

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA**

REGIONAL BENCH – COURT NO.2

Customs Appeal No. 75188 of 2015

(Arising out of Order-in-Original No. KOL/CUS/COMMR/PORT/74/2014 dated 31.10.2014 passed by Commr. of Customs (Port), Kolkata)

M/s. Tata Steel Ltd.

(Bombay House, 24, Homi Mody Street, Fort, Mumbai-400001)

Appellant

VERSUS

Commr. of Customs (Port), Kolkata

(15/1, Strand Road, Kolkata-700001)

Respondent

With

(i) Customs Appeal No. 75189 of 2015 (Shri S. K. Roy Vs. Commr. of Customs (Port), Kolkata (ii) Customs Appeal No. 75190 of 2015 (Shri R. P. Singh Vs. Commr. of Customs (Port), Kolkata (iii) Customs Appeal No. 75191 of 2015 (M/s T M International Logistics Ltd. Vs. Commr. of Customs (Port), Kolkata (iv) Customs Appeal No. 75192 of 2015 (Shri Koushik Chatterjee Vs. Commr. of Customs (Port), Kolkata (V) Customs Appeal No. 75193 of 2015 (Shri N Rammurthy Vs. Commr. of Customs (Port), Kolkata (vi) Customs Appeal No. 75194 of 2015 (M/s. Larsen & Toubro Vs. Commr. of Customs (Port), Kolkata (vii) Customs Appeal No. 75195 of 2015 (Mr. AB Das Vs. Commr. of Customs (Port), Kolkata

- (i) (Arising out of Order-in-Original No. KOL/CUS/COMMR/PORT/74/2014 dated 31.10.2014 passed by Commr. of Customs (Port), Kolkata)
- (ii) (Arising out of Order-in-Original No. KOL/CUS/COMMR/PORT/74/2014 dated 31.10.2014 passed by Commr. of Customs (Port), Kolkata)
- (iii) (Arising out of Order-in-Original No. KOL/CUS/COMMR/PORT/74/2014 dated 31.10.2014 passed by Commr. of Customs (Port), Kolkata)
- (iv) (Arising out of Order-in-Original No. KOL/CUS/COMMR/PORT/74/2014 dated 31.10.2014 passed by Commr. of Customs (Port), Kolkata)
- (v) (Arising out of Order-in-Original No. KOL/CUS/COMMR/PORT/74/2014 dated 31.10.2014 passed by Commr. of Customs (Port), Kolkata)
- (vi) (Arising out of Order-in-Original No. KOL/CUS/COMMR/PORT/74/2014 dated 31.10.2014 passed by Commr. of Customs (Port), Kolkata)
- (vii) (Arising out of Order-in-Original No. KOL/CUS/COMMR/PORT/74/2014 dated 31.10.2014 passed by Commr. of Customs (Port), Kolkata)

APPEARANCE :

Mr. Gajendra Jain, Mr. Narendra Dave, Mr. Rahul Tangri, Ms. Udit Saraf, Mr. P. R. Renganath and Mr. M. Kannan, all Advocates for the Appellant

Mr. Mihir Ranjan, Spl. Counsel for the Respondent

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CORAM:

HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)

HON'BLE MR. RAJEEV TANDON, MEMBER (TECHNICAL)

FINAL ORDER NO.77379-77386/2023

Date of Hearing : 28 August 2023

Date of Pronouncement: 19.10.2023

PER R. MURALIDHAR

The appellants Tata Steel Ltd. are engaged in manufacture of iron and steel having its largest production facility in Jamshedpur, wherein the Appellant had commissioned seven blast furnaces referred to as "A" to "G" having aggregate capacity of 5 million MPTA. Subsequently, the Appellant sought to enhance the capacity of its blast furnace upto 10 million MPTA and thus conceived the plan to install "H" blast furnace and "I" blast furnace of 2.5 million capacity each. For the purpose of setting and commissioning the aforementioned blast furnaces, the Appellant invited tenders from prospective bidders through **Enquiry Specification** No. TSGP-05-PRJ-001 dated December, 2003.

2. The SCN was issued alleging that the Appellant had entered into sham agreements with a view to split the consideration for supply of imported equipments under FOB Agreement into designs & drawings and other post importation activities so as to evade customs duty. Accordingly, Show Cause Notice sought to add the consideration paid to agreement holders under the above four Agreements, to the assessable value of equipments/goods imported under FOB Agreement by re-assessing 77 Bills of Entry under FOB Agreement, for import of goods by PWIT.

3. SCN dated 21.8.2012 had also sought to deny benefit of EPCG scheme under Notification No. 97/2004-Cus dated 17.9.2004 in respect of 19 BsOE for following reasons:

- Location of HBF was not mentioned in EPCG Authorization No. 0230001781 & 0230001782 and
- Location of HBF was mentioned in EPCG Authorization No. 0230002342 after amendment from licensing authority; and
- Items imported under EPCG Authorization are not spares but goods for setting and commissioning of new plant and machinery.

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4. After due process the following demands were confirmed :

1	Differential Customs duty in respect of goods imported at concessional rate of duty under EPCG Scheme notified in Notification No. 97/2004–Cus dated 17.9.2004 [Sl. No. 1 of Annexure C to SCN, Vol-3] & [Annexure A-4 to SCN, Vol-3]	5,80,02,819 + 3,96,69,000 ----- 9,76,71,819
2	Customs Duty on the revised assessable value of the goods imported during the period 22.11.2006 to 22.11.2007, determined under Section 28(8) of the Customs Act, 1962. [Annexure A-3 to SCN, Vol-3]	32,76,67,821

4. Being aggrieved, the appellant is before the Tribunal.

5. In respect of the confirmed demand on account of the EPCG Licenses not showing the 'H Blast' as the location, the appellants submit as under :

- a. In case of EPCG License No0230001782/2/11/00 dated 15.06.20206, request was made vide letter dated 19.3.2012 to include 'H Blast' as 'location' and the same was allowed by the DGFT vide License Amendment Sheet dated 23.03.2012 [Page No.1094 and 1098 of the Vol 12].
- b. Similarly in respect of EPCG License No0230001781/2/11/00 dated 15.09.20206, request was made vide letter dated 19.3.2012 to include 'H Blast' as 'location' and the same was allowed by the DGFT vide License Amendment Sheet dated 23.03.2012 [Page No.1095 and 1096 of the Vol 12].
- c. The customs officials do not have any power to challenge the licensing authorities power of amendment of the license. Reliance in this regard was placed on the decision of **Bhilwara Spinners Ltd. Vs. Union of India – 2011(267) 49 (Bom.)**.

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- d. It is alleged that the Appellant has imported goods for installation of new capital goods and these goods cannot be spares because spares are those which are acquired to replace defective spares/parts of existing/old capital goods. In this regard, it is submitted that goods imported for installation of new capital goods can include assemblies, sub-assemblies, components, sub-components. The Appellant submits that these assemblies, sub-assemblies, components, sub-components has been allowed as spares in Foreign Trade Policy under Para 9.57. Reference is also made paragraph 6 of 5.1 of FTP, which defines the capital goods to include spares. It means that the spares can be imported for pre-production purposes also.
- e. Further, Para 5.3.4(i) of the Handbook of Procedures of the Foreign Trade Procedures, 2006-07 allows import of spares for installation and maintenance of capital goods imported / to be imported under EPCG scheme.
- f. In view of the foregoing, it is submitted that demand of Rs.9,76,71,819 is required to be set aside on merits.

6 In respect of the differential Customs Duty demand the following submission are made :

- a) Pursuant to Enquiry Specification floated by the Appellant, '**Pre-First Offer**' dated 15.1.2003 was submitted by SMS Demag SpA [later on renamed as M/s. Paul Wurth Italia SpA (PWIT)] and L&T. In the 'Pre-First Offer', civil and structural design work for HBF was indicated separately under the scope of work. Furthermore, the offer also contained price break up for imported supplies, imported services, indigenous supplies and indigenous services. [Copy of 'Pre-first Offer' dated 15.1.2003 is enclosed as Exhibit-A1 in Vol-9, pages 1-4]. Subsequently, PWIT vide their letter dated 30.6.2005 submitted its '**First Offer**'. [Copy of First Offer is enclosed as Exhibit B-1, Vol-9, pages 6-11].
- b) Based on certain discussion, the Appellant and PWIT decided to form a consortium consisting of PWIT, L&T and Paul Wurth India Ltd. (PWIN), for executing fully integrated & complete work with a secured cost of investment for setting up & commissioning HBF. It was decided to reduce the activity and responsibility of the Appellant by engaging local partners namely L&T and

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PWIN who would undertake most of the indigenous activities. In view of the above, a revised proposal bearing no. SBF/051-05 dated 25.7.2005 (**'Second Offer'**) was submitted by PWIT. *[Copy of the of Second Offer is enclosed as Exhibit B-2, Vol-9, pages 12-21].*

- c) On account of further discussion and amendment in scope of work, **"Third Offer"** dated 28.7.2005 was submitted by PWIT along with Responsibility Matrix and price summary as per division of work under Attachment-A. *[Copy of the of Third Offer is enclosed as Exhibit B-3, Vol-9, pages 22-44].* Third Offer provided for division as import of supply and services, indigenous supply and services and supply of spare parts.
- d) The said Responsibility Matrix and detailed Technical Specification No. SBF/EIM/29/EC dated July, 2005 was finalized and signed by authorized representatives of the Appellant, PWIT, L&T and PWIN on 29.7.2005. The said Responsibility matrix defined roles and responsibilities of the Appellant, PWIT, PWIN and L&T and was binding on all these parties concerned. It is pertinent to note that though the work was divided among the parties to the consortium, however, PWIT was made responsible for complete execution of setting up & commissioning of HBF till performance guarantee so as to ensure completeness & achieving specified performance guarantee. *[Copy of said Technical Specification along with Responsibility Matrix is enclosed as Exhibit-C, Vol-9 & 10, pages 49-693].*
- e) Thereafter, **"Fourth Offer"** dated 29.7.2005 was received by the Appellant with revised price list. This was **Final Offer**. *[Copy of Fourth Offer is enclosed as Exhibit B-4, Vol-9, pages 45-48].* Just like Third Offer, the Fourth and Final Offer also provided for division as import of supply and services, indigenous supply and services and supply of spare parts.
- f) Vide letter dated 1.8.2005, the Appellant issued offer acceptance letters ('Letters of Intent') to concerned parties viz., PWIT, L&T and PWIN, which was subsequently accepted by the respective parties. Pursuant to acceptance of the Letter of Intent, the Appellant signed six agreements with PWIT, based on the Technical Specification dated July 2005 and Fourth Offer. *[Copy of three Letters of Intent are enclosed as Exhibit E-1, E-2 and E-3, Vol-1, pages 700-702].*

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- g) The appellant has provided the details of the six agreements along with price break up is mentioned herein below:

Table-A

Sr. No.	Agreement No./date & Purchase Order No.	Agreement Title	Consideration (Amt in Euro)	Hereafter referred as	Exhibit
1	TATA STEEL/HBF/ FOB dated 1.8.2005 & P.O. No.2400000254	Agreement for Design, Manufacture and Supply of imported plant machinery & equipment with auxiliaries for "H" Blast Furnace at Tata Steel.	<u>Agreement:</u> 34,900,000 <u>Amended to:</u> 34,693,600	FOB Agreement	K, Vol-11, Pages 770-822
2	TATA STEEL/HBF/ FDR-CIVERC dated 1.8.2005 & P.O. No. 2300010743	Agreement for supply of imported designs and drawings for civil and structural work, utility and other services, assembly, erection, refractory work, blowing in operation commissioning and demonstration of performance tests etc. for "H" Blast Furnace at Tata Steel, Jamshedpur	<u>Agreement:</u> 8,000,000 <u>Amended to:</u> 8,369,000	FDR-CIVERC Agreement	L, Vol-11, Pages 823-861
3	TATA STEEL/HBF/ FDR-EQP dated 1.8.2005 & P.O. No. 2300010742	Agreement for supply of imported designs and drawings for manufacture of indigenous equipment for "H" Blast Furnace at Tata Steel, Jamshedpur	<u>Agreement</u> 2,430,000	FDR-EQP Agreement	M, Vol-11, Pages 862-900
4	TATA STEEL/HBF/ SUP dated 1.8.2005 & P.O. No. 2000000010	Agreement for foreign technicians' services for supervision of detailed engi-	<u>Agreement:</u> 5,500,000 <u>Amended to:</u> 6,348,952	SUP Agreement	N, Vol-11, Pages 901-933

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		neering in India, manufacture of indigenous equipment, erection, blowing-in, commissioning and demonstration of performance tests for "H" Blast Furnace at Tata Steel, Jamshedpur			
5	TATA STEEL/HBF/ TAS dated 1.8.2005 & P.O. No. 2000000014	Agreement for technical assistance to Tata Steel for sourcing of various items of capital equipment and related documentation for "H" Blast Furnace at Tata Steel, Jamshedpur	<u>Agreement:</u> 711,000 <u>Amended to:</u> 1,205,446	TAS Agreement	O, Vol-11, Pages 934-955
6	TATA STEEL/HBF/ TRN dated 1.8.2005 & P.O. No. 2000000013	Agreement for In-Plant training at Foreign Supplier's works to Tata Steel's personnel for "H" Blast Furnace at Tata Steel, Jamshedpur.	EURO 860,000	TRN Agreement	P, Vol-11, Pages 956-963

- h) The consideration payable to PWIT under aforementioned agreements at Sl. No. (ii) to (v) was for supply of designs & drawings and activities/services to be rendered by PWIT. Hence, the Appellant did not pay any customs duty on the consideration paid to PWIT under aforementioned four agreements. Instead, Service Tax was discharged on consideration received in respect of said four agreements for supply of designs and drawings, on reverse charge basis.
- i) Apart from the above, the Appellant also formed two agreements with PWIN and four agreements with L&T, which was approved by the Managing Director on 6.9.2005 and signed by Mr. R. P. Singh on behalf of the Appellant on a date between 7th and 9th September 2005. However, the date of signing/witnessing of these agreements was inadvertently indicated

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as 1.8.2005 by a handwritten entry made by Mrs. P. Jayaram of the Appellant-company on the Agreements.

7. The Adjudicating authority while confirming the demand, has given following findings :

- i) The Appellant has entered into four different agreements (viz. FDR-CIVERC, FDR-EQP, SUP & TAS) which were fraudulently executed with a malafide intention to split the consideration for supply of imported equipments under FOB Agreement and divert it towards four such Agreements. All the goods & services imported under the above four agreements were pre-importation activity and consideration paid for the same has been fraudulently distinguished from the price payable for the equipment imported under FOB Agreement
- ii) Agreement FDR-CIVERC executed by the Appellant for execution of 'Civil & Structural design work' was fraudulently conceived and executed for services relatable to post importation work. Entire amount paid under the aforesaid CIVERC Agreement was for the various Civil & Structural Drawings & Designs imported by the Appellant in connection to the HBF which was not within the bidders' scope of work in terms of Clause 6 of the Enquiry Specification
- iii) Agreement FDR-EQP was executed by the Appellant to fraudulently cover the 'Assembly Drawings' for already manufactured imported equipment supplied by PWIT. The Commissioner of Customs (Port) contended that 'Assembly Drawings' are those drawings on the basis of which imported/manufactured equipments, imported in knocked down conditions, are assembled. Hence, importation of the 'Assembly Drawings' under FDR-EQP agreement under the scope of supply of drawing and design for manufacture of indigenous equipments was certainly intended for diverting the cost and charges related to equipments imported under FOB Agreements
- iv) 'Load Data'/ 'Assignment Drawings' & 'Assembly Drawings' were not covered in the scope of FDR-CIVERC & FDR-EQP respectively. These Drawings & Designs were neither in accordance with the scope of the works and payment's terms & conditions nor were they put to use for the designated purpose. The Appellant fail to produce any satisfactory and

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prudent explanation for refuting the aforesaid allegations made in the show cause notice

- v) The Appellant has imported same set of the Drawings & Designs second time with sole intention of regularizing foreign exchange remittance made to PWIT. This was done with aim to, *inter alia*, show fulfillment of contractual obligations relating to 'terms of payment' for execution of two fraudulently entered Agreements viz. FDR-CIVERC & FDR-EQP
- vi) Overall responsibility towards integrated cold test, blowing-in operations & performance test was bestowed upon PWIT under FOB Agreement. Even then the Appellant entered into SUP Agreement for providing supervision services with PWIT. Consideration paid under SUP Agreement was fixed and was not based upon actual man-days of supervision with a view to divert a fixed sum from cost of equipment imported under FOB Agreement
- vii) In terms of Technical Specification, supervision of activity was bifurcated under two separate heads viz. 'Supervision for erection' & 'Supervision for commissioning' and PWIT & L&T were to share the said responsibility. However, the Appellant have not placed any evidence to show that the responsibility was shared by both or whether any payment has been made to L&T for the same
- viii) The Appellant has not submitted the actual scope & division of work & responsibility between the consortium partners. Supervision services received under SUP Agreement was for total supervision and nature of supervision was not clearly defined. Hence, entire scheme of contract for supervision services is fraudulently conceived and executed by diverting the consideration towards value of equipments
- ix) The Appellant has deliberately and intentionally under declared the value of goods imported for setting up of HBF, with sole intention of evading payment of duties. Due to arbitrarily splitting the lumpsum offer amount suppression of relevant facts, & willful mis-declaration, the Appellant has evaded payment of customs duty

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- x) The Appellant had availed undue benefit of concessional rate of duty on those clearances which were otherwise liable for assessment at merits rate of duty. The Appellant has imported prime capital goods for the first time cleared under guise of 'Spares' on the strength of invalid EPCG Authorizations
- xi) The department is bound to re-determine the value of imported goods if the declared value has been doubted and if it is proved that some elements of cost & services covered under fraudulently conceived and executed contacts have been knowingly split from the value of imported goods to evade duty. Therefore, the Appellant's submissions that the department has no jurisdiction to doubt the authenticity of the consideration paid for consideration mutually and freely agreed between the two parties is not incorrect.

8. As per Adjudicating authority, initially the Consortium offered lumpsum upto the stage of setting up and commissioning of HBF in India and subsequently, as an afterthought, the project was broken up and some arbitrary portion of the lumpsum consideration was apportioned over other four agreements towards post importation costs and services, with malafide intention to avoid customs duty. As per him, such agreements, namely, FDR-CIVERC Agreement, FDR-EQP Agreement, SUP Agreement and TAS Agreement are sham and the considerations for these Agreements need to be added to the value of the imported goods under the first Agreement i.e., FOB Agreement in terms of Rule 4(1) of Customs Valuation Rules, 1998 and interpretative notes for Rule 4(1).

9. The Appellant submits that the Commissioner has committed a fundamental error which goes to the root of the matter. It is submitted that since inception i.e., Enquiry Specification stage, there was division of work and consideration therefor, in respect of importation and post importation activity (viz., design & drawings, technical assistance, etc). There is not even a single document, wherein the parties had agreed for lumpsum consideration including for the services to be rendered in India. There is no single document to suggest that parties did not envisage post importation services and value therefor.

10. As narrated above, the pre-First offer (15.1.2005), First offer to Second offer to Third offer (28.7.2005) to Fourth and Final offer (29.7.2005), the parties always bargained and negotiated for post importation services and costs. Significantly, the

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show cause notice does not recognize pre-First offer even though duly submitted during investigation. In any case, undisputedly, Fourth and Final offer dated 29.7.2005 did contain the breakup.

11. Therefore, the Adjudicating authority is in error to hold that the initial lumpsum consideration was later bifurcated to gain any undue Customs Duty advantage. In view of the foregoing, the confirmed demand of Rs.32,76,67,821 is required to be set aside on merits.

12. The learned counsel appearing on behalf of the appellant TISCO submits that the Show Cause Notice has been issued on 21.8.2012, for the imports carried out under 77 Bills of Entry during the period 22.11.2006 to 22.11.2007. The demand pertaining to Bills of Entry prior to 21.8.2007 are beyond the maximum permissible period of five years. As per the appellant Rs.31.89 crores out of the total confirmed demand of Rs.42.54 crores falls under this category.

13. It is submitted that since the confirmed demand is not sustainable both on merits as well as on account of limitation, it is submitted that the Confiscation under Section 111 (m) and (o) of the Customs Act 1962 and penalties imposed under Section 114A and 114AA of the Customs Act 1962 are required to be set aside.

14. The learned Counsel appearing on behalf of appellants Larsen and Toubro Ltd and A B Das, adopts the details arguments adduced by the counsels of TISCO. He further submits that L & T has entered into the Contract with TISCO for execution of the Civil Works, erection and commissioning works purely as a business transaction. There is nothing brought in the SCN or OIO that L & T in any way was responsible for the various Agreements made out by TISCO with different parties. There is nothing to show any active participation from their side in the alleged bifurcation. Hence, the imposing of penalties under Section 112 is legally not sustainable.

15. The other Advocates / Consultants appearing on behalf of other appellants adopted the argument adduced by the counsels of TISCO and L & T and submitted that the penalties imposed on them are legally not sustainable.

16. Shri Mihir Ranjan, the Special Counsel representing the Revenue in this case has made the following submissions :

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- i) In respect of the demand on account of usage of EPCG, in view of the documentary evidence placed towards the amendments carried out by DGFT, there is no dispute that subsequently, the necessary amendments have been carried out by DGFT. Hence, he reiterates the findings of the Adjudicating authority.
- ii) In respect of the balance demand, he submits that as per the investigation carried out, it emerges that TISCO initially had finalized lumpsum amount for the entire project. However, in order to take the advantage of lower Customs Duty benefit under EPCG scheme, the sham agreements were made bifurcating the import of goods and import of services separately. The factual details prove that for conveniently lowering the Customs Duty portion, the Agreements were bifurcated by TISCO with the active participations of the parties entering into Agreement with them. He justifies the confirmed duties and confiscation ordered and the penalties imposed.

17. Heard both the sides, perused the Appeal Papers and all the other documentary evidence placed before us.

18. In respect of the demand on account of EPCG usage, the demands have been confirmed on the following two counts :

- (a) That the EPCG Licenses do not carry the 'H Blast' as the location.
- (b) Spares have been imported under EPCG which are required only subsequent to the installation of the capital goods.

19. It is observed from the documentary evidence placed before us, the appellants have sought necessary amendment for the EPCG License to include the name of 'H Blast' therein. These requests were entertained by the DGFT and on examination of the amendment letters issued by them, it clear this issue has been properly addressed by the appellant. Therefore, we hold that the confirmed demand on this account does not survive and we set aside the same.

20. In respect of the spares imported by them under EPCG, the imported assemblies, sub-assemblies, components, sub-components are held as allowed as spares under the Foreign Trade Policy at Para 9.57. Apart from this, Paragraph 6 of 5.1 of FTP, which defines the capital goods to include spares, meaning that the spares can be imported for pre-production purposes also. In order to obtain the Discharge Certificate for the EPCG License issued by the DGFT, the appellants have provided the details of spares imported by them and

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DGFT is satisfied with the imports made. Therefore, when the FTP allows such imports under the EPCG, the Customs Dept. cannot question the same and in fact have no authority to do so. The Bombay High Court in the case of **Bhilwara Spinners Ltd. Vs. Union of India – 2011(267) 49 (Bom.)**, has held as under :

18. It is not the case of the customs authorities that the decision of the licensing authorities to convert the 'zero duty EPCG licence' into '10% duty EPCG licence' was not a *bona fide* decision or the said decision was vitiated by *mala fides*. Since the policy empowers the DGFT to exempt any person from any provision of Foreign Trade Policy or any procedure, in the facts of the present case, *bona fide* decision was taken by the EPCG committee/licensing authority to convert the licence so as to relieve the petitioner from complying with condition No. 5 of the Notification No. 29/97. Therefore, the Larger Bench of the CESTAT was not justified in holding that the licensing authorities do not have the power to amend the licence retrospectively especially when the Foreign Trade Policy and the Rules framed thereunder empower the DGFT to do the needful in deserving cases.

20. Moreover, the Larger Bench decision of the CESTAT is mutually contradictory, because the Larger Bench on the one hand holds that the customs authorities cannot challenge the powers of licensing authorities to amend the licence and on the other hand holds at the instance of the customs authorities that the licensing authorities do not have the power to amend the licence retrospectively. Such an order of the CESTAT which is mutually contradictory cannot be sustained in so far as it holds that the licensing authorities do not have the power to amend the licence retrospectively.

23. For all the aforesaid reasons, we set aside the Larger Bench decision of the CESTAT dated 18-1-2008 and the Division Bench decision of the CESTAT dated 11-5-2010 to the extent they hold that the licensing authorities do not have the power to amend the licence with retrospective effect from the date of granting the licence. Consequently, the decision of the customs authorities seeking to recover duty with interest and penalty on the footing that the petitioner

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has violated condition No. 5 of Notification No. 29/97 is also quashed and set aside. [Emphasis supplied]

21. Accordingly, we hold that the confirmed demand on this account is required to be set aside and we do so.

22. In view of the foregoing, the confirmed demand of Rs.9,76,71,819 stands set aside on merits.

23. In respect of the balance confirmed demand, the main allegation of the Dept. is based on the assumption that the appellants have initially envisaged a single contract for the entire project, but in order to evade the Customs Duty payment, the contract has been divided into several sham contracts. On going through the documentary evidence, the factual matrix emerges as under :

- a) Pursuant to Enquiry Specification floated by the Appellant, '**Pre-First Offer**' dated 15.1.2003 was submitted. In the 'Pre-First Offer', civil and structural design work for HBF was indicated separately under the scope of work. This offer contained price break up for imported supplies, imported services, indigenous supplies and indigenous services. [*Copy of 'Pre-first Offer' dated 15.1.2003 is enclosed as Exhibit-A1 in Vol-9, pages 1-4*].
- b) Subsequently, PWIT vide their letter dated 30.6.2005 submitted its '**First Offer**'. [*Copy of First Offer is enclosed as Exhibit B-1, Vol-9, pages 6-11*].
- c) A revised proposal bearing no. SBF/051-05 dated 25.7.2005 ('**Second Offer**') was submitted by PWIT. [*Copy of the of Second Offer is enclosed as Exhibit B-2, Vol-9, pages 12-21*].
- d) On account of further discussion and amendment in scope of work, "**Third Offer**" dated 28.7.2005 was submitted by PWIT along with Responsibility Matrix and price summary as per division of work under Attachment-A. [*Copy of the of Third Offer is enclosed as Exhibit B-3, Vol-9, pages 22-44*]. This Third Offer provided for division as import of supply and services, indigenous supply and services and supply of spare parts.
- e) The said Responsibility Matrix and detailed Technical Specification No. SBF/EIM/29/EC dated July, 2005 was finalized and signed by authorized representatives of the Appellant, PWIT, L&T and PWIN on 29.7.2005. [*Copy of said Technical Specification along with Responsibility Matrix is enclosed as Exhibit-C, Vol-9 & 10, pages 49-693*].

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- f) Thereafter, "**Fourth Offer**" dated 29.7.2005 was received by the Appellant with revised price list. This was **Final Offer**. [*Copy of Fourth Offer is enclosed as Exhibit B-4, Vol-9, pages 45-48*].
- g) Just like Third Offer, the Fourth and Final Offer also provided for division as import of supply and services, indigenous supply and services and supply of spare parts.
- h) Vide letter dated 1.8.2005, the Appellant issued offer acceptance letters ('**Letters of Intent**') to concerned parties viz., PWIT, L&T and PWIN, which was subsequently accepted by the respective parties. Pursuant to acceptance of the Letter of Intent, the Appellant signed six agreements with PWIT, based on the Technical Specification dated July 2005 and Fourth Offer. [*Copy of three Letters of Intent are enclosed as Exhibit E-1, E-2 and E-3, Vol-1, pages 700-702*].

24. From the above chronological details, it is clear that right from the beginning, even at the stage of pre-first Offer dated 15.01.2003, the clear demarcation of service, purchase, scope of work was available at all stages. This was the case with all the other intervening Offer letters till the Final Offer dated 29.7.2005. Thus, it shows that proper planning was made for this project clearly demarcating the import of goods, purchase of indigenous goods, involvement of service works etc. The Final Six Agreements dated 1.8.2005 are the result of the detailed discussions and planning undertaken during the period 15.1.2003 till 1.8.2005.

25. It is on record that in respect of 4 Agreements, since the same pertained to supply of designs and drawings, the appellant has paid the Service Tax on the consideration paid for them. When Service Tax has been discharged on such designs and drawings and the same has been accepted by the Revenue without questioning the Service Tax being paid by the appellant, the Revenue cannot term the same contract items as goods so as to demand the Customs Duty, as has been done in this case.

26. The six Agreements were approved by the Managing Director on 6.9.2005 and signed by Mr. R. P. Singh on behalf of the Appellant on a date between 7th and 9th September 2005. However, the date of signing/witnessing of these agreements was inadvertently indicated as 1.8.2005 by a handwritten entry made by Mr. P. Jayaram of the Appellant-company on the Agreements. The Revenue is trying to

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make a big issue out this, which at the most would be some kind of clerical error, when the entire pre-first offer to the Fourth Offer details are carefully viewed.

27. In view of the foregoing, we conclude that the Revenue has built the present case purely on presumptions and assumptions basis, without actually verifying the documentary evidence placed before them. The Adjudicating authority has failed to appreciate these documentary evidence and has confirmed the demand by simply relying the assumptions made during the issue of the SCN. Hence, we hold that the confirmed demand of Rs. 32,76,67,821 is legally not sustainable and we set aside the same.

28. The appellant has also raised the point about the demand being issued for the period which is beyond even the extended period of five years. They have submitted that the Show Cause Notice has been issued on 21.8.2012, for the imports carried out under 77 Bills of Entry during the period 22.11.2006 to 22.11.2007. The demand pertaining to Bills of Entry prior to 21.8.2007 are beyond the maximum permissible period of five years. As per the appellant Rs.31.89 crores out of the total confirmed demand of Rs.42.54 crores falls under this category. It is not the case of the Revenue that the Export Obligations have not been fulfilled by the appellant. The Notification No.55/2003 Cus dated 1.4.2003, speaks of Bond to be executed by the importer using the EPCG. This Bond is to ensure that the Export Obligations under the EPCG scheme are fulfilled. In the present case, the issue is that of valuation and not that of the appellant's non-fulfillment of the Export Obligations. Therefore, the imports done under 77 Bills of Entry are not covered by any Bond. Hence, the demand should have been made within one year from the date of Bill of Entry. Only in case of any suppression, the period of 5 years could be invoked. In the present case, the appellants have placed all the documents before the Appraising Officer and the goods have been cleared in the normal course. There is nothing to suggest from the present proceedings that the goods were provisionally assessed. Further, as all the transactions have been carried out with clear records for all the pre-offers and subsequent Four Offers in a transparent manner, we do not see any suppression coming out in the entire transaction. At the most, it would amount a proper tax-planning, keeping in view the best interest of the appellant company. Nothing with any substance has been brought on record that the appellant has indulged in any suppression, so as to invoke the extended period demand. Hence, we hold that

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the confirmed demand for the extended period is legally not sustainable on account of limitation also. Hence, we allow the Appeal even on account of Limitation.

29. As has been held supra, the confirmed demands do not sustain both on merits as well as on account of limitation against the main appellant TISCO. Hence, we hold that the confiscation ordered and penalties imposed on them also do not survive.

30. No case has been made against the other appellants to allege that they have had any role in the transactions carried out by TISCO. So far as TISCO is concerned, we have held that the confirmed demands do not survive. As a result the penalties imposed on the other appellants are also set aside, allowing their appeals.

31. To summarize :

- (a) The confirmed demands against TISCO do not survive both on account of merit as well as on account of limitation.
- (b) The confiscation order stands set aside.
- (c) The penalties imposed against TISCO and all the other appellants stands set aside.

32. The impugned Order is set aside and appeals are allowed with consequential relief, if any, as per law.

(Order was pronounced in the open Court on 19.10.2023)

Sd/-

(R. Muralidhar)
Member (Judicial)

Sd/-

(Rajeev Tandon)
Member (Technical)

Pooja