goods at any point of time; and
- (xii) At the time of clearance of goods imported under the 57 Bills of Entry, MEGPTCL through PMC arranged for presentation of the inflated invoices of EIF to the customs authorities on the basis of which they declared the value of the goods. It was represented that the value declared therein represented the transaction value paid or payable for the goods imported, though PMC was fully aware that the value declared by them on the strength of inflated invoices raised by EIF did not represent the actual value of the goods.

REPLY TO SHOW CAUSE NOTICE

22. Both MEGPTCL and PMC filed separate replies to the show cause notice on 29.11.2016 and 10.12.2016 respectively.

23. The gist of the reply submitted by **MEGPTCL** is as follows:

- (i) The show cause notice was issued basis the documents adduced by the Directorate of Revenue Intelligence from foreign banks. As these documents were obtained without following the due procedure of law as provided in the Double Tax Avoidance Agreement¹⁹ signed between UAE and India on 22.09.1993, the said documents are not admissible as evidence;
- (ii) In any event, the said documents are mere photocopies and are not authenticated as required under section 139 of the Customs Act and, therefore, the same are not admissible as evidence;
- (iii) Section 138C(4) of the Customs Act lays down the requirement of producing a Certificate authenticating the source and other relevant particulars of the said documents received from outside India if the same are required to be taken as evidence. Since, in the present case the documents obtained from the banks were computer print outs/photocopies, the Department should have followed the provisions of the section 138 C (4) of the Customs Act, but having failed to do so, the said documents received from unverified channels cannot be admissible as evidence;

19. DTAA

- (iv) The Department committed a grave error in considering the assessment of Bills of Entry consignment wise in as much as the entire contract was registered with the Kandla Customs under PIR read with Heading 98.01 of the Tariff Act;
- (v) The bid cost of PMC led Consortium is at par with the cost of Transmission Line and Substation packages of 765KV project executed by a leading public sector company namely M/s Power Grid Corporation of India Limited²⁰ in the year 2009-10 i.e. during the same time for similar scope of work;
- (vi) The allegation that MEGPTCL and EIF, which is one of the Consortium members with PMC, are related to each other through Vinod Shantilal Shah is without any basis as MEGPTCL and the lead Consortium member namely PMC are not related to MEGPTCL. Even otherwise, merely because Vinod Shah happens to be the brother of the promoters and/or directors of AEL, it cannot be said that price has been influenced. The Company had invited bids based International Competitive Bidding Guidelines and the lowest bidder was awarded the contract. As such, the contract value has been arrived at on arm's length basis and, therefore, the allegation that MEGPTCL is related to EIF and that EIF is a dummy or an intermediary invoicing agent for facilitating inflation of invoice value is misconceived and baseless. In any event, the show cause notice does not specify the particular clause of rule 2(2)

of the Valuation Rules under which EIF and APML/APRL are related;

- (vii) MEGPTCL had entered into a contract with PMC on a Turn Key / EPC contract basis and, therefore, the assessable value of the individual items cannot be looked into; and
- (viii) The allegation that MEGPTCL is the actual importer and not PMC is without any basis in as much as admittedly PMC had filed the Bills of Entry.

24. The gist of the reply submitted by **PMC** is as follows:

- (i) PMC was awarded the contract by MEGPTCL as it was as the lowest bidder. The whole bidding process was done by MEGPTCL by following International Competitive Bidding Route;
- (ii) PMC along with the respective Consortium partners were required to execute the entire Transmission Line & Substation project on a Turn Key basis;
- (iii) The entire contract was registered under PIR and as such the action of the Department to assess each and every consignment individually is without any basis and authority of law;
- (iv) The price for the entire lumpsum contract was on the basis of various factors such as extended warranty, type testing of equipments, stringent time frame to conclude the project;
- (v) The bid cost submitted by PMC (through Consortium), was at par with Transmission Line and Substation

package cost of 765KV project executed by a leading public sector company namely PGCIL in the year 2009-2010 during the same time period;

- (vi)** Cost per kilometer quoted for PGCIL project for Sasan-Satna. Transmission Line (Circuit-II) and Agra-Meerut Transmission Line, worked out to be Rs. 2.52 crores and Rs. 1.78 crores respectively, as against the cost quoted by PMC of Rs.1.70 crores. Similarly, the cost quoted for the PGCIL Substation worked out to be 16% higher than the cost quoted by PMC;
- (vii)** The allegation that PMC is related to MEGPTCL is devoid of merits as none of the clauses of rule 2(2) of the Valuation Rules could have been invoked;
- (viii)** PMC was not a front and intermediary invoicing agent as PMC had entered into various contracts with various suppliers / contractors both in India and abroad for executing the contract awarded by MEGPTCL;
- (ix)** PMC had a comprehensive role to pay in the execution of the contract awarded to the Consortium, which not only included procurement of equipments from EIF but also included the responsibility of entering into EPC contracts for procurement of equipments and services from local vendors;
- (x)** The redetermination of valuation sought to be done is without any basis in as much as the price of identical goods in terms of rule 4 of Valuation Rules is not available with the Department;

- (xi) The show cause notice was issued on the basis of documents adduced by Directorate of Revenue Intelligence from foreign banks without following the due procedure of law as provided in the DTAA signed between UAE and India on 22.09.1993. The said documents are, therefore, not admissible as evidence;
- (xii) Section 138C(4) of the Customs Act lays down the requirement of producing a Certificate authenticating the source and other relevant particulars of the said documents received from outside India if the same is required to be taken as evidence. Since, in the present case the documents obtained from the bank were computer print outs/photocopies, the Department should have followed the provisions of section 138C(4) of the Customs Act. As this procedure was not availed, the said documents cannot be admissible as evidence; and
- (xiii) In any event, the said documents were mere photocopies and not authenticated as required under section 139 of the Customs Act and, therefore, the same are not admissible as evidence.

ORDER

25. The adjudicating authority examined the following issues:
1. Whether the value declared by PMC and MEGPTCL should be rejected in terms of rule 12 of the Valuation Rules read with section 14 of the Customs Act and redetermined under rule 4 read with section 14 of the Customs Act;

2. Whether the impugned goods are liable to confiscation under sub-section (d) and (m) of section 111 of the Customs Act; and
3. Whether penalty could be imposed under sections 112(a) and 112(b) of the Customs Act and section 114AA of the Customs Act on the noticees.

26. The adjudicating authority, by order dated 18.10.2017, dropped the proceeding initiated against the respondents by the aforesaid show cause notice dated 15.05.2014 and the gist of the findings are as follows:

- (i) EIF and MEGPTCL are related under rule 2(2)(iv) of the Valuation Rules, but the said relationship has not affected the transaction price and was at arm's length;
- (ii) The allegation that PMC was managed and controlled by Adani Group through its entity MEGPTCL is unsustainable for the reason that the price was arrived at arm's length. The question of MEGPTCL influencing or controlling PMC is far-fetched as both MEGPTCL and PMC are not related;
- (iii) As regards MEGPTCL being the actual importer, the show cause notice itself mentioned that PMC had filed the Bills of Entry and cleared the goods. Further, the duty on 26 consignments was paid by PMC and, therefore, it cannot be said that MEGPTCL was the actual importer and not PMC. Also, PMC had in their reply given details of the projects handled by it in the past and their credential in this field. This would demonstrate that MEGPTCL is not the defacto importer;

- (iv) The allegation made in the show cause notice that PMC had sought financial assistance from MEGPTCL and requested MEGPTCL to open Letters of Credit in favour of the Original Equipment Manufactures would show that MEGPTCL was not the de-facto importer. The explanation offered by PMC that the Letters of Credit were opened as payment to PMC was delayed by MEGPTCL due to which the working capital of PMC was getting blocked leading to severe cash crunch and the supplier was insisting for payment at site, deserves to be accepted. Further, the opening of Letters of Credit by MEGPTCL was to ensure timely project completion;
- (v) Reliance was placed by the adjudicating authority on the order passed by Deputy Commissioner of Income Tax, for the Assessment year 2011-12 and 2012-13 wherein it was held that the parties namely, the buyer and seller were not Associate Enterprises and the prices were at arm's length. The said findings of the Income Tax Authority can be considered as supporting evidence to hold that the prices were at arm's length;
- (vi) It was not permissible to redetermine the value under rule 4 of the Valuation Rules as identical goods cannot mean the very goods which are being valued;
- (vii) The contention of the respondent for supporting the escalation of value by EIF to PMC, when compared to value between Original Equipment Manufacture and EIF due to various factors such as extended warranty, financial risk, type testing of equipments, payment of

liquidated damages for delay in delivery was accepted and it was held that the said factors would also form part of the assessable value;

- (viii) The transaction value was accepted also on the ground that the contemporaneous data submitted by the respondents was found to be at par with the cost of Transmission Line and Substation package in the present case;
- (ix) EIF cannot be treated as an intermediary invoicing agent for inflating the value of the imported goods;
- (x) The imported goods in question were eligible for the benefit of PIR and once the contract between PMC and EIF was registered under PIR, the Department could not make consignment wise assessment; and
- (xi) The allegation that the funds were siphoned off through PMC under the aegis of Government of Maharashtra was discarded.

27. The conclusion recorded by the adjudicating authority is as follows:

"5.1.3.31 In view of the above discussion I am of the opinion that:

- (i) the two entities viz. MEGPTCL and EIF may be considered as related during the relevant period, but the price was not affected by the relationship because the contract was granted to the Consortium consisting of PMC, EIF and HHCIL with PMC being the Lead Member on the basis of International Competitive Bidding (ICB), and
- (ii) all the payments 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 noticees is correct and proper."

28. Having arrived at the aforesaid finding, the adjudicating authority dropped the proceedings initiated by the show cause notice.

SUMMISSIONS

29. Shri P.R.V. Ramanan, learned special counsel for the Department made the following submissions:

- (i) The adjudicating authority failed to comprehend that while the contract between MEGPTCL and PMC may have been an EPC contract as claimed, there is nothing in the contract between PMC and EIF to suggest that it was an EPC contract;
- (ii) The finding of the adjudicating authority that the value of the goods invoiced by the EIF was arrived on the basis of ICB, is contrary to the facts on record;
- (iii) The adjudicating authority erred in holding that the show cause notice had not challenged the validity of invoices issued by EIF and so also the contract between EIF and PMC as the said findings run contrary to the allegations made in the show cause notice wherein it has been alleged that the transaction between EIF and PMC were sham transaction and EIF was only a front of Adani Group, which acted merely as an intermediary invoicing agent for inflation of the value;

- (iv) The adjudicating authority erred in holding that MEGPTCL, EIF and PMC were not related to each other;
- (v) The adjudicating authority erred in holding that MEGPTCL is not the actual importer and PMC is the owner since MEGPTCL had itself declared it to be the owner of the imported goods;
- (vi) The so-called additional factors such as extended warranty of ten years, type testing of equipments, liquidated damages, stringent delivery schedule were an afterthought and could not have been considered to justify the over-valuation alleged by the Department;
- (vii) The contention of the respondents that the contract was awarded under the ICB route has been accepted by the adjudicating authority without critically examining the facts brought on record in the show cause notice. Similarly, the finding of the adjudicating authority that the value of the imported goods was at arm's length basis the said ICB process is flawed;
- (viii) The adjudicating authority erred in holding that import valuation of each and every consignment was not permissible and the valuation was required to be done of the entire project as a whole; and
- (ix) The adjudicating authority erred in holding that the transaction between MEGPTCL and PMC were at arm's length as per the assessment order of the Income Tax Authority.

30. PMC and its employees namely, respondent nos. 8 and 9 are represented by Shri Jaydeep Patel, whereas respondent no. 1 is

represented by Shri Vikram Nankani, learned senior counsel assisted by Shri Jitendra Motwani.

31. Shri Jaydeep Patel, learned counsel appearing for respondent nos. 8 and 9 made the following submissions:

- (i) Keeping the credential of PMC in mind, the submission of the department that PMC/EIF was a mere front or an intermediary invoicing agent of MEGPTCL is not correct;
- (ii) Even prior to the commencement of bidding process, PMC was in existence and was actively involved in business. The department overlooked the credentials of PMC with an intention to make a case of over-valuation. Likewise, the submission that MEGPTCL was the actual importer and PMC was a dummy of MEGPTCL is baseless as the goods were imported by PMC to execute the project it was awarded;
- (iii) The submission of the department with regards to the relationship of PMC and EIF is not correct as PMC employee Dharmesh Parekh signed the agreement on behalf of EIF, not in his capacity as employee of PMC, but in his individual capacity upon being authorized by EIF to sign on its behalf;
- (iv) In any event, even if it is assumed that PMC and EIF are related, the price of the transaction has not been influenced by the said relationship in as much as the entire contract was awarded by MEGPTCL to PMC led Consortium after following the ICB process;

- (v) In paragraphs 5.1.3.25 and 5.1.3.25.1 of the order, the adjudicating authority, after considering the contemporaneous data submitted by PMC in the form of project cost of similar project of Power Grid Corporation of India Limited, held that the said cost is comparable to the cost of the present project. This finding does not suffer from any infirmity;
- (vi) The proposal of the department to compare the price charged by the Original Equipment Manufactures to EIF with the value of imported goods is incorrect as it fails to consider that the two contracts are entirely different having different obligations, financial exposure, risk undertaken, extended warranty, etc.;
- (vii) The submission of the department that EIF was only required to supply the equipments manufactured by the Original Equipment Manufactures is erroneous as the same completely ignores the overall scope of the role PMC was required to play;
- (viii) The submission of the department that PMC is just an intermediary, basis that PMC had sought financial assistance from MEGPTCL and MEGPTCL and opened the transferable Letters Of Credit is without any basis;
- (ix) The documents relied upon by the department in support of over-valuation documents cannot be relied upon as they were obtained without complying with the provisions of section 138(4) of the Customs Act and have not been proved in accordance with the provisions of the section 139 (ii) of the Customs Act;

- (x) The invocation of rule 4 of the Valuation Rules by the Department by treating the Original Equipment Manufactures invoice price as the transaction value is without any basis and beyond the provisions of Valuation Rules and the Customs Act;
- (xi) Under PIR, the entire contract has to be assessed under Chapter Heading 98.01 of the Tariff Act and not individual consignments that are the part of the contract;
- (xii) A leading financial service provider M/s. Vivro Financial Services Pvt. Ltd. and a leading Engineering consultant Laheyer International India Pvt. Ltd. had given opinion and in the face of these opinions, the contention of the Department regarding purported overvaluation of goods cannot be accepted;
- (xiii) The imported goods, where the benefit of concessional rate of duty was not availed, have been assessed under section 14 of the Customs Act on the basis of invoices issued by EIF. Consequently, the proposal in the show cause notice to determine the value of goods that had already been assessed is not tenable in law. In support of this contention reliance has been placed on the decision of the Tribunal in **Knowledge Infrastructure Systems Private Limited vs. Additional Director General, D.R.I.**²¹

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

32. Shri Vikram Nankani, learned senior counsel appearing for the MEGPTCL adopted the submissions advanced on behalf of PMC. In addition thereto, the following submissions were made:

(i) In view of the definition of the term 'importer' under section 2(26) of the Customs Act, the term 'importer' would include any owner or any person holding himself to be the importer. PMC had filed the Bills of Entry and the goods were cleared for home consumption by them. Further, the customs duty on 26 consignments was paid by PMC. Therefore, the submission of the Department that MEGPTCL is the owner and hence the importer is without any basis. To support this contention reliance has been placed on the following decisions:

- (a) **Bimal Kumar Mehta vs. CC, Mumbai**²²;
- (b) **Proprietor, Carmel Exports & Imports vs. CC, Cochin**²³; and
- (c) **Brij Mohan Sood vs. C.C., Kandla**²⁴.

(ii) The definition of term 'import' was amended w.e.f. 31.03.2017. Post amendment, the term 'importer' includes a beneficial owner of the goods. The term beneficial owner is defined under section 2(3A) of the Customs Act to mean any person on whose behalf the goods are being imported or exported or who exercises control over the goods imported. MEGPTCL cannot be considered as 'importer', as the goods were imported prior to the amendment.

22. 2011 (270) E.L.T. 280

23. 2012 (276) E.L.T. 505 (Ker.)

24. 2007 (217) E.L.T. 570 (Tri.-Ahmd.)

33. The submissions advanced by the learned special counsel appearing for the Department and the learned counsel for the respondents have been considered.

DISCUSSION

34. The issues that arise for consideration in this appeal will be considered separately.

WHO IS THE IMPORTER

35. It would first be necessary to determine who is the importer in the present case. While it is the case of the Department that MEGPTCL is the importer as it had declared itself to be owner of the goods, it is the case of both MEGPTCL and PMC that the importer is PMC.

36. It will, therefore, be necessary to examine the definition of the term 'importer' under the Customs Act. Section 2 (26) of the Customs Act defines it as follows:

"Section 2(26) "Importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer."

37. It is clear from the above definition that an importer in relation to any goods includes any owner or any person holding himself out to be an importer. In the present case, it is not in dispute that the Bills of Entry were filed by PMC. It is also not in dispute that in respect of 26 consignments where benefit of Chapter Heading 98.01 of the Tariff Act was not available, duty has been paid by PMC on the tariff value at the time of assessment under section 14 of the Customs Act. For an assessee to fall within the term 'importer', it is necessary that an

assessee, as the owner of goods, clears the goods for home consumption by filing a Bill of Entry. It is important to note that the definition of 'importer' also includes any person "who holds himself out" as the importer vis-à-vis the goods in question between the date of its importation until the time of its clearance for home consumption.

38. MEGPTCL did not hold itself out to be the importer. Undisputedly, the Bills of Entry were filed by PMC and right from filing the Bill of Entry to the stage of investigation PMC held itself to be the importer. The document of title, on the basis of which ownership is determined, is the Bill of Lading. It is not the case of the department that the Bill of Lading was not in the name of PMC, for it is on the basis the said Bill of Lading that PMC had filed the Bills of Entry as an importer. Thus, MEGPTCL cannot be termed as an importer or de-facto importer as claimed by the Revenue.

39. The submission of the Department is that since MEGPTCL had declared itself to be the owner of the goods before the Government of Maharashtra and transferable Letters of Credit were also opened by it for the imported goods, it would mean that PMC was merely a contractor and cannot be treated as importer.

40. This submission of the Department cannot be accepted. MEGPTCL had declared itself to be the owner of imported goods as the entire project was owned by MEGPTCL. However, this would not mean that for each and every equipment imported for setting up the project, the importer would be the owner of the project. As noticed above, the contract to set up the project was awarded to a Consortium led by PMC and it is, therefore, the responsibility of PMC to execute the said project. Filing of the Bill of Entry and the act of holding itself to be the

importer of the said goods is enough to hold that PMC can only be treated as the importer and not MEGPTCL.

41. The fact that a person who files the Bill of Entry is the importer has been settled by the Tribunal in **Nalin Z Mehta vs. CC, Ahmedabad**²⁵ and the relevant paragraph of the said decision is reproduced below:

“11. In view of the above reproduced ratio of various judgments, it has to be concluded that an importer under Section 2(26) is a person who has filed the Bills of Entry for the clearances and has paid the Customs duty. The above said judgments also lay down a ratio that an IEC code holder cannot be denied the clearances of consignments if he has filed the Bills of Entry. In these appeals before us, it is undisputed that Bills of Entry are not filed by the appellant herein and in our considered view, he cannot be held as an importer.”

42. In **Brij Mohan Sood**, the Tribunal observed that a financier of goods cannot be treated as the importer and the person who has filed the Bill of Entry and paid the customs duty will be treated as the importer. The relevant paragraph of the said decision is reproduced below:

“5. We agree with the above contention of the Id. DR. The financier of the goods or the owners of the same do not become importers and any liability which may arise would fall upon the person who has filed the bill of entry for clearance of goods and in whose name the goods have been imported. As such by rejecting the above contention of the Id. Advocate, we proceed to decide the appeal on merits.”

43. The same view was taken by the Tribunal in **Bimal Kumar Mehta and Proprietor, Carmel Exports & Imports**.

25. 2014 (303) E.L.T. 267 (Tri.-Ahmd.)

44. Thus, there is no difficulty in holding that PMC alone can be treated as the 'importer' of goods as the Bills of Entry were filed by it and duty with respect to 26 consignments was also paid by it.

45. The definition of term 'importer' was amended w.e.f. 31.03.2017 wherein the term 'beneficial owner' was for the first time, introduced. A person who would fall under the category of 'beneficial owner' can also be treated as an 'importer' w.e.f. 31.03.2017. The change in law w.e.f. 31.03.2017 would apply to all imports on or after that date and would not be applicable to imports made prior to the said date. In the instant case, the imports took place much prior to the said amendment.

DOCUMENTS ADMISSIBLE AS EVIDENCE

46. The case of the Department relating to imports made by PMC from EIF being grossly over-valued is based on the documentary evidence which have been resumed by the Directorate of Revenue Intelligence from the following sources:

- (i) Axis Bank, Dubai International Financial Centre (DIFC) Branch in Dubai;
- (ii) Bank of Baroda, Dubai Main Branch; and
- (iii) ICICI Bank Limited, Dubai International Financial Centre (DIFC) Branch.

47. All the documents were requisitioned and received from the above Banks during investigation and against issuance of summons under section 108 of the Customs At. It is the case of the Department that each document was authenticated and attested under the seal of Bank and was received under the letter head of the Bank.

48. Brief details of the documents resumed from the banks and relied upon in the show cause notice are as under:

Sr. No.	Source of Information	Details of information
1.	Customs, Kandla-EDI Data	26 Consignments cleared at Merit Rate – 31 consignments cleared at concessional rate under Heading 98.01
2.	Axis Bank, Mumbai and DIFC, Dubai	Documents received included Bank attested photocopies of Bills of Lading along with corresponding invoices of Original Equipments Manufactures and packing lists, copies of Letters of Credit opened in the name of EIF, Agreement between EIF and Hyundai. Agreements between three other Original Equipments Manufactures namely, Dalian, Sediver and Suzhou and EIF. Back-to-back invoices-one raised by Hyundai on EIF and another raised by EIF on PMC for the same Bill of Lading were noticed. KYC documents and account opening forms submitted to DIFC, Dubai Branch, Statement of accounts, Names of signatories and Directors of EIF. Copies of MOA, Register of Members, Board resolution etc.
3.	ICICI Bank, DIFC Branch at Dubai	KYC documents account opening forms, details of inward and outward remittances relating to EIF's account with them and some import and Export bills and Financial statements and directors' report of EIF. Documents filed by EIF while applying for Advanced Payment guarantee facility from ICICI Branch, Singapore.
3.	Bank of Baroda, Dubai Branch	KYC documents account opening forms, Statement of accounts relating to EIF, Invoices raised by three Original Equipments Manufactures, namely, Dalian, Sediver and Suzhou on EIF relatable to supplies to PMC covering 25 consignments and Bank attested copies of invoices.

49. A bare perusal of these documents show that very few documents bear the bank seal and some initials, but majority of the documents do not bear the seal or signature. Even those documents that have initials do not bear the name of the person who has initialed the same. While few of the documents issued by Axis Bank and ICICI bear the seal, the same do not disclose the name of the person who initialed them. With respect to documents issued by Original Equipment Manufactures submitted by Bank of Baroda, it is seen that neither they have bank seal nor are they initialed. Some documents in relation to one Original Equipment Manufactures namely, Hyundai Heavy Industries have bank seals but the name of the person initialing the documents has not been disclosed. Documents pertaining to other Original Equipment Manufactures namely, Dalian, Sediver and Suzhou also do not bear bank seals and initials.

50. The respondents had 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.

51. A bare perusal of section 138C of the Customs Act 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.

52. 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 Directorate of Revenue Intelligence 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.

53. 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 Directorate of Revenue Intelligence from various banks outside India cannot be admitted as evidence. Reliance cannot, therefore, be placed on these documents for this reason.

54. 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 documents 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.

55. This issue was also examined by this Bench in detail in **Commissioner of Customs (Import) vs. M/s. Adani Power Maharashtra Ltd.**²⁶

56. Thus, the documents relied upon by the Department are inadmissible as evidence as the authenticity of the same have not been proved in terms of provisions of sections 138C(4) and 139(ii) of the Customs Act.

RELATIONSHIP

57. Learned special counsel for the Department submitted that since Dharmesh Parekh, an employee of PMC, had signed the contract executed between EIF and the Original Equipment Manufactures as an

26. **Customs Appeal No. 87758 of 2017 decided on 18.07.2022**

authorized signatory of EIF, the distinction between PMC and EIF was obliterated. Learned special counsel also submitted that the adjudicating authority failed to take into account the fact that AEL was able to exercise control and direction over PMC through EIF in as much as EIF had directed PMC through authorization to sign the contract with the Original Equipment Manufactures on behalf of EIF. It is on this basis that it was submitted that the contract between MEGPTCL and PMC for offshore supplies of goods on one hand and PMC and EIF for supply of the same goods on the other hand were dubious paper work.

58. In this connection it needs to be noted that Dharmesh Parekh, an employee of PMC, in his individual capacity and on being authorized by EIF, signed the contracts entered into between EIF and Original Equipment Manufactures as authorized signatory of EIF. While PMC is a legal entity incorporated in India, EIF is a separate independent entity incorporated under the laws of UAE and there is no commonality of shareholders and Directors between the said two entities. The said two entities have, therefore, to be treated as distinct legal entities.

59. Under the provisions of Customs Act, two parties can be termed and treated as related if they fall within any of the eight clauses of rule 2(2) of the Valuation Rules. It is no doubt true that Dharmesh Parekh was an employee of PMC and that PMC and EIF were part of the Consortium and had entered into an agreement for supply of Transmission Equipment, and that Dharmesh Parekh, being an employee of PMC, had signed the contract that was entered between EIF and Original Equipment Manufactures on behalf of EIF, but there is nothing which may prohibit and disqualify an employee of PMC to be authorized by EIF for signing a contract on its behalf. The said act of

authorizing an employee of PMC to sign a contract on behalf of EIF cannot lead to a conclusion that EIF and PMC were related to each other under rule 2(2) of the Valuation Rule.

60. Learned special counsel for the Department also contended that since the contracts between EIF and Original Equipment Manufactures did not indicate the place where they were signed PMC and EIF are two sides of the same coin.

61. This submission cannot be accepted. Allegations of over-valuation, being serious in nature, cannot be said to be established merely because place was not mentioned in the contract or for the reason that an employee of PMC signed the contract on behalf of EIF after authorization. To prove the relationship, it was necessary for the Department to establish that one of the clauses of rule 2(2) of the Valuation Rules was satisfied.

62. It also needs to be noted that Jatin Shah, who had authorized Dharmesh Parekh to sign on behalf of EIF, had left the Adani Group on 19.08.2009, and thereafter he was free to join any organization and he decided to join EIF. At no point in time, he was holding position in Adani Group and EIF at the same time. Therefore, the role of Jatin Shah also does not carry forward this submission of the Department on the issue of relationship.

63. Learned special counsel for the Department also submitted that PMC was a dummy and AEL was able to exercise control and direction over it through EIF.

64. It has been stated that PMC was incorporated non 03.05.2005 as an Engineering, Procurement and Project Management Company. Its core areas of expertise are in infrastructure, railways and power

distribution. It has credentials in port development and infrastructure segment and had carried out significant work in some of the operational ports in India. Additionally, it also provided Project Management Consulting services for the overseas projects such as coal terminal expansion at Abbot Point, Australia, Carmichael Coal Mine Project etc.

65. While one of the role of PMC was to obtain imported equipments from EIF, PMC was also required to play a comprehensive role in execution of contract awarded to the Consortium. It not only included procurement of equipment from EIF, but also included the responsibility of entering into various EPC contracts for equipments and services from various local parties. Similarly, equipment was procured by PMC on high sea sale basis from ABB Ltd.

66. It has been found that PMC has to be treated as the importer. The infrastructure landmark achieved by PMC is clear from the literature submitted by PMC in the Paper Book which gives detail of the various projects which were executed by PMC. The same are reproduced below:

PMC Projects – An Overview

3.1 Project Reference

Sr. No.	Type of Project	Project Status	Est. Project cost in INR Cr	Est. Project cost in Million USD	Project completion time in month – Construction Phase
1.	Multipurpose terminals				
1.1	Multipurpose terminal T-3 at Mundra	Operational since 2012	500	100	18
1.2	Multipurpose	Operational	900	180	18

	terminal T-3 at Hazira	since 2012			
2	Dry bulk				
2.1	Multi-Commodity				
2.1.1	Dry Bulk Terminal at Tuna, Kandla	Operational since 2014	1150	230	24
2.1.2	Dry Bulk Terminal at Dahej	Operational since 2010	1150	230	48
2.2.1	Coal Terminal at West Basin, Mundra	Operational since 2010	2400	480	32
2.2.2	Coal Terminal at Mormugao Port Trust	Operational since 2014	450	90	32
2.2.3	Coal Terminal at Visakhapatnam Port Trust	Operational since 2014	400	80	19
2.3	Agro				
2.3.1	Fertilizer Cargo Complex & Agri Park at Mundra	Operational since 2010	225	45	12
3	Liquid Bulk				
3.1	Multi Commodity				
3.1.2	Liquid Bulk terminal at Hazira	Operational since 2013	350	70	12
4	Container terminal				
4.2	Container terminal – AMCT at Mundra	Operational Since 2007	1150	230	27
4.3	Container terminal – CT 3 at South Basin, Mundra	Operational Since 2012	1400	280	18
5	Specialised terminals				
5.1	RO RO Terminal	Operational	75	15	10

		since 2008			
5.2	Steel Terminal	Operational since 2010	75	15	16

3.2 Project Landmark

Sr. No.	Type of Project	Project Status	Benchmarking Parameter (Best in Class in India/World/Innovation in Technology)
1	Multipurpose terminals		
1.1	Multipurpose terminal T-3 at Mundra	Operational	From planning to handover, 300 meter length of berth 9 was completed in 7 months
1.2	Multipurpose terminal at Hazira	Operational	From start to commissioning of the terminal was done in record time of 18 months
2	Dry bulk		
2.1	Multi-Commodity		
2.1.1	Dry Bulk Terminal at Tuna, Kandla	Operational	Terminal construction including Marine and backup year is like to be completed in 24 months, which will be fastest in India. Conveyor of 8.1 m/sec speed is being designed and developed for first time in India.
2.1.2	Dry Bulk Terminal at Dahej	Operational	India's First elevated Triangular gallery for Overland high speed Conveyor System was commissioned at Dahej Project
2.2	Coal Terminals		
2.2.1	Coal Terminal at West Basin, Mundra	Operational	West Basin Coal terminal is World's largest coal Import Terminal
2.2.2	Coal Terminal at Mormugao Port Trust	Operational	1) BWSR boom length of 51m which is one of the largest in port terminals in

			<p>India. Erection is under progress.</p> <p>2) 2 nos. of tunnel conveyors of 110m. Each commissioned (no load). Each conveyor gets the feed from 4 nos. of vibrating feeders (750 TPH) located at the top of the tunnel. This is also unique feature in ports.</p> <p>3) Stacking of coal through travelling trippers which is at 15m height. Necessary DSS is also provided. (although this is not a good idea)</p>
2.2.3	Coal Terminal at Visakhapatnam Port Trust	Operational	1st 54m C frame Stacker-Reclaimer machine in India and project is likely to be completed within contractual date.
2.3	Agro		
2.3.1	Fertilizer Cargo Complex and Agri Park at Mundra	Operational	
3	Liquid Bulk		
3.1	Multi Commodity		
3.1.1.	Liquid Bulk terminal at Mundra	Operational	
3.1.2	Liquid Bulk terminal at Hazira	Operational	Terminal started commencement of operation in record time of 12 Months
3.2	Liquid Special terminal		
3.2.1	Single Point Mooring Facilities at Mundra	Operational	
4	Container terminal		
4.1	Container terminal No 1 (MICT) at Mundra	Operational	Ground improvement against liquefaction by vibro stone column was adopted for open-type berth with diaphragm wall tie back system.

4.2	Container terminal No 2 (CT 2) at Mundra	Operational	
4.3	Container terminal No 3 (CT 3) at South Basin, Mundra	Operational	First time in India marine piles were done by hydraulic rotary rigs from travelling platform
4.4	Container terminal at Hazira	Operational	
5	Specialised terminals		
5.1	RO RO Terminal	Operational	
5.2	Steel Terminal	Operational	

67. In view of the aforesaid facts there is no merit in the contention of the Department that PMC was only a contractor acting as a conduit on behalf of the buyer.

EPC CONTRACT

68. An important aspect that needs to be addressed is about the nature of the contract entered into between PMC and EIF. While the adjudicating authority in paragraph 5.1.3.22 held that the contract in the nature of an EPC contract, it is the case of the Department that the said contract is merely a supply contract.

69. Learned special counsel for the Department submitted that the terms of the contract executed between EIF and the Original Equipment Manufactures is substantially the same as the contract between PMC and EIF and the adjudicating authority erred in considering additional factors, such as extended warranty of 10 years, type testing of equipment, liquidated damages and stringent delivery schedule / completion schedule to hold that it was an EPC contract. Learned special counsel also submitted that this was clearly an afterthought.

70. It is not in dispute that MEGPTCL had invited two separate tenders for appointment of EPC contractors for Transmission Line and Substation packages in accordance with International Competitive Bidding guidelines. Notice inviting tenders were published in leading news-papers and the same were also sent to various embassies. The scope of work mentioned in the Notice Inviting Tender is as follows:

For Transmission Line

Scope of Work:

Design & Engineering for river crossing / special towers, if any, Manufacture, Procurement, Assembly and Testing at Works, Proto assembly of Tower materials and Type Testing of other material's, as required, Packing & Forwarding for Supply on CIF/Ex-works Basis, Port Handling and Clearance, Reconciliation with Custom authorities, for the Imported Goods, Inland Transportation and Transit Insurance, Transportation up to Site, Unloading, Storage, Handling at Site, Survey, Soil Investigation, Arranging Right of Way (RoW), Tower Foundation including Design and Engineering for river crossing / special towers, if any, Pile Foundation complete in all respect wherever required, Erection of Towers along with Extensions with all Fittings, Hangers, Step Bolts D-shackles, Pack Washer etc including Tack Welding, Protection of Tower footing, Stringing, Installation / Earthing of Towers, Installation of Tower accessories, Painting, Testing and Commissioning of 2 Nos. 765KV S/C Tiroda-Koradi III- Akola II- Aurangabad Transmission Lines Package and 400KV D/C Akola I - Akola II

Transmission Line complete in all respect with all fittings and accessories as per Technical Specifications.

Line I

765KV S/C Tiroda - Koradi III - Akola II - Aurangabad

Transmission Line-630 KMs

Line II

765KV S/C Tiroda - Koradi III - Akola II - Aurangabad

Transmission Line-630 KMs

400KV D/C Transmission Line:

30 KMs. (approx.) 400KV D/C Transmission Line (Quad Moose) from Akola I to Akola II.

For Substations

Scope of Work:

Design, Engineering, Manufacture, Procurement, Assembly and Testing at Works, Type testing as required, Packing & Forwarding for Supply on CIF/Ex-works Basis, Port Handling and Clearance, Reconciliation with Custom Authorities for the Imported Goods, Inland Transportation and Transit Insurance, Transportation to Site, Unloading, Storage, Handling at Site, Soil Investigation, Construction, Erection, Testing and Commissioning including associated Civil Works of 765KV & 400KV Substations including all equipments, Auto Transformers & Reactors associated with 765KV Tiroda-Koradi III-Akola II-Aurangabad Transmission

System complete in all respect with all fittings and accessories as per Technical Specifications for evacuation of Power From North-Eastern part of Maharashtra, India.

Construction of 765KV & 400KV Sub stations with the provision of following bays as per the Single Line Diagram: -

1. Establishment of 765/400KV Sub station at Tiroda.
 - 1 x 1500 MVA, 765/400KV Transformer with bays on 765KV and 400KV side (4x500 MVA I ph unites providing 1x1500 MVA bank with one spare unit)
 - 2x240 MVAR, 765KV Switchable Line Reactors (7x80 MVAR I ph units providing 2x240 MVAR banks with one spare unit) (for Tiroda - Koradi III, 2xS/C 765KV lines)
 - 2 nos. of 765KV Line Bays (for Tiroda - Koradi III, 2xS/C 765KV lines)
 - Space for 1 number 765KV bay (for future use)
2. Establishment of 765/400kV Substation at Koradi III.
 - 2x1500 MVA, 765/400KV Transformer with bays on 765KV and 400KV side (7x500 MVA I ph unites providing 2x1500 MVA bank with one spare unit)
 - 4x240 MVAR, 765KV switchable Line Reactors (14x80 MVAR I ph units providing 4x240 MVAR banks with one spare unit) (for Tiroda - Koradi III and Koradi III- Akola II, 2xS/C 765KV lines)
 - 1x240 MVAR, 765KV switchable Bus Reactors (4x80 MVAR Iph units providing 1x240 MVAR banks with one spare unit)
 - 4 nos. of 765KV Line Bays (for Tiroda - Koradi III and Koradi III- Akola II, 2xS/C 765KV lines)

- 4 nos. of 400KV Line Bays
(for Koradi III- Koradi II and Koradi III-
Khaperkheda D/C 400KV lines)
 - Space for 2 nos. 765KV Bay
(for future use)
 - Space for 2 number 400KV Line Bays
(for future use)
3. Establishment of 765/400KV Substation at Akola II.
- 1x1500 MVA, 765/400KV Transformer with bays on
765KV and 400KV side (4x500 MVA I ph unites
providing 1x1500 MVA bank with one spare unit)
 - 2x240 MVAR, 765KV fixed Line Reactors
(7x80 MVAR I ph units providing 2x240 MVAR
banks with one spare unit) (for Koradi III - Akola
II, 2xS/C 765KV Lines)
 - 2x240 MVAR, 765KV switchable Line Reactors
(7x80 MVAR I ph units providing 2x240 MVAR
banks with one spare unit) (for Akola II-
Aurangabad, 2xS/C 765KV lines)
 - 1x240 MVAR, 765KV switchable Bus Reactors
(4x80 MVAR I ph units providing 1x240 MVAR
banks with one spare unit)
 - 4 nos. of 765KV Line Bays
(for Koradi III - Akola II and Akola II- Aurangabad,
2xS/C 765KV lines)
 - 4 nos. of 400KV Line Bays
 - (2nos. for Akola II - Akola I 400KV quad D/C line
and 2 nos for Nandgaonpet - Akola II 400KV D/C
line)

- Space for 2 number 765KV Bay
(for future use)
 - Space for 2 number 400KV Line Bays
(for future use)
4. Extension of 765KV Aurangabad Substation
- 2x240 MVAR, 765KV fixed Line Reactors
(7x80 MVAR 1 ph units providing 2x240 MVAR
banks with one spare unit)(for Akola II -
Aurangabad, 2XS/C 765KV Lines)

71. It would be more than apparent from the aforesaid that the scope of work required to be executed, was in nature of an EPC contract.

72. The PMC led Consortium was found to be the lowest bidder for both the Transmission and substation packages. One of the Consortium members with respect to both the contract was EIF. The Consortium members distributed the work for execution of the entire project amongst themselves. MEGPTCL was only concerned with the total project which included supply of items and performance of services.

73. The Department does not dispute that the contract awarded by MEGPTCL to PMC led Consortium was an EPC contract. However, the Department has raised doubts on the contract entered between EIF and PMC by stating that the same was substantially similar to the contract entered between EIF and Original Equipment Manufacture.

74. The purchase order dated 27.09.2010 raised by MEGPTCL on PMC refers to various documents, one of which is the pre-bid minutes of the meeting held on 21.08.2010. The last two lines of the first

paragraph state "all the terms and conditions other than those listed in this contract shall be as per the tender documents and the correspondence referred above". This means that the four documents mentioned in the reference column of the purchase order would be treated as part and parcel of the purchase order. The pre-bid minutes of the meeting deal with the price basis, payment terms, stringent delivery schedule, etc., and they are reproduced below:

"1. Price Basis: PMC requested MEGPTCL to allow price variation for critical high value items such as Tower materials, ACSR Bersimis as Auto & Moose Conductor, substation equipment such Circuit Breakers, Isolators, Transformers, Shunt Reactors, Instrument Transformers (CT/PT), Lightning Arresters, Civil works, substation structures etc. normally allowed by other utilities for execution of such works. MEGPTCL asked PMC to quote price for entire Supply and Service Scope on 'Firm Price' basis. However, PMC informed MEGPTCL that this shall have huge price implication in their price bid.

2. Payment Terms: PMC requested MEGPTCL to keep the standard payment terms of 10% Advance, 80% pro-rata upon delivery for supplies and against monthly Running Bill for Services and 10% upon completion/ commissioning, Section wise/ Substation wise, instead of payment terms as per the Tender document, i.e for supply contract: 10% advance, 5% upon drawing approval, 40% pro-rata upon delivery of supplies, 35% upon mechanical completion and balance 10% upon completion of supplies Section wise/ Substation wise and for service contract: 10% advance, 40% pro-rata upon against monthly Running Bill for Services, 40% upon mechanical completion and balance 10% upon taking over of work/facilities. PMC informed that the above payment terms would help in their cash flow. MEGPTCL informed that deviation in the payment terms cannot be accepted.

3. Stringent Delivery Schedule: PMC requested MEGPTCL to relax the delivery/completion/ commission schedule to about 36 months instead of 17 months (substation) and 18/21 months (Lines) for smooth execution of the project. However, MEGPTCL

informed PMC that considering the urgent requirement of power evacuation, they are facing a very stringent completion/commission schedule for this project and asked PMC to comply with the delivery/completion/ commissioning schedule as per the NIT. PMC noted and informed MEGPTCL to comply with the same.

4. As PMC proposed to source Auto Transformers & Shunt Reactors from HHI, South Korea (OEM) through EGI and it would be the first time import of such high voltage Transformers and Reactors from HHI to India without having any service support network in India, MEGPTCL insisted for extended warranty of Ten (10) years on each of the equipment with a confirmation that HHI would open the service support network in India within One year in case the award is decided in favour of PMC. MEGPTCL further insisted that the Transformers and Reactors of HHI does not have type test certificate for Indian conditions so PMC would be required to enforce EGI/HHI for conducting the type test for the equipment in case of award.

5. Type Test Charges for Transmission Line Tender: MEGPTCL informed PMC that only design of Tower structure and foundation shall be provided by MEGPTCL, while type testing of all other items shall be undertaken by PMC as per technical specification, as required without any extra cost implication to MEGPTCL. PMC agreed.

6. Royalties: PMC requested MEGPTCL to reimburse the Royalty charges at actuals on the raw material of civil works. MEGPTCL denied and informed to comply the Tender conditions.

7. Right of Way: PMC requested MEGPTCL to exclude the ROW scope from the Bidder's scope. MEGPTCL denied and informed to comply the Tender conditions.

8. PMC requested MEGPTCL to consider Idling charges of manpower and construction machineries in case of non-availability of continuous work front during execution of the works. MEGPTCL denied and asked PMC to comply with the Tender conditions.

9. In case PMC emerges as a successful bidder, MEGPTCL asked PMC to mobilize adequate skilled man power for management

and execution of the works considering the specialized nature of work. MEGPTCL further informed PMC to ensure presence of experts from the OEM's to supervise the work during execution and MEGPTCL also informed PMC that MEGPTCL would depute 2/3 specialized persons from their end to PMC to do the effective project management and these people would work in close association with PMC during the entire execution of the works. PMC agreed to provide free access to their premises and project documentation to these deputed people for close monitoring."

75. Thereafter, a meeting took place between PMC and EIF and the minutes of the meeting are reproduced below:

"PMC briefed EGI regarding the salient terms & conditions of MEGPTCL Tender for Transmission Line and Substation package.

- Is mutually agreed between PMC and EGI that in case the consortium becomes successful bidder, EGI shall be responsible for supply of offshore items for Transmission Line and Substation package on CIF Indian port basis. In such an event detail scope of work shall be mutually decided between PMC and EGI.
- PMC informed EGI that project completion period shall be as per MEGPTCL bid documents i.e. 17 months for Substation package and 18 & 21 months for 765 KV Line-1 along with 400 KV D/C Line & Line-2 respectively. Considering the same PMC and EGI mutually agreed for following delivery (on CIF Indian Port basis) schedule for the offshore items:
 - i. Auto Transformers & Shunt Reactor: 15 months from the date of Contract
 - ii. Disc Insulator & Optical Fiber Ground Wire: Commencing from 3rd month from the date of Contract and completion within 13th month from the date of Contract.
- Following payment terms are agreed for entire offshore supplies:

90% of the Contract price of supplies shall be paid pro-rata as per mutually agreed billing scheduled by

irrevocable without recourse Letter of Credit (LC) with a suitable usance period payable at site basis against shipment of items/ materials.

This payment shall be subject to submission of supporting documents.

Balance 10% of the Contract price of supplies shall be paid through LC on Taking Over of each Auto Transformer Bank, Reactor Bank, Dis Insulator and OPGW upon submission of the supporting documents.

- PMC informed EGI that this would be first supplies of such high voltage Auto Transformers & Shunt Reactors by Hyundai Heavy Industries Co. Ltd. South Korea (HHI) in India and there is no established service support network of HHI for said equipment in India, MEGPTCL has insisted for extended warranty of 10 (ten) years on each of the equipment with a confirmation that HHI would open their service support network in India within 01 (one) year in case of the award is decided in favour of our Consortium. EGI noted the same and agreed in principle to the extended warranty requirement of 10 (ten) years however, EGI informed PMC that there shall be considerable financial liability due to the extended warranty period clause. PMC noted the same.
- PMC informed EGI that MEGPTCL has insisted for fresh type testing of Auto Transformers & Shunt Reactors. EGI agreed to perform the type testing of Auto Transformers and Shunt Reactor in case of the award is decided in favour of the Consortium. It was mutually agreed by PMC and EGI that type testing for disc insulators and OPGW shall be carried out as per technical specification."

76. It is clear that the terms and conditions such as payment terms, stringent delivery schedule, type test of the Transmission Line, extended warranty were required to be fulfilled by PMC. Thereafter, EIF agreed to fulfill the said conditions, as can be seen from the minutes of meeting between PMC and EIF. The respondents are,

therefore, correct in their submission that the contract between PMC and EIF cannot be compared with contract executed between EIF and Original Equipment Manufactures. The submission advanced by the learned special counsel for the revenue that this was an afterthought cannot be accepted. The letter issued by the Engineering Firms states that the extended warranty of 10 years for critical equipment such as Transformers and Shunt Reactors would be somewhere in the range of 8% to 9% per annum and 80% to 90% for 10 years. This apart, other factors such as liquidated damages, type testing charges, stringent delivery schedule cannot also be overlooked. Due to a default on the part of EIF, PMC could charge liquidated damages to the extent of INR 700 Millions from EIF.

77. There is, therefore, no hesitation in holding that the contract between PMC and EIF and EIF and the Original Equipment Manufactures cannot be compared as there is a clear difference. The contract executed between PMC and EIF is, therefore, an EPL contract.

VALUATION

78. What is now required to be examined is whether the Department is justified in redetermining the value of the goods on the basis of the Valuation Rules. The Department proposes to redetermine the value on the basis of the following documents:

- a. 55 consignments where back-to-back documents are available; and
- b. 2 consignments where back-to-back documents were not available, and the value of the goods has been taken as per contemporary import price in one case and in the other case price is taken on the basis of Contract price.

79. These documents have been resumed by the Directorate of Revenue Intelligence at the time of investigation from the foreign branches of Indian Banks. The Department has proposed to reject the value of imported goods declared by PMC and sought redetermination of the same, basis the transaction between the supplier namely, EIF and the Original Equipment Manufactures. For this purpose, the provision of rule 12 of Valuation Rules read with section 14 of the Customs Act have been invoked and the redetermination of the value is sought to be made under rule 4 of the Valuation Rules read with section 14 of the Customs Act.

80. It has already been found that the documents, which form the basis for the proposed redetermination of value, are inadmissible in evidence. Therefore, they cannot be considered for seeking a redetermination of the value.

81. Even otherwise, the value could not have been rejected and redetermined.

82. It needs to be remembered that number of players were setting up coal based Power Generation Plants in the State of Maharashtra and so there was a huge requirement of Transmission Network for evacuation of power from such Thermal Power generation plants. MSETCL, a Government of Maharashtra Undertaking, was examining setting up Transmission Networks. Accordingly, a Special Purpose Vehicle namely, MEGPTCL was formed for development of 765 KV intra state Transmission system, comprising of 2 x 765 KV S/C Tiroda – Kordai – Akola – Aurangabad Transmission Line along with Associated Substation and Bays for evacuation of power from projects in North Eastern Maharashtra. This Special Purpose Vehicle was proposed to be

a Joint Venture between AEL and MSETCL with a proposed shareholding of 74% with AEL and the balance 26% with MSETCL. In this connection it would be appropriate to refer to a letter dated 01.07.2010 addressed by AEL to MSETCL proposing the Joint Venture for development of Transmission Line. The relevant paragraphs are reproduced below:

“The Technical Validation session of MERC was held on 17th April 2010. All other directives/data gaps pointed out by MERC has been complied with except the approval of Govt. of Maharashtra (GoM) for participation of MSETCL in JV Company. MSETCL has also requested GoM for approval to join as Joint Venture partner with AEL for development of 765 KV transmission project. However, GoM approval to MSETCL proposal is pending. In absence of GoM approval, neither MERC is in a position to admit our application for grant of transmission license nor is MEGPTCL is a position to undertake project development activities such as ICB bidding for finalization of supply and erection contracts for transmission lines and substations.

As mentioned above synchronization schedule of Tiroda Power Project only 21 months time period is left to complete the 765 KV transmission project. You will appreciate that it can be completed in above time frame only if the project development activities are undertaken without a loss of day and license is granted by MERC within a month or two.

Under such circumstances, pending GoM approval for equity participation of MSETCL, we request MSETCL to convey to MERC a No Objection Certificate (NOC) in favour of MEGPTCL so as to enable MEGTPCL to complete regulatory process and initiate project implementation activities, including ICB bidding. Meanwhile as and when GoM approval is received, MSETCL will take 26% equity in MEGPTCL, as originally envisaged. We also confirm to undertake all project development activities in accordance with provisions of draft JV agreement, including finalization contracts through ICB. In this way MEGPTCL will be able to go ahead with the project implementation without any further delay in regulatory process.”

83. MSETCL, by letter 02.07.2010, provided their No Objection Certificate to MEGPTCL. MEGPTCL was granted a Transmission License by MERC on 14/21.09.2010 for a period of 25 years for development of Transmission Project. ICB process was followed by MEGPTCL for inviting tenders for appointment of EPC contractors. Two separate tenders were issued by MEGPTCL for Transmission Line and Substation packages respectively. As noticed above, the tenders were published in leading news-papers and were also sent to various embassies. The Consortium led by PMC emerged as the successful bidder for both the Transmission Line and Substation and accordingly purchase orders and service orders were placed on the lead member of the Consortium for Transmission Line and Substation packages. Prior to the award of the tender, a pre bid meeting was held between MEGPTCL and PMC in which the terms of the projects were discussed and PMC was informed about the terms of bidding namely, requirement of extended warranty, type testing, liquidated damages etc.

84. The Consortium for the Transmission Line led by PMC consisted of PMC, EIF and Gammon India Ltd. For substation package the Consortium led by PMC consisted of PMC, EIF and Hyundai Heavy Industries Co. Ltd.

85. The details of Consortium Members with the scope of work is as follows:

Transmission Lines : Supply Contract

- (i) For Transmission Line Supplies
 - (a) Gammon India Limited
 - (b) Jyoti Structures Limited
 - (c) Kalpataru Power Transmission Limited
- (ii) For ACSR Conductors Supplies

- (a) Apar Industries Limited
- (b) Gupta Power Infrastructure Limited
- (c) JSK Industries Private Limited
- (d) Sterlite Technologies Limited
- (e) Gammon India Limited
- (iii) For Hardware Fitting and Accessories Supplies
 - (a) Asbesco (India) Private Limited
 - (b) Tag Corporation
- (iv) For GS Earthwire supplies
 - (a) UIC Udyog Limited
- (v) Offshore supplies : 765KV Insulators and OPGW
 - (a) Electrogen Infra FZE, UAE

Transmission Line : Service Contract

- (i) Transmission Line Services
 - (a) Gammon India Limited
 - (b) Jyoti Structures Limited
 - (c) Kalpataru Power Transmission Limited
- (ii) OPGW Installation
 - (a) Sree Krishna Power Engineering & Consultancy Private Limited

Substation : Supply Contract

- (i) Substation Equipment Package w/o ATs & SRs
 - (a) ABB Limited
- (ii) Onshore Supplies (ATs & SRs Accessories)
 - (a) A2Z Maintenance and Engineering Service Limited
- (iii) Offshore Supplies – (ATs & SRs)
 - (a) Electrogen Infra FZE, UAE

Substation : Service Contract

- (i) Substation Equipment Package w/o ATs & SRs
 - (a) ABB Limited
- (ii) ETC & F&TI for ATs and SRs
 - (a) A2Z Maintenance & Engineering Services Limited
- (iii) Civil Works for Substations
 - (a) Gammon India Limited (Tiroda SS)
 - (b) Gannon Dunkerley & Company Limited (Akola II SS)
 - (c) Abhi Engineering Company – (Koradi III SS)
 - (d) Hemant Enterprises – (Aurangabad SS)

86. An agreement was also entered between PMC and EIF for sourcing auto transformers, shunt reactors, disc insulators and optical fiber cable along with hardware and fittings.

87. In terms of General Exemption Notification dated 01.03.2002 at serial no. 424, High Voltage Power Transmission Project equipment was permitted to be cleared under concessional rate of customs duty. Thus, concessional rate of customs duty benefit was available for 765KV auto transformers, shunt reactors, isolators and surge arrestors, subject to fulfillment of the conditions specified therein. The Principal Secretary, on being satisfied as to the eligibility to avail the benefit of the aforesaid exemption, issued Essentiality Certificates, which was a condition stipulated in the said Notification. On receipt of the Essentiality Certificate(s), MEGPTCL registered the contract between PMC and EIF with the Customs House at Kandla as prescribed under regulation nos. 4 and 5 of the PIR. Based on the above

registration, the equipments were imported as per approved list of goods and cleared by PMC and were dispatched to MEGPTCL as per the contract conditions. Consequently, the said goods were assessed under Chapter Heading 98.01 of the First Schedule to the Tariff Act. PMC also imported disc insulators and optical fibre ground wire and the same were cleared on payment of duty, as concessional customs duty benefit was not available in respect of these items. No objection was raised by the Department at the time of clearance of goods and the assessment was finalized under section 14 of the Customs Act. All other Bills of Entry, where the benefit under Chapter Heading 98.01 of the Tariff Act was availed, were assessed provisionally and subject to reconciliation under PIR. There is no dispute that all goods/items have been imported against the approved list of goods registered with Customs and the value as declared by PMC in the Bills of Entry have also been accepted by Customs. There is also no dispute that the goods imported are mentioned in the approved list.

88. The show cause notice proposes redetermination of the value for the reason that the goods imported by PMC from EIF are over-valued with the sole intention to siphon off money outside India. To support this allegation, the Department alleges that EIF was a front created by Adani Group and has been used as an intermediary invoicing agent and that the contracts between MEGPTCL and PMC for offshore supply of goods on one hand and PMC and EIF on the other for the same supplies were dubious paper work created to provide a cover.

89. There are 57 consignments imported by PMC for the purpose of setting up the Transmission Line and Substation Project. The said imports were made by PMC from EIF, which was a Consortium

member. Out of the 57 consignments, 26 consignments were cleared on the appropriate rate of customs duty that was paid at the time of import, but the balance 31 consignments were cleared at concessional rate of duty under Heading 98.01 of the Tariff Act. The case of the Department is that the value declared by PMC for the imported goods, basis the invoices issued by EIF was grossly over-valued as the goods were directly shipped by the Original Equipment Manufactures to ports at Mundra and Nhava Sheva and the actual price claimed by Original Equipment Manufactures from EIF was far lower than the price claimed by EIF from PMC. The Department has treated the invoice value raised by the Original Equipment Manufactures on EIF as the transaction value for the purpose of assessment under the Customs Act. It is the case of the Department that on an average there has been over-valuation to the extent of five times of the actual value and the same has been depicted in a table forming part of paragraph 5.1 of the submissions filed by the Department. It is reproduced below:

Sr. No.	Name of the Original Equipment Manufactures	Agreement between Original Equipment Manufactures and EIF	Contract price in USD	Value in USD as per Agreement between PMC and EIF	Difference in USD and as % of contract price
1.	Hyundai	700003 dated 05-10-2010	65,328,309	260,269,798	194,941,489 (298.40%)
2.	Sediver	700001 dated 07-10-2010	5938460.1	83,794,854	71,917,933.8 (605.53%)
3.	Dalian	700002 dated 07-10-2010	5938460.1		
4.	Suzhou	700004 dated 22-10-2010	2637757	32,131,000	29,495,243 (1118.12%)

90. The adjudicating authority has found no merit in the allegations proposing redetermination for more than one reason and has consequently dropped the proceedings against all the respondents.

91. As noticed above, 26 out of the 57 consignments were cleared by PMC on merit rate of duty. In other words, the said 26 consignments have been finally assessed to duty, basis the value declared by PMC and the said assessment proceedings under section 14 of the Customs Act have attained finality. With respect to balance 31 consignments, the same have been cleared under concessional rate of duty under Chapter Heading 98.01 of the Tariff Act read with PIR. The respondents have pointed out that the value of the entire 57 consignments, including the 26 consignments for which the assessment became final under section 14 of the Customs Act, has been redetermined and that while clearing the said 26 consignments, customs duty aggregating to approximately Rs. 400 Crores has been paid. The submission is that it is not open to the Department to have two different values for the same goods, one under section 14 of the Customs Act for assessment of duty and another for the purpose of section 111(m) of the Customs Act.

92. Learned special counsel for the Revenue, however, submitted that section 111(m) of the Customs Act is applicable to any goods and not to imported goods only and, therefore, even if the goods have been cleared for home consumption after determination of value, the assessment of the same can still be reopened under section 111(m) of the Customs Act. Further submission is that the matter with respect to the 31 Bills of Entry was provisional in nature and, therefore, section 18 of the Customs Act would apply. Learned special counsel, therefore,

also submitted that in view of the magnitude of over-valuation, which was detected after extensive investigation, there cannot be any restriction with regards to redetermination of value as fraud overrides all considerations.

93. It is true that fraud would vitiate everything, but then fraud has not only to be alleged but also proved. In the present case, the documents that form the basis of the allegation of overvaluation cannot be relied upon by the Department as the same cannot be admitted as evidence under the Customs Act. The allegation of fraud, therefore, has not been proved.

94. Be that as it may, the proposition that despite finalization of assessment under section 14 of the Customs Act, the provisions of section 111(m) of the Customs Act can still be invoked cannot be accepted. If this submission is accepted, proceedings with respect to any transaction will never attain finality. It should not be forgotten that the assessment with respect of 26 Bills of Entry had attained finality under section 14 of the Customs Act.

95. 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: "

96. The Supreme Court in **Wipro Ltd. vs. Assistant Collector of Customs**²⁷ 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 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

27. 2015 (319) E.L.T. 177 (SC)

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".

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.

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.

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."

97. 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."

98. 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.

99. 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.

100. 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.

101. There is also merit in the submission made by the learned counsel for the respondents that no evidence was brought on record to show that the transaction value of the goods was influenced by the

alleged relationship between EIF and PMC. The contract was awarded to the PMC led Consortium by MEGPTCL after following the International Competitive Bidding process. The said bids were independently evaluated by an expert of Price Waterhouse Coopers. Both Transmission Line and Substation projects bids submitted by PMC led Consortium were found to be the lowest. The Department should have brought on record independent evidence in the form of contemporaneous data to show that the price of the imported goods were over-valued. In fact, PMC has stated that the bid price of PMC led Consortium was comparable to the project cost of similar project set up by a Public Sector Undertaking namely, Power Grid Corporation of India Ltd. and the adjudicating authority also accepted this contention. Paragraphs 5.1.3.25 and 5.1.3.25.1 of the order of the adjudicating authority deal with the said submission and are reproduced below:

“5.1.3.25 Further, I find that the notice has contended that value of the current contract in respect of laying the transmission lines and erection of sub-stations was comparable with the similar project executed by the leading public sector company Mis Power Grid Corporation of India Limited (PGCIL) in the year 2009-10 i.e. during the same time frame for similar scope of work at Sasan-Satna Transmission Line (Circuit-II) and Agro-Meerut Transmission Line Projects. Furthermore, the bid cost made by PMC (through consortium), was at par with cost of transmission line and substation package of 765KV project executed by the leading public sector company M/s Power Grid Corporation of India Limited (PGCIL) in the year 2009-10.

5.1.3.25.1 The noticee has further submitted that the cost worked out for the PGCIL substation (as per petition filed by PGCIL to Central Electricity Regulatory Commission) was 16% higher than the cost quoted by PMC. A comparative chart of the cost incurred by MEGPTCL and PGCIL is reproduced below:

		MEGPTCL	PGCIL Total
Sr. No.	Description	Total Cost	Cost
1	765/400 KV Auto Transformer	753.61	398.14
2	80 MVAR, 765 KV Shunt Reactor	872.71	557.28
3	765 KV bays	269.56	468.00
4	400 KV bays		110
	Grand total	1895.88	1533.42
5	Extra Loadings		
5(i)	Fixed Price/Variable Price contract on sr. no. 1 and 2 @ 5.5% per year for 17 months	Incl	74.44
5(ii)	LD charges on Sr. no. 1 and 2 (Total LD @ 10%, loading considered for 50% of total LD i.e. 5 %)	Incl	47.77
5(iii)	Extended warranty for (8.5 years) premium of 664 cr. For sr. no. 1 and 2 has been derived considering 8.5% premium per year. So Premium considered of 550 cr. In lumpsum basis	Incl	550.00
	Total of Loading	--	672.21
	Grand Total after loading	1895.88	2205.63
	% Diff. w.r.t. PGCIL Petition	16.34%	
		Say 16%	

102. The comparative chart submitted by PMC, also makes it clear that the price declared by MEGPTCL, when compared to that of PGCIL project, was in fact lesser.

103. Learned special counsel for the Department submitted that the cost of auto transformer and shunt reactor, as declared by MEGPTCL, were far higher than the price of the said goods declared by PGCIL. On the basis of these two values it was submitted that the contemporaneous data is not comparable and the overall cost is

sought to be inflated by adding the notional cost of Rs. 550 crores on account of extended warranty.

104. A perusal of the aforesaid chart shows that the price quoted by MEGPTCL is far less than the project cost of PGCIL. In so far as the submission of the Department relating to extended warranty is concerned, it is seen that Siemens Limited, which is a known Engineering Company, has stated that for extended warranty of 10 years, the premium would be in the range of 80% to 90% of the equipment price for critical high equipment. The said letter also states that warranty provided in general terms is the standard warranty of 12 months from the date of commissioning and 18 months from the date of supply, whichever is earlier. Apart from the same there are two opinions provided by M/s Vivro Financial Services Pvt. Ltd. and M/s Lahyer International India Pvt. Ltd. wherein the contract price of offshore supplies made by EIF to PMC have been said to be reasonable. The report of M/s Development Consultant Pvt. Ltd., who were appointed as Consulting Engineer by the lender of the project namely, ICICI Bank, also mentions that the total cost of the project is in line with the market price trend. Thus, while the Department has placed reliance on evidence which have been found to be inadmissible, the respondents have submitted contemporaneous data with evidence in the form of a letter stating that in case of extended warranty the premium on the product would be 8 to 9% per year. No error can, therefore, be found in the view taken by the adjudicating authority and it is also in accordance with the law laid down by the Supreme Court in **Commissioner of Customs vs. South India Television 2007**²⁸

28. 2007 (214) E.L.T. 3 (SC)

wherein it was held that in the absence of contemporaneous imports, the transaction value cannot be discarded. The transaction value, therefore, has to be accepted and the question of redetermination of the value does not arise at all.

105. It is also important to examine the presence of MSETCL when the bidding was in process and when PMC was awarded the contract. Initially, by a letter dated 01.07.2010, AEL proposed MSETCL, a Government of Maharashtra undertaking, to form a Joint Venture for development of Transmission System, pursuant to which a Joint Venture was formed between AEL and MSETCL where AEL held 74% of share and MSETCL held balance 26%. The notice inviting tender, awarding of the bid, filing of applications seeking registration of contract under PIR were also done while the said Joint Venture was existing. It was only on 27.12.2012 that MSETCL expressed its inability to form the Joint Venture. In the event MSETCL would not have backed out, they would have been 26% shareholders in MEGPTCL.

106. It was, accordingly, submitted by learned counsel for the respondent that the State Government Undertaking itself was involved in the process and it may not be correct to allege that the State Government Undertaking was a part of the alleged over-valuation. In this connection, it would be appropriate to reproduce paragraph 5.1.3.30 of the order of the adjudicating authority and it is as follow:

"5.1.3.30 I also find that MEGPTCL was a Special Purpose Vehicle formed through a joint venture between Adani Enterprises Ltd. (AEL) holding 74% of the share holding and Maharashtra State Electricity Transmission Company Ltd. (a Govt. of Maharashtra of Maharashtra Enterprise) holding the balance 26%. I find that it was only in December 2012 that MSETCL decided not to be part of the joint venture with AEL.

Thus, the joint venture was in existence when the Transmission license was issued by MERC, the ICB was conducted and the contract between MEGPTCL and PMC was signed. Hence to allege that MEGPTCL had through PMC siphoned funds out of India under the aegis of Government of Maharashtra appears to be far fetched."

107. No error can be attributed to the aforesaid finding of the adjudicating authority as undisputedly when the whole bidding process was ongoing and when PMC was awarded the contract, MSETCL was a part of the Joint Venture. In such circumstances, it is difficult to accept the submission regarding the alleged overvaluation.

108. As noticed above, the documents which formed the basis of redetermination have also been held to be inadmissible in evidence.

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

WHOLE EFFECT OF CONTRACT/EFFECT OF REGISTRATION UNDER PIR

110. The adjudicating authority, in paragraph 5.1.3.27.7 concluded that the contract as a whole was required to be assessed and not individual consignments.

111. 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.

112. This issue was examined at length by this Bench in **Adani Power Maharashtra Ltd.** and after examination of the provisions of Chapter 98 of the Tariff Act and regulations 2,4,5 and 7 of the PIR, the Bench observed as follows:

"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."

113. In view of the detailed discussions on this issue in **Adani Power Maharashtra Ltd.**, there is no difficulty in holding that the contract as a whole was required to be assessed and not individual consignment.

CONFISCATION

114. 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**, 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.”

115. 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.

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

117. Thus, as the contentions advanced by the learned special counsel for the appellant do not have force, the order dated 17.10.2017 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 11.08.2022)

**(JUSTICE DILIP GUPTA)
PRESIDENT**

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

Shreya