IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO.32 OF 2015
AND
APPEAL NO.47 OF 2015

Dated : 04TH JULY, 2017.

Present: Hon'ble Smt. Justice Ranjana P. Desai, Chairperson
Hon'ble Shri I.J. Kapoor, Technical Member.

IN THE MATTER OF:

TALWANDI SABO POWER LIMITED)
Banwala, Mansa-Talwandi Sabo)
Road, District: Mansa, Punjab – 151)
302.) **... Appellants**

AND

1. **PUNJAB STATE ELECTRICITY)**
REGULATORY COMMISSION)
SCO No. 220-221, Sector 34-A,)
Chandigarh – 160 009.)
(Through the Registrar))

2. **PUNJAB STATE POWER)**
CORPORATION LIMITED,)
The Mall, Patiala, Punjab –)
147 001)

3. **THE SECRETARY)**
Department of Power,)
Government of Punjab, Mini)
Secretariat, Sector 9, Chandigarh)
– 160 009) **... Respondents**

Counsel for the Appellant(s) : Mr. Sujit Ghosh
Mr. Shashank Shekhar
Mr. Krishna Rao
Mr. P.C. Sen
Mr. Udayan Verma
Mr. Sarvesh Mishra

Counsel for the Respondent(s) : Ms. Shikha Ohri
Mr. Matrugupta Mishra
Mr. Nimesh Kumar Jha for R-1

Mr. M.G. Ramachandran
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Ms. Anushree Bardahn
Mr. Shubham Arya for R-2

APPEAL NO. 47 OF 2015

IN THE MATTER OF:

1. **NABHA POWER LIMITED**)
Aspire Tower,, 4th Floor, Plot No.)
55, Industrial and Business Park,)
Phase-I, Chandigarh – 160 002.)

2. **L&T POWER DEVELOPMENT LTD.**)
Powai Campus, Gate No.1, C Building, 1st Floor, Saki Vihar Road, Mumbai – 400 072.) **... Appellants**

AND

1. **PUNJAB STATE POWER CORPORATION LIMITED**)
(A successor entity of Punjab State Electricity Board), Through its Engineer-in-Chief, Thermal)

Designs, PSPCL, Shed No. T – 2 ,)
Thermal Design Complex, Patiala)
– 147001)

2. **PUNJAB STATE ELECTRICITY REGULATORY COMMISSION**)
Through its Registrar)
SCO No. 220-221, Sector 34-A,)
Chandigarh – 160022) **... Respondents**

Counsel for the Appellant(s) : Mr. C.S. Vaidyanathan, Sr. Adv.
Mr. S. Ganesh, Sr. Adv.
Mr. Aniket Prasoon
Mr. Abhishek KUmar
Mr.Kush Saggi

Counsel for the Respondent(s) : Mr. M.G. Ramachandran
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Ms. Anushree Bardahn
Mr. Shubham Arya for R-1

Ms. Shikha Ohri
Mr. Matrugupta Mishra
Mr. Nimesh Kumar Jha for R-2

J U D G M E N T

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI – CHAIRPERSON

1. In Appeal No.32 of 2015, the Appellant - Talwandi Sabo Power Limited (**"TSPL"**) has challenged Order dated 02/12/2014 passed by the Punjab State Electricity Regulatory Commission (**"the State Commission"**). In Appeal No.47 of

2015 Nabha Power Limited (**"NPL"**) and L&T Power Development Ltd. (**"L&T"**) have challenged Order dated 16/12/2014 passed by the State Commission. TSPL and NPL and L&T have also been referred to as the Appellants in this judgment at some places for convenience.

2. These two appeals can be disposed of by a common judgment because the major issues involved in them are the same, though there are some differences in their factual matrix. The relevant provisions of the Power Purchase Agreements (**"PPAs"**) and of Request for Proposal (**"RFP"**) and Request for Qualification (**"RFQ"**) are similar.

3. We shall first narrate the facts of TSPL's Appeal No.32 of 2015 as disclosed in the appeal memo and also briefly state TSPL's case as stated therein:

(a) TSPL is a company incorporated under the provisions of the Companies Act 1956. It is a power generating company. TSPL was incorporated as a Special

Purpose Vehicle (**"SPV"**) by the erstwhile Punjab State Electricity Board (**"PSEB"**) to establish a power project in the State of Punjab (**"TSPL Project"**). M/s Sterlite Energy Limited (**"SEL"**) was a company incorporated under the Companies Act, 1956 which has merged in Sesa Sterlite Limited ("**Sesa Limited"**) pursuant to the Madras High Court's order. SEL participated in the Tariff Based International Competitive Bidding Process conducted by the PSEB for development of TSPL Project and was selected as the successful bidder. On being selected as the successful bidder, the entire shareholding of the SPV, i.e. TSPL was transferred by PSEB to SEL.

(b) Respondent No.2 - Punjab State Power Corporation Limited (**"PSPCL"**) is an entity succeeding the erstwhile PSEB and is vested with the functions of generation and distribution of electricity in the State of Punjab. Respondent No.3 is the Secretary to the Government of Punjab in the Department of Power

who has been responsible for the grant of essentiality certificate to TSPL.

(c) TSPL as SPV and authorised representative of PSEB, invited bids, in relation to TSPL Project, in terms of the Bidding Guidelines dated 19/01/2005 which required that the bidding has to be necessarily by way of International Competitive Bidding ("ICB"). Accordingly on 25/09/2007, TSPL acting as the authorised representative of PSEB, issued Request for Qualification (**"RFQ"**) for selection of the developer through Tariff Based International Competitive Bidding Process for procurement of power on long term basis from TSPL Project. The relevant dates of the bidding process are as follows:

Request for Qualification and Request for Proposal notified and circulated by the Respondent No. 2 through its SPV	25.09.2007 & 18.01.2008
Pre-bid conference held	22.05.2008
Bid submitted by SEL	23.06.2008
Bid deadline	23.06.2008
Issuance of Letter of Intent to SEL	04.07.2008

Share Purchase Agreement executed for transfer of shares in the SPV by the Respondent No. 2 to SEL	01.09.2008
Execution of Power Purchase Agreement between the Respondent No. 2 and the Appellant	01.09.2008

(d) The bid document included the RFP and the RFQ and the draft PPA to be entered into between the parties. In terms of the RFP, the prospective bidders were required to take into account all applicable laws while submitting the bid. The relevant extracts from the RFP are as under:

> ***Para 2.7.2.2 of RFP*** *– "In their own interest, the Bidders are requested to familiarize themselves with the Electricity Act, 2003, the Income Tax Act, 1961, the Companies Act, 1956, the Customs Act, the Foreign Exchange Management Act, IEGC, the regulations framed by regulatory commissions and all other related acts, laws, rules and regulations prevalent in India…….The Bidder undertakes and agrees that before submission of its Bid all such factors, as generally brought out above, have been fully investigated and considered while submitting the Bid."*
>
> ***Para 3, Annexure 9 of RFP – Familiarity With Relevant Indian Laws & Regulations***
>
> *"We confirm that we have studied the provisions of relevant Indian laws and regulations as required to enable us to quote for this Bid and execute the RfP Project Documents, if awarded. We further undertake and agree that all such factors as*

mentioned in Clause 2.7.2 of RfP have been fully examined and considered while submitting the Bid."

(e) The PPA dated 01/09/2008 signed between PSPCL and TSPL provided for adjustment in tariff on account of any Change in Law occurring after seven days prior to bid deadline i.e. 16/06/2008 (the cut-off date) which has an impact on the cost and expenditure in the establishment and/or operation of the power project.

(f) Certain important definitions and clauses of the PPA need to be quoted.

"'Bid Deadline' shall mean the last date for submission of the Bid in response to the RfP, specified in Clause 2.8.1 of the RfP.

'Law' means, in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the Appropriate Commission;

.....

13.1 Definitions

In this Article 13, the following terms shall have the following meanings:

13.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:

(i) the enactment, brining into effect, adoption, promulgation, amendment, modification or repeal, of any law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement, or (iv) any change in the (a) Declared Price of Land for the Project or (b) the cost of implementation of the resettlement and rehabilitation package of the land for the Project mentioned in the RfP or (c) the cost of implementing Environmental Management Plan for the Power Station (d) Deleted but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission.

……

13.2 Application and Principles for computing impact of Change in Law

While determining the consequences of Change in Law under this Article 13, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff

payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such Change in Law has not occurred."

(g) It is the case of TSPL that in line with the requirement of the RFP, SEL factored various available benefits including *inter alia D*eemed Export benefits under the Foreign Trade Policy while submitting its bid for TSPL Project.

(h) The Foreign Trade Policy (**"the FTP"**) was formulated by the Central Government in terms of the powers conferred by Section 5 of the Foreign Trade (Development and Regulation) Act 1992 (**"the FTDRA"**) with a view to facilitating import and augmenting export. For the purposes of this appeal, the relevant FTP is FTP 2004-2009 as effective from 01/04/2008. Chapter 8 of the FTP categorizes supply of goods to certain specified projects as "Deemed Export" and provides for various fiscal benefits for such supplies.

(i) Supplies to power projects had also been categorized as Deemed Export. While supplies to the Mega Power Projects were covered under Article 8.2 (f) of the FTP, supplies to Non-Mega Projects were separately covered under Article 8.2 (g) of the FTP.

(j) Admittedly at the time of bidding, TSPL Project was not entitled to Mega Power Project status owing to the conditions contained in the then Mega Power Policy which *inter alia* required sale of power to more than one State. However, TSPL Project qualified as a Non-Mega Power Project and was *inter alia* eligible to benefits under the Deemed Export Scheme under the FTP as well as concessional rate of customs duty under the Project Imports Scheme under the Customs Tariff Act.

(k) According to TSPL at the bidding stage, as per the provisions of the FTP the supplies to TSPL Project

qualified as "Deemed Export" under Article 8.2 (g) of the FTP read with Article 8.4.4.(iv) of the FTP. Such an interpretation was duly endorsed by the Director General of Foreign Trade (**"DGFT"**) at that stage. According to TSPL, SEL legitimately factored in the Deemed Export benefits while quoting its bid for TSPL Project. TSPL contends that the same was also in line with the practice being followed by DGFT authorities for years whereby the Deemed Export benefits were being granted to the Non-Mega Power Projects. Subsequently, Mega Power Policy was amended whereby the condition of inter-State sale of electricity was done away with. TSPL applied to the Government of India for being designated as a Mega Power Project and was granted Mega Power Project status on 19/08/2010. TSPL being entitled to the Mega Power Project status opted to avail of the benefits under the said scheme.

(l) As per the procedure TSPL vide letter dated 30/08/2010 applied for Essentiality Certificate for obtaining the customs duty benefits under the Mega Power Project Policy. On the said letter, TSPL inserted the following hand written note:

> *P.S: The benefit of Mega status would be passed on as per clause no.13.2 A of Article 13 of the PPA.*

TSPL also furnished to PSPCL undertaking dated 13/09/2010 stating that PSPCL should follow the provisions of Article 13 of the PPA subject to the passing on the Mega Power Project benefits to the State and that TSPL shall abide by the same. Similar letters were issued by TSPL thereafter as according to the TSPL, PSPCL made the furnishing of the undertaking a precondition for any further Essentiality Certificates. It is the case of TSPL that TSPL was forced to give the said undertakings because Essentiality Certificates would have been withheld causing serious financial loss to TSPL.

(m) On 15/03/2011 meeting of the Policy Interpretation Committee (**"PIC"**) was held in which a decision was taken *inter alia* to withdraw Deemed Export benefits available to Non Mega Power Projects. Circulars dated 27-28/04/2011 were issued accordingly. The regional authorities were instructed not to make any further payments; keep the matter in abeyance and initiate recovery proceeding in respect of cases where Deemed Export benefit was disbursed.

(n) Thereafter, vide Notification dated 28/12/2011, the Central Government amended Article 8.4.4 (iv) of the FTP and withdrew the benefit of duty drawback given to the goods supplied to Non-Mega Power Projects. The said notification clarified that supplies to Non Mega Power Project shall henceforth be entitled to benefits of Deemed Exports only under Article 8.3 (a) of the FTP i.e. advance authorization. By Notification dated 21/03/2012, the above benefit was also

withdrawn, whereby the supplies to Non-Mega Power Projects were categorized under the 'Ineligible Category' not entitled to any Deemed Export benefits.

(o) The action of the DGFT of withdrawing the Deemed Export benefits retrospectively and initiating recovery proceedings is admittedly under challenge before the various High Courts.

(p) It is TSPL's case in short that the withdrawal of Deemed Export benefits constituted a 'Change in Law' post cut off date i.e. 16/06/2008. However, as TSPL was granted the Mega Power Project status it was not largely affected by such withdrawal of benefits.

(q) TSPL's letters addressed to PSPCL being letters dated 08/12/2011, 04/11/2011, 21/12/2011, 25/04/2012, 05/10/2012 and 17/04/2013 indicated that TSPL was not inclined to provide

undertakings as required and TSPL took a stand that grant of Mega Power status and the benefits accrued to TSPL was not a Change in Law under Article 13 of the PPA and TSPL was not liable to pass on the benefits received to PSPCL in the tariff. PSPCL therefore filed a petition being Petition No.41 of 2013 under Section 86 (1) (f) of the said Act. Following prayers were made:

a) declare that the grant of the mega power status to the Respondent No.1 amounts to a Change in Law in terms of Article 13 of the PPA between the parties;

b) declare that the Respondent No.1 is liable to pass all the benefits(for Off-shore and On-shore supplies) to PSPCL that ought to have accrued to the Respondent No.1 on account of the grant of the mega power status;

c) direct the Respondent No.1 to tender true and full accounts of all benefits (for Off-shore and On-shore supplies) that ought to have accrued to the Respondent No.1 on account of the grant of the mega power status;

Respondent No.1 in the petition was the TSPL.

4. The State Commission by its order dated 27/12/2013 held that the benefits under the FTP were not available to the

TSPL Project and therefore TSPL did not rely upon the FTP for claiming benefits. The State Commission further held that the interpretation given by PIC was clarificatory in nature. It was to clarify that under the FTP as it existed Non Mega Power Projects were not eligible to Deemed Export benefits and since these benefits were not available to TSPL there is no question of setting off those benefits against the benefits which were received by TSPL on account of grant of Mega Power status. The State Commission further held that grant of Mega Power status to the TSPL Project amounts to 'Change in Law' within the meaning of Article 13 of the PPA and TSPL is liable to pass on all the benefits accrued to it to PSPCL. PSPCL's petition was thus disposed off.

5. Being aggrieved by this order TSPL and SEL filed Appeal No.55 of 2014 before this Tribunal. By its judgment dated 25/07/2014 this Tribunal remanded the matter to the State Commission noting its decision in Appeal No.29 of 2013, where in similar fact situation it had remanded the matter to the State Commission. The State Commission was directed to

consider the issue regarding 'Change in Law' with respect to the benefits under the FTP.

6. The State Commission heard the matter as directed. By the impugned order dated 02/12/2014, the majority of the Members of the State Commission held that the Deemed Export benefits under the FTP were not available to TSPL as on the cut-off date i.e. 16/06/2008. The impugned order further states that in view of this decision, it has not examined whether the clarifications dated 27-28/04/2011 and subsequent Notifications dated 28/12/2011 and 21/03/2012 issued by the DGFT amount to 'Change in Law' under Article 13 of the PPA. The State Commission has further observed that TSPL was liable to pass on the benefits actually availed of under the FTP to PSPCL.

7. We shall now turn to the facts of Appeal No.47 of 2015 and briefly state the case of the Appellants therein as disclosed in the memo of appeal.

(a) Appellant No.1 - Nabha Power Limited (**"NPL"**) is a Company, incorporated under the Companies Act, 1956. It has been set up as SPV by PSEB for developing a 2x700 MW thermal based project at Rajpura (**"the Project"**). The entire shareholding of NPL was subsequently transferred to Appellant No.2 - L&T Power Development Limited (**"L&T"**) after having been selected as the successful bidder for the development of the Project through NPL under a competitive bidding process held by PSEB. Respondent No.1 is PSPCL.

(b) The erstwhile PSEB intending to procure power through competitive bidding, under Section 63 of the Electricity Act and the Competitive Bidding Guidelines, decided to invite bids (under Case-2) from power project developers to set up the Project. On 10/06/2009, NPL acting as an authorised representative for PSEB issued RFQ and RFP for selection of a developer through Tariff Based

Competitive Bidding Process for procurement of power on long term basis from power station to set up the Project.

(c) It is NPL's case that in terms of clauses 2.7.2.2 and 2.7.1.4(3) of RFP, the bidder was required to consider various fiscal benefits and concessions available to an entity executing a thermal power project of over 1000 MW having the specifications set up in the PPA. According to NPL, in this regard two policy regimes, first under the FTP and the other under the Mega Power Policy, 2009 were considered by L&T which provided for various indirect tax benefits.

(d) Until 01/10/2009, under the Mega Power Policy, 2006, NPL's Project was termed as a Non-Mega Power Project. On account of modification of Mega Power Policy, 2006, on 01/10/2009, the Union Cabinet extended the benefits under the Mega Power Policy to thermal power project of 1000 MW or above

irrespective of whether it was supplying power to one or more than one State. In view of this development, L&T submitted letter dated 06/10/2009 to PSPCL stating that the bid was being submitted in light of the changes approved by the Union Cabinet in the Mega Power Policy, 2006 and that L&T had also taken into consideration the benefits associated with Mega Power status for the purpose of evaluation of its Project. PSPCL asked L&T to withdraw the said letter stating that it was extraneous to the requirements of the bid documents. L&T thereafter submitted the bid on 06/10/2009. Pursuant to the bid process, L&T was selected as the successful bidder. The Project was awarded to L&T vide Letter of Intent dated 19/11/2009. The PPA dated 18/01/2010 was signed between NPL and PSPCL.

(e) On 30/07/2010, NPL's Project got Mega Power status. Thereafter, NPL requested the Department of Energy, Government of Punjab to issue Essentiality

Certificate which was required to avail of benefits under the Mega Power Policy while importing the goods for the Project. NPL requested PSPCL to issue appropriate recommendation. According to NPL, for grant of Essentiality Certificate, PSPCL insisted on L&T to furnish an affidavit undertaking to pass on the benefits accrued to the Project on account of becoming a Mega Power Project. It is the case of NPL that it clarified to PSPCL that it had already considered the benefits associated with Mega Power status and passed on the fiscal benefits to PSPCL by quoting lowest tariff. Hence, there was no basis for submission of any affidavit to ensure passing of such benefits at a future date. It is NPL's case that PSPCL continued denying the issuance of the recommendation to the Government of Punjab. Considering the urgent requirement of the imported goods for construction of the Project, it had no option but to issue the undertaking. NPL vide its letter dated 23/05/2011 made it clear that it was

submitting undertaking in the specified format under protest. Thereafter, Essentiality Certificates came to be issued.

(f) According to NPL, it proceeded to fulfil the necessary formalities for claiming the benefits available under the Mega Power Policy, 2009. However, PSPCL claimed that the benefits under the modified Mega Power Policy should be passed on to PSPCL. NPL pointed out to PSPCL that similar fiscal benefits were available to its Project under the FTP as a Non Mega Power Project at the time of bidding on standalone basis regardless of its status under the Mega Power Policy, 2009.

(g) L&T was entitled to Deemed Export benefits for the Project as a Non Mega Power Project under the FTP prior to bidding in terms of Para 8.3 of the FTP. Combined reading of Para 8.4.4 (i) and Para 8.4.4(iv) of the FTP made it clear that benefits listed in Paras

8.3(a) and (b) are available to Non Mega Power Projects. They are as under:

a) Advance Authorization/Advance Authorization for annual requirement/DFIA; and

b) Deemed Export Drawback.

As far as benefits under Para 8.3(c) (i.e. Terminal Excise Duty [TED]) are concerned, the Non Mega Power Projects were also entitled to exemption/refund of TED as the same was allowed by the DGFT for supplies made to Non Mega Power Projects under Para 8.3(c) of the FTP. Thus all the benefits under Para 8.3 of the FTP were available to the Project as a Non-Mega Power Project at the time of bidding.

(h) However, the benefits under the FTP which were available to NPL's Project at the time of bidding, irrespective of it being a Mega Power Project have since been withdrawn by the DGFT. The DGFT changed the interpretation of the relevant provisions

of the FTP restricting the refund of TED to a Non Mega Power Project. Two notifications were issued which disentitled Non Mega Power Projects from claiming benefits under the FTP which they were allowed to avail at the time of bidding. It is NPL's case that the aforesaid withdrawal under the FTP regime on standalone basis entitled it to claim under the 'Çhange in Law' provision in terms of Article 13.1.1.(ii) of the PPA wherein a change in interpretation of any law *inter alia* by an Indian Government Instrumentality is covered.

(i) By virtue of the PIC decision taken in PIC meeting held on 15/03/2011 TED benefits that were available to Non Mega Power Project under both Para 8.3(b) and Para 8.3(c) were withdrawn. The DGFT gave effect to its decision by letter dated 27-28/04/2011 which provided that no Deemed Export benefit should be given to non-eligible supplies. It is NPL's case that the minutes of the meeting dated

15/03/2011 and the DGFT's letter are covered under the definition of "Change in Law" under Article 13 of the PPA. The Ministry of Commerce and Industries issued two notifications which amended the FTP. The effect of these notifications was to completely efface all the Deemed Exports benefits available to Non Mega Power Projects.

(j) According to NPL, Para 2.3 of the FTP postulates that the DGFT is the final authority for interpreting the FTP and its decision would be final and binding. Therefore change in interpretation of the FTP provisions by the DGFT should be regarded as "Change in Law" as per the PPA. Further, the amendments introduced by Ministry of Commerce and Industries will also fall within the ambit of "Change in Law" provision.

(k) In the light of "Change in Law" claim made by PSPCL on the basis of Mega Power Policy 2009, NPL made the "Change in Law" claim on the basis of changes in

the FTP provisions which resulted in withdrawal of fiscal benefits and clarified that the net effect on account of withdrawal of such benefits to a Non Mega Power Project is not being felt by the Project under the Mega Power Policy 2009. NPL by its letter dated 27/01/2012 requested PSPCL to consider its "Change in Law" claim on the basis of withdrawal of the fiscal benefits available to the Non Mega Power Projects under the FTP after conclusion of the bidding process and accordingly, revisit its "Change in Law" claim based on accrual of the Mega Power Policy 2009 benefits post submission of the bid, from the aspect of scrutinizing the net change in the capital cost of the Project. PSPCL vide its letter dated 12/03/2012 replied that there has been no "Change in Law" effected by the DGFT, since Non Mega Power Projects were never entitled to benefits under the FTP.

(l) The Appellants therefore filed a petition before the State Commission on 22/05/2012 seeking resolution of the dispute. The Appellants prayed for a declaration that they are not required to pass on any benefits under Article 13 of the PPA on account of implementation of Mega Power Policy 2009 as they had already considered and factored in the benefits available to the Project under the said policy on the basis of the Union Cabinet's policy decision dated 01/10/2009 and had informed PSPCL about the same vide its letter dated 06/10/2009. The Appellants' alternate claim was based on the premise that in the event the aforesaid alternative prayer is not granted, they would at least be entitled to set-off and adjustment of the value of FTP benefits which were available to the Project as a Non-Mega Power Project at the time of bidding which have been subsequently withdrawn by way of various "Changes in Law" and accordingly, they should be allowed to make a "Change in Law" claim against PSPCL on the

basis of withdrawal of benefits under the FTP. We may quote the relevant prayers:

> *"a) to declare that that the Union Cabinet's decision dated 01/10/2009 modifying the Mega Policy 2006 reported vide Press Information Bureau on the same date does not amount to 'Change in Law' under Article 13 of the PPA;*
>
> *b) following the declaratory relief sought by the Petitioners, to hold that consequential relief as set out under Article 13.2 of the PPA has not triggered and no consequential benefits under Article 13 have to be passed on to the Respondent by the Petitioner under the PPA on account of Union Cabinet's decision to change the Mega Policy 2006 dated 01/10/2009;*
>
> *c) in alternative, if reliefs sought under para (a) and (b) above are not granted then to direct and allow that the Petitioners shall be entitled to claim 'Çhange in Law' against the Respondent's claim on the basis of withdrawal of fiscal benefits which were available to the Project under the FTP on the date of bidding on standalone basis, without considering Mega Policy, 2009;"*

8. The State Commission by its order dated 12/11/2012 disposed of the petition. The State Commission held that the Appellants claiming the benefits under the Mega Power Policy itself sufficiently establishes that the benefits under the FTP were not applicable to their project. The State Commission observed that a holistic reading of the relevant extracts of FTP

2009-14, PIC decision dated 15/03/2011 and relevant circulars and notifications make it clear that the benefits under the FTP were not available to NPL's Project and for this reason the Appellants opted for the identical benefits purported to be available under the Mega Power Policy on the date of bidding. The State Commission further held that if it is assumed for the sake of argument, that benefits were available to NPL's Project under the FTP on the date of bidding, the Appellants had forfeited their rights to subsequently claim the benefits under the FTP by opting out of the same having claimed the benefits under the Mega Power Policy.

9. Being aggrieved by this order, the Appellants filed Appeal No.29 of 2013 in this Tribunal. By its judgment and order dated 30/06/2014 this Tribunal set aside the State Commission's order in respect of the alternative claim alone. This Tribunal remanded the matter to the State Commission with following direction:

> *"(ii) We find that the State Commission has not analysed the question as to whether the benefits under the Foreign Trade*

Policy were available to the Appellant as on the cut off date (2.10.2009) which were subsequently withdrawn by the Govt. of India by clarification/notification and whether this would amount to 'Change in Law' under Article 13 of the PPA. Accordingly, we remand the second issue regarding 'Change in Law' with respect to benefits under Foreign Trade Policy to the State Commission for fresh consideration and decide the same in accordance with the law in light of the submissions made by both the parties without being influenced by its earlier decision."

10. By the impugned order dated 16/12/2014 the State Commission held that the Deemed Export benefits were not available to the Appellants as on the cut-off date i.e. 02/10/2009 and, hence, it had not examined whether the clarifications dated 27-28/04/2011 and the subsequent notifications issued by the DGFT amount to "Change in Law" under Article 13 of the PPA. The State Commission held that the Appellants are liable to pass on the benefits actually availed under Mega Power Policy, 2009 to PSPCL. Hence, these appeals.

11. We have heard Mr. Ghosh, learned counsel appearing for TSPL and Mr. Vaidhyanathan and Mr. Ganesh, Senior Advocates appearing for NPL. We have also heard Mr.

Ramachandran, learned counsel appearing for PSPCL. We have also heard Mr. Shikha Ohri, learned counsel appearing for the State Commission, who has supported the impugned judgment. We have also perused the written submissions filed by them. Many of the submissions advanced on behalf of the Appellants are common. We shall therefore avoid repetition while reproducing them.

12. Gist of the submissions of Mr. Ghosh counsel appearing for TSPL is as under:

(a) The remand order of this Tribunal required the State Commission to examine whether the benefits under the FTP were available to the Appellants as on the cut-off date; whether the said benefits were withdrawn by the Government of India by a clarification/notification and whether such withdrawal would amount to Change in Law under Article 13 of the PPA. The State Commission travelled beyond this order and unnecessarily entered

into analysis of the FTP provisions and wrongly relied on the DGFT clarification post cut-off date. The dispute pertained to interpretation of Change in Law clause and not grant or denial of Deemed Exports benefits to a Non Mega Power Project.

(b) So long as there existed an interpretation from the office of the DGFT, an Indian Government instrumentality whose decision is final as per para 2.3 of the FTP as on the cut-off date under which Deemed Export benefits were granted to similarly situated Non Mega Power Projects and such interpretation stood altered post the cut-off date, such alteration tantamounts to Change in Law under the PPA.

(c) Deemed Export benefits to Non Mega Power Projects were withdrawn pursuant PIC Minutes of 15/3/2011. The Appellants having factored the Deemed Export benefits as on the cut-off date as per Para 2.7.2.2 of the RFP were no more eligible to such Deemed Export

benefits post the cut-off date. Such a loss of benefit was clearly offset by the grant of fiscal benefits under the Mega Power Policy and accordingly the loss stood neutralized by the gain. No additional benefits were conferred on the Appellants which bettered their economic position. Therefore, reduction in tariff is not warranted.

(d) Similar Non Mega Power Projects were granted Deemed Export benefits as on cut-off date on the basis of Circular dated 05/12/2000 and Minutes of Norms Committee Meeting dated 15/04/2008.

(e) Interpretation of the Deemed Export provisions by the office of the DGFT as on the cut-off date vide Circular dated 05/12/2000 and implementation of the said interpretation by the office of the DGFT by actual grant of Deemed Export benefits to Non Mega Power Projects by the DGFT, makes it clear that as on the cut-off date Deemed Export benefits were available on

goods manufactured and supplied to both Mega as well as Non Mega Power Projects.

(f) DGFT's order dated 24/09/2013 in ***Alstom case*** was relied upon without giving notice to the Appellants. The said order not being appealable a writ petition was filed in the Gujarat High Court challenging the same. It was transferred to the Supreme Court vide TC (Civil) No.8914 of 2014. The State Commission therefore wrongly held that this order has assumed finality.

(g) The State Commission failed to consider cases where on the basis of 2000 circular Deemed Export benefits were granted insofar as Non Mega Power Projects are concerned. The State Commission also failed to take note of the Minutes of the Meeting of 2008 of the DGFT.

(h) Neither the decision of the Gujarat High Court in ***Alstom India Ltd v. UOI***[1] nor the decision of the Delhi High Court in ***Simplex Infrastructures Ltd. v. UOI***[2] was considered in the right perspective.

(i) The submission that PIC Minutes of March 2011 was the correct interpretation of the FTP and it being a clarification must have retrospective effect, and that earlier interpretation, if any, was erroneous and contrary to the scheme of the FTP deserves to be rejected. Existence of the interpretation, correct or otherwise, of the DGFT as on cut-off date is important. If that interpretation has undergone a change after the cut-off date that is a Change in Law.

(j) Without prejudice to this submission it is submitted that to substantiate its case about the alleged incorrectness of the interpretation of the DGFT as it existed on the cut-off date complex Central Excise

[1] -2014 (301) ELT 446 (Guj)
[2] 2016 (342) ELT 59 (Del.)

Laws are sought to be applied to the FTP which is wrong.

(k) The meaning of the term "manufacture" under a particular statute cannot be applied to another statute. ***Qazi Noorul H.H H Petrol Pump & Anr. v. Dy. Director, ESI Corporation***[3]

(l) Following decisions are relevant on this point: ***Ahmedabad Manufacturing & Calico Printing Co. Ltd. v. S.G. Mehta, Income Tax Officer***[4], ***Sonebhadra Fuels v. Commissioner of Trade Tax UP*** [5], ***Ashirwad Ispat Udyog & Ors. v. State Level Committee***[6] , ***CIT v. Venkateshwara Hatcheries Pvt. Ltd.***[7], ***Bangalore Turf Club v. Regional Director, Employees State Insurance Corporation***[8], ***Apex Cooperative Bank of Urban***

[3] 2009 (24) ELT 481 (SC).
[4] (1963) Suppl. 2 SCR 92
[5] (2006) 7 SCC 322
[6] (1998) 8 SCC 85
[7] (1999) 3 SCC 632
[8] (2009) 15 SCC 33

Bank of Maharashtra & Goa Ltd v. Maharashtra State Cooperative Bank Ltd. & Ors[9].

(m) Borrowing a definition from one statute into another cannot be permitted.(***Apex Cooperative Bank, Venkataeshwar Hatcheries.)***

(n) The FTDRA, the FTP and the Handbook of Procedure ("**HOB**") together, are a complete code in themselves. They cannot be influenced or controlled by legislations/notifications issued by the Ministry of Finance/Department of Revenue, such as the Central Excise Act. (***Greatship India Ltd. v. UOI***[10], ***Fuerst Day Lawson Ltd v. Jindal Exports Ltd***[11]).

(o) Definition of the term 'Manufacture' under the Central Excise Act is not the same as that under the FTP. The said term has widest amplitude in the FTP. Wherever it was felt necessary to adopt the meaning

[9] (2003) 11 SCC 66
[10] 2016 (338) ELT 545 (Del.)
[11] (2011) 8 SCC 333

of the term 'Manufacture' under the Central Excise Act it has been so adopted and in other cases the definition of the term 'Manufacture' under the FTP has been continued to be referred to.

(p) The regime governing duty drawback under the Customs Act and the Deemed Export drawback under the FTP are independent of one another. Hence, principles governing interpretation of the term 'Manufacture' under statutes such as the Customs Act or the Central Excise Act ought not to be read into the FTP. Such an attempt was thwarted by the judiciary.

(q) The words fabrication, assembly and production are covered by the term 'Manufacture' under the FTP. They inherently mean 'Manufacture' as per dictionary meanings (***CIT Goa v. Sesa Goa Ltd.***[12],

[12] 2004 (13) SCC 548

Scalemaster Adlam Pvt. Ltd v. Commissioner of Customs & Central Excise, Hyderabad[13]).

(r) Circular issued under Section 37-B of the Central Excise Act dated 15/01/2002 has a very limited application. It is issued only for the purposes of uniformity in the classification of excisable goods. Reliance placed on this circular is misplaced.

(s) Without prejudice to the submission that the Central Excise definitions ought not to be borrowed for the purposes of the FTP, it is submitted that Turbines and parts of Turbine are classified under two separate chapter headings of the Central Excise Tariff Act. Where by application of a given process, the classification of the resultant product is distinct from the inputs, the process would amount to manufacture (***Lal Woolen and Silk Mills (P) Ltd. v. Collector of Central Excise.***)[14]

[13] 2015 (315) ELT 390 (AP)
[14] 1999(108) ELT 7(SC)

(t) Whether or not manufacture for the purposes of Central Excise has taken place is a question of fact. (***Collector of Central Excise, Bombay v. S. D. Fines Chemicals Pvt. Ltd.***)[15]. No such factual matrix was available and therefore it was wrong to conclude that there was no manufacture.

(u) The attempt on the part of PSPCL to distinguish the applicability of Circular dated 05/12/2000 stating that it contemplates import of certain parts directly to the site, whereas, the Appellants had imported all the parts, would tantamount to improving the impugned order, which it cannot do.

(v) The submission that Deemed Export benefits cannot be said to have been available to the Appellants project since the power project which has been supplied is an immovable property and Deemed Export benefits relate to supply of capital goods which must be movable in nature must be rejected

[15] 1995 (77) ELT 49 (SC)

because the term 'Capital goods' is defined at Para 9.12 of the FTP to include plant amongst other things. Therefore there is inherent evidence that the word 'capital goods' has to be construed in the light of the meaning of the term 'Plant' which by necessary implication means immovable property. (***Ashirwad Ispat Udyog).***

(w) Plant is not defined in the FTP. Hence common parlance test must be applied. The term 'Plant' is of wide import and covers immovable property. ***Scientific Engineering House (Pvt.) Ltd. v. CIT Andhra Pradesh***[16], ***Cooke (Inspector of Taxes) v. Beach Station Caravans Ltd***[17], ***CIT, Andhra Pradesh v. Taj Mahal Hotel, Secunderabad***[18] ***CIT, Karnataka v. M/s Karnataka Power Corporation***[19], ***CCE, Bangalore-II v. SLR Steels Ltd***[20].

[16] (1986) 1 SCC 11
[17] 1974 (3) All ER 159
[18] (1971) 3 SCC 550
[19] (2002) 9 SCC 571
[20] 2012 (280) ELT 176 (Ker.)

(x) The definition of the term 'Capital goods' under the FTP covers Captive Plants, which by their very nature are immovable. Several paragraphs of the FTP 2004-09 indicate that the term 'Plant' has been used in the context of immovable property.

(y) Fiscal statutes have to be read strictly (***Income Tax Officer, Tuticorin v. T.S. Devinath Nadar & Ors.***[21]).

(z) The phrase "ICB at Independent Power Producer Stage" means, the stage where a developer of a power project is selected on "Build, Own and Operate" basis through Tariff Based International Competitive Bidding process. This process was followed as can be seen from the RFP documents. In the case of TSPL, the Independent Power Producer (TSPL) is identified and selected by the Distribution Licensee i.e. PSPCL by following International Competitive Bidding

[21] 1968 (2) SCR 33

(Section 63 of the Electricity Act, 2003 read with the Guidelines).

(aa) ICB at EPC stage means the stage where appointment of Engineering, Procurement and Construction (**"EPC"**) contractor (for construction of the power plant) by the IPP takes place by following International Competitive Bidding. By necessary implication IPP stage always precedes the EPC stage. Where the power procurement has been undertaken through ICB there is never a need for appointment of the EPC contractors through ICB process since the consumer interest stands protected as the power tariff itself was arrived at by following the ICB route. Appellants have met the condition of ICB at the IPP stage.

(bb) The State Commission has placed reliance on Sub-para to Para 8.2, but has ignored Para 8.4(iv) according to which ICB condition can be met either at IPP stage or at EPC stage. In this connection reliance

is placed on ***Bharat Petroleum Corporation Ltd v. P. Kesavan and Anr***.[22] where the Supreme Court has applied the maxim '*generalia specialibus non derogant*' (general things do not derogate special things).

(cc) The Appellants' submission that it has met the ICB conditions stands supported and substantiated on perusal of various communications exchanged between Ministry of Power and Ministry of Commerce, which the Appellants could get through the Right to Information Act and which are made part of I.A.No.76 of 2015. These documents are the Secretary, Ministry of Power's letter dated 22/02/2008 to the Secretary, Ministry of Commerce, Ministry of Power's letter dated 04/08/2008, DGFT's opinion dated 14/08/2008 on the reference by the Ministry of Commerce, Minutes of the Meeting held on 22/08/2008 and DGFT's clarification dated

[22] (2004) 9 SCC 772

20/08/2008. These documents dispel the State Commission's finding that ICB followed at the procurement of power is restricted only to Mega Power Projects and not to Non Mega Power Projects.

(dd) TSPL's undertaking was not a carte blanche undertaking as can be seen from the handwritten note at the bottom of the said undertaking which stated that the benefit of Mega status would be passed on as per Clause No.13.2(a) of Article 13 of the PPA.

(ee) Moreover TSPL was forced to give undertakings because if undertakings were not given goods would not have been cleared from customs, without payment of duty. PSPCL adopted a highhanded approach in withholding recommendation letter resulting in non grant of essentiality certificate.

(ff) Merely because the Appellants had not opted for Mega benefits (post the cut-off date) that cannot be

the basis to hold that the Appellants had never considered the FTP benefits available to Non Mega Power Projects. While at the stage of bidding the Appellants had factored Deemed Export Drawback under the FTP, it had every right to shun that and seek mega benefits post the cut-off date since the latter benefit was more advantageous to the Appellants. (***Share Medical Case v. UOI & Ors.*** [23])

(gg) Judgment of the Karnataka High Court in ***Saikala Power Limited v. Additional DGFT***[24] is not applicable to this case. This case supports the Appellant's contention that as on the cut-off date it has always been the interpretation of the office of DGFT that imported equipments such as Turbines, Generators, etc. when assembled at site, the pre-condition of manufacture under the FTP stood satisfied.

[23] 2007 (209) ELT 321 SC
[24] Judgment dated 30/12/2015 in W.P. No.10561 of 2013

(hh) To read the word "correct" interpretation into the meaning of the term "law" would be a violation of the express definition of the term "law" in the PPA.

(ii) A bidder is not expected to carry out a detailed analysis of correctness or otherwise of every interpretation by every Government Instrumentality.

(jj) It is submitted on the basis of ***Saikala*** that PIC Minutes dated 15/03/2011 are merely clarificatory and hence would have retrospective operation. Oppressive circulars are always prospective (***Suchitra Components Ltd. v. Commissioner of Central Excise, Guntur***)[25]. To this extent ***Saikala*** is *per incuriam*.

(kk) The Appellants never adopted the plea of negative equality. It was not the case of the Appellants that a wrong decision in favour of a particular party entitles the Appellants to claim the benefit on the basis of the

[25] 2007 (208) ELT 321 (SC)

said wrong decision. The Appellants' limited point has been that an interpretation, that was in force as on the cut-off date, would necessarily have to be considered as a law for the purposes of the PPA and subsequent reversal thereof post the cut-off date by the judiciary or the DGFT, holding it to be bad in law would constitute a Change in Law as per Article 13 of the PPA. In view of the above the appeal needs to be allowed.

13. Gist of submissions of Mr. Vaidyanathan and Mr. Ganesh appearing for NPL and L&T is as under:

(a) In the earlier round this Tribunal had remanded the matter to the State Commission to decide the issue regarding 'Change in Law' with respect to benefits under the FTP. The core issue was whether there is a 'Change in Law' within the meaning of Article 13.1.1 of the PPA. The State Commission wrongly analysed

the merits of the claim of Deemed Export benefits to a Non Mega Power Project.

(b) As on the cut-off date i.e. 02/10/2009 FTP 2009-14 was in force. As per Chapter 8 of the said FTP, Deemed Export benefits were available on goods manufactured and supplied to both Mega Power Projects as well as Non Mega Power Projects.

(c) For Non Mega Power Projects as per Para 8.4.4 (iv) of the FTP, they would be eligible for Deemed Export benefits so long as (i) either ICB was followed at IPP stage; or (ii) ICB was followed at EPC stage. As per Para 8.3.1 of the HBP to the FTP, the claim for Deemed Export could be made either by the supplier of the goods or by the Project owner.

(d) DGFT Circular dated 05/12/2000 which was never cancelled or withdrawn clearly stated that Deemed Export benefits were available to Non Mega Power Projects. This interpretation was followed by giving

Deemed Export benefits to a large number of Non Mega Power Projects. In terms of this circular requirement of "manufacture in India" stood satisfied when directly supplied items are used in the assembly, commissioning, erection, etc. at the Project site. The said clarification was given after interpreting Para 3.31 of the Exim Policy which deals with the definition of "Manufacture" which has been expanded in the FTPs issued subsequently. This interpretation was re-stated in the Minutes of the Meeting dated 15/04/2008 of the Norms Committee. There has been consistent implementation of the aforesaid interpretation of the FTP by the DGFT prior to and after the cut-off date. The said FTP benefits have been granted directly to the project developer's contractor or sub-contractor. Show Cause Notice dated 28/02/2012 issued to M/s Simplex Infrastructure by the DGFT supports this.

(e) The benefits under Para 8.3(b) and 8.3(a) of the FTP were withdrawn vide Notifications dated 28/12/2011 and 21/03/2012 respectively issued by Ministry of Commerce and Industry. The benefit under Para 8.3(c) of the FTP was withdrawn by reason of PIC meeting held on 15/03/2011. Withdrawal of these benefits is a 'Change in Law' under Article 13.1.1 of the PPA because the DGFT adopted a certain interpretation of the FTP prior to the cut-off date and then adopted a different interpretation.

(f) Every change in interpretation carries with it by necessary implication the pronouncement that the earlier interpretation was erroneous and is therefore being replaced or substituted by the subsequent interpretation which is regarded as the correct interpretation. This would amount to 'Change in Law' under Article 13.1.1(ii).

(g) In terms of the RFP the bidder is not merely entitled, but is required to make his bid on the basis of

interpretation of the DGFT. The bidder is not expected to reach the conclusion that the prevailing interpretation is likely to be held to be erroneous. Correctness of the DGFT interpretation is not to be examined while examining whether there is a Change in Law.

(h) The mere fact that the subsequent interpretation is described as clarification does not make it any less than a Change in Law because dictionaries equate interpretation with clarification.

(i) Meaning of the word 'interpretation' would depend on the context in which it is used (***Kesavananda Bharati v. State of Kerala & Anr.***[26])

(j) Article 13.1.1 is a benevolent provision, the objective of which is to protect the bidder from the effects and consequences of a 'Change in Law' after the cut-off

[26] (1973) 4 SCC 225

date. Article 13.1.1 has to be therefore read broadly and liberally.

(k) Conjoint reading of Clause 2.7.2.2 of the RFP and Annexure 9 of the PPA makes it clear that if the DGFT was prior to the cut-off date, based on his then interpretation of the FTP provisions, granting all FTP benefits to the Non Mega Power Projects in several cases over a long period that would have to be taken into account by the bidder while submitting his bid. If different interpretation is adopted after the cut-off date Article 13.1.1 can be invoked. Doctrine of "Contemporanea Expositio" i.e. the contemporaneous understanding of the concerned authorities and the interpretation placed by them on the relevant provisions which they had to administer, implement and enforce is attracted here:

(i) ***Spentex Industries Ltd. v. Commissioner of Central Excise and Ors***.[27]

[27] (2016) 1 SCC 780

(ii) ***Desh Bandhu Gupta & Co. and Ors. v. Delhi Stock Exchange Association Ltd***.[28].

(iii) ***Indian Metal & Ferro Alloys Ltd., Cuttack v. Collector of Central Excise, Bhubaneshwar***[29]

(iv) ***Collector of Central Excise, Guntur v. Andhra Sugar Ltd*** [30]

(v) ***K.P. Varghese v. Income Tax Officer***[31]

(vi) ***State of Tamil Nadu v. Mahi Traders & Ors***.[32]

(l) These judgments lay down that the Government is bound by the contemporaneous understanding and exposition of the concerned authorities and further, the court would ordinarily not depart from such contemporaneous understanding.

(m) There is no allegation of misuse, abuse or illegality by Non Mega Power Project developers with respect to receiving FTP benefits even where the recovery

[28] AIR 1979 SC 1049
[29] (1991) Supp. (1) SCC 125
[30] 1989 Supp. (1) SCC 144
[31] AIR 1981 SC 1922
[32] (1989) 1 SCC 724

proceedings have been initiated by the DGFT or Union of India.

(n) Subsequent application for Mega Power Projects benefits did not disqualify the Appellants from making a 'Change in Law' claim based on FTP benefits. Such a contention raised by PSPCL was negated by this Tribunal in its order dated 30/06/2014. This Tribunal observed that the term alternative claim itself would indicate that if the party did not succeed in respect of the main claim, the party is entitled at least to make an alternative claim.

(o) PSPCL did not file any appeal against this Tribunal's order dated 30/06/2014. The issues decided in favour of NPL have thus become final.

(i) ***Satyadhyan Ghosal & Ors. v. Deorajin Debi & Anr***[33].

(ii) ***C.V. Rajendran & Anr. v. N.M. Muhammed Kunhi***[34]

[33] AIR 1960 SC 941.
[34] (2002) 7 SCC 447

(iii) ***Hope Plantations Ltd. v. Taluk Land Board, Peermade & Anr***[35].

(iv) ***K.K. John v. State of Goa***[36]

(p) Developments subsequent to the cut-off date which dispute correctness of DGFT's interpretation prior to the cut-off date also constitute Change in Law. Judgment of Karnataka High Court in ***Saikala*** and other judgment which came after the cut-off date are also covered by 'Change in Law' clause.

(q) The definition of the term 'Manufacture' under the FTP is very wide and covers activities which otherwise may not amount to manufacture such as assembly of equipment, refrigeration, re-packing, labelling etc., which do not result in the emergence of a new product having a distinctive name, character or use. For the purpose of the FTP, manufacture even includes undertaking certain processes.

[35] (1999) 5 SCC 590
[36] (2003) 8 SCC 193

(r) The Appellants' contractor had sourced various goods from suppliers both in India and outside India. L&T had undertaken various operations such as assembly, engineering, fabrication, etc. to bring the power plant into existence, which operations are covered by the definition of the term 'Manufacture'. Setting up of a power project by carrying out such operations with respect to various supplies/capital goods including imported goods as inputs completely fulfils the requirement of the goods being manufactured in India.

(s) Definition of 'Manufacture' which is a part of the charging provisions of the Central Excise Act cannot be borrowed while interpreting the said term under the FTP. The FTP provisions are benevolent in nature. Their object is to reduce project cost so that the power tariff can be reduced. They have to be therefore construed broadly.

(t) If the intention was to borrow the definition of 'Manufacture' from the Central Excise Act. Para 9.36 would have stated that the term 'Manufacture' in this Policy has the same meaning as that contained therein.

(u) Nothing stopped the legislature from incorporating the definition of the word 'Manufacture' as found under Central Excise into the FTP. No such incorporation by reference has ever been done for purposes of Deemed Export benefits under Para 8.3(b) of the FTP. (See: ***New Central Jute Mills Company Limited v. Assistant Collector of Central Excise***[37] and ***Oriental Traders v. State of Maharashtra***[38].)

(v) The definition of the term 'Manufacture' in the FTP in Para 9.36 only refers to products and not excisable goods (which are defined in Para 9.25 of the FTP). This shows how Para 9.36 of the FTP has consciously moved away from the concept of manufacture under

[37] (1970) 2 SCC 820
[38] (2011) 3 SCC 1

the Central Excise Act. (***Union of India v. Delhi Cloth & General Mills Ltd.***[39], ***Mahadeolal Kanodia v. Administrator General of West Bengal***[40])

(w) When words that do not find mention in the definition of the term 'Manufacture' in the Central Excise Act have been specifically used in the FTP, full play must be given to those words.

(x) The FTP does not disallow a project authority/recipient who procures goods from claiming benefits. The HBP provides the procedure for a recipient of goods to claim FTP benefits (Clause 8.3.1 of the HBP). Various project developers have received these benefits. It is not open to PSPCL to say that the HBP is not valid.

(y) At the stage of award of power supply to the Appellants, ICB procedure was duly followed.

[39] AIR 1963 SC 791
[40] AIR 1960 SC 936

Therefore, there is no requirement at all that ICB procedure should be complied with at the subsequent stage of EPC as well. This is because since tariff of power to be sold by a generating company to a distribution licensee is getting fixed for the term of the Project under the PPA through tariff based ICB, no further purpose would be served by carrying out ICB at EPC stage for procuring supplies.

(z) The condition of complying with ICB cannot have any impact on the core issue of determining 'Change in Law' issue. Moreover, since the Appellants decided to avail of the benefits under the Mega Power Policy 2009 after the award of the Project the condition of ICB has lost relevance.

(aa) As regards undertakings given by NPL in the order dated 30/06/2014, this Tribunal clearly held that NPL had no other option but to give undertaking to PSPCL because of the conduct of PSPCL.

(bb) In any case in the first undertaking NPL had stated that it would pass on fiscal benefits as per provisions of the PPA. Subsequently PSPCL forced NPL to remove the words "under protest".

(cc) The conduct of the Appellants cannot impact the availability of the benefits to a Non Mega Power Project under the FTP before the cut-off date or withdrawal of such benefits after the cut-off date.

(dd) DGFT's Circular dated 05/12/2000 does not envisage any restriction on percentage of imported items.

(ee) NPL has clarified the manner and method of implementation of its project to the State Commission in its reply. PSPCL has drawn an erroneous presumption that none of its items were manufactured in India and were imported as such to set up the power plant. Considering the fact that some imported and some indigenous items are used

in the power project, it fits the scenario envisaged in DGFT circular dated 05/12/2000. It is covered under the definition of Manufacture as per Para 9.36 of the FTP read with DGFT Circular dated 05/12/2000.

(ff) Import substitution is not the objective of the FTP. The key objective of the FTP is to relieve power projects of the entire burden of customs duty and excise duty that would be levied on all items of plant, machinery and equipment which are either imported or indigenously manufactured and which thereafter become part of the power project (either Mega or Non Mega).

(gg) In this case, it is essential to take a pragmatic view of the matter. If as per PSPCL's contention after the cut-off date the Project became eligible to be considered as Mega Power Project and accordingly entitled to Mega Power Project benefits, the so-called Mega Power Project benefits after the cut-off date are

completely counterbalanced by the loss of the FTP benefits of the same value. Therefore, there has to be a corresponding set off or adjustment to the same extent as the gain accruing to PSPCL in the Mega Power Project matter. The end result will be that the tariff will be restored at the level at which it was bid by the Appellants which was considered to be the lowest and most competitive.

(hh) In the above circumstances the appeal be allowed and the impugned order be set aside.

14. Gist of submissions of Mr. Ramachandran learned counsel appearing for PSPCL is as under:

(a) The FTDRA read with the FTP is a complete code on the aspect of Deemed Export. The complete code principle does not mean that there cannot be a reference to harmonious statutes as external aids to interpret and apply the provisions of the FTP

properly. It only means that if the target statute defines a term in a different manner, the definition or general way in which the term has been dealt in other statutes cannot be used to vary the definition in the target statute or otherwise give an extended restrictive meaning. ***Sonebhadra Fuels, Ashirwad Ispat Udyog*** and ***Venkateshwara Hatcheries*** are those cases falling under the situation where the target Act deals with the term or aspect in a deemed or specific manner.

(b) Meaning of the term used in a statute can be understood with reference to harmonious statutes (See: ***Greatship India Limited***). The FTDRA, the FTP, the Central Excise Act, the Customs Act are to be viewed as forming part of one harmonious scheme.

(c) The doctrine of '*pari materia*' extends to reference to other statutes dealing with the same object or forming part of the same system. ***Ahmedabad Private Primary Teachers Association v.***

Administrative Officer[41]. Reference may also be made to ***G. P. Singh's Principles of Statutory Interpretation, 13th Edition pages 301-305***.

(d) The Courts must make an endeavour to find the intention of the legislature (See: ***CIT v. Vatika Township***[42]). Accordingly the object, purpose and scheme of the FTDRA and the FTP are relevant.

(e) Pre-conditions for eligibility for Deemed Export benefits in the case of Non Mega Power Projects as per the FTP are as under:

(a) Deemed Export benefits relate to goods.

(b) Goods to be supplied must be manufactured in India.

(c) There must be an act of supply of goods to Power Projects.

(d) Supply of goods must be by the Main/Sub Contractor to the Project.

(e) Goods supplied do not leave the country.

(f) Supply is made under the procedure of ICB.

[41] (2004) 1 SCC 755
[42] (2015) 1 SCC 1

(g) ICB Procedure can either be at IPP stage or at the EPC stage.

(f) Goods can only be taken to mean movable things/items. (See: ***Quality Steel Tubes (P.) Limited v. Collector of Central Excise***[43]; ***Mittal Engineering Works (P) Ltd. v. Collector of Central Excise***[44], ***Triveni Engineering and Industries Limited & Anr. v. Commissioner of Central Excise***[45]; ***T.T.G. Industries Limited v. Collector of Central Excise***[46]; ***Elecon Engineering Company Limited v. Collector of Central Excise***[47] and ***ABB Industries v. Commissioner of Central Excise***[48]).

(g) A power generating unit of 660 MW with Boiler, Turbine Generator, etc. can never be described as movable property as per the above judgments.

(h) Even otherwise the term 'Capital Goods' appearing in Para 9.12 is to be interpreted as meaning movable

[43] (1995) 2 SCC 372)
[44] (1997) 1 SCC 203)
[45] (2000) 7 SCC 29
[46] (2004) 4 SCC 751
[47] (1999) 107 ELT 337
[48] (2006) 198 ELT 79

items only. The terms which follow the expression 'Capital Goods' means and the terms which follow the expression 'includes' have to be given the scope and meaning in line with the controlling word 'goods' applying the principle of *ejusdem generis.*

(i) There is no fiction created in the definition to include something which is otherwise not 'Goods' in the scope of Capital Goods by virtue of the same being illustrated in the latter part of the definition in Para 9.12 (See: ***J.K. Cement Works v. St. of Karnataka***[49].

(j) ***GSPL India Transco Ltd.***[50] and ***Commissioner of Central Excise v. SLR Steels Ltd.***[51] have no application to this case because they are based on the specific provision of the statute dealing with Capital Goods definition in a different manner.

[49] 2013 (17) Kar LJ 445
[50] Ruling dt.3/7/2015 of the Authority for Advance Ruling in Appln. AAR/44/ST/02/13 & AAR/44/ST/04/13
[51] 2012 (280) ELT 176 (Kar)

(k) ***Zuari Industries Ltd. v. Commissioner of Central Excise & Customs***[52] has no application to this case because it is a case of 6 MW Captive Power Plant being procured for a Fertilizer Project and not a case of a 660 MW Power Project. There is no essentiality certificate for the power project/generating unit in the case of TSPL for the project as a whole, as Capital Goods.

(l) Captive Plant has been held as Capital Goods in Export Promotion Capital Goods Scheme in FTP 2015-2020. If it is an import of Captive Power Plant, it is a Movable Plant. The Power Plant can be movable or immovable depending upon the size, and only Movable Power Plant is covered under the term "Plant" under the definition of 'Capital Goods'. That is why the HBP 2015-2020 makes a specific reference to only Captive Power Plants as Capital Goods. The FTP recognises only small units such as DG sets,

[52] (2007) 14 SCC 614

Captive Power Plants and not generating unit of 660 MW as Capital Goods.

(m) There has to be a supply of goods to power projects. The recipient of the goods is the power project. There cannot be a supply of power project to the power project.

(n) There has to be manufacture of goods in India. Manufacture as defined in the FTP means bringing into existence a new product having a distinctive name, character or use. (See: ***South Bihar Sugar Mills Ltd. v. Union of India***[53]***, Moti Laminates Pvt. Ltd. & Ors. v. Collector of Central Excise***[54] and ***CEE v. S.D. Fine Chemicals Pvt. Ltd.***[55]***)***.

(o) There has to be supply by the main/sub-contractor. Here deemed export is claimed for supply of power project itself which is undertaken by TSPL.

(p) The FTP provisions before 14/01/2010 and as on the cut-off dates of TSPL (16/06/2008) or NPL

[53] AIR 1968 SC 992
[54] (1995) 3 SCC 23
[55] (1995) 77 ELT 49 (SC)

(02/10/2009) did not have the stipulation of Tariff Based Competitive Bid Process for the selection of power developer as an alternate to ICB either for Mega or for Non-Mega Power Project. Accordingly, all projects under Paras 8.2(f) and (g) of the FTP had necessarily to follow the procurement of goods through ICB route. ICB was mandatory.

(q) TSPL and NPL have not complied with the conditions entitling them to grant of Deemed Export benefits.

(r) The conduct of TSPL and NPL shows that neither of them intended to avail of Deemed Export benefits as on the cut-off date and their claims are an afterthought.

(s) TSPL and NPL have given undertakings to PSPCL and the Government of Punjab in regard to passing on the benefits of Mega Power Status to PSPCL.

(t) TSPL and NPL have contended that they were forced to give the undertakings. No particulars of coercion have been given (See: ***A.P. TRANSCO v. Sai Renewable Power (P) Ltd.***[56]***, Bishundeo Narain & Anr. v. Seogeni Rai***[57] and ***Shanti Budhiya Vesta Patel v. Nirmala Jayprakash Tiwari***[58].

(u) Circular dated 05/12/2000 does not deal with a situation of total import of capital goods for the power projects as has been done by TSPL or import of all articles such as Boiler, Turbine, Generator, etc. done by NPL. This circular deals with turnkey contractors processing goods as main contractor within the meaning of Para 8.2 of the FTP. It does not deal with assembling at site for establishing power project as an immoveable property. It does not say that procurement of goods need not be through ICB. Reliance placed on this circular is misplaced. This circular does not support the case of the Appellants

[56] (2011) 11 SCC 34
[57] (1951) 2 SCR 548
[58] (2010) 5 SCC 104

that there was an existing interpretation allowing Deemed Export benefits for such importation and installation of immoveable power project.

(v) The Order dated 15/01/2002 of the Central Board of Excise and Customs clarifies what is manufacture on the basis of the Supreme Court decisions. The Central Excise Act and the FTP are cognate statutes and have to be given similar interpretation. Despite this, if some section of the Trade proceeded on a misplaced basis, the same cannot be a ground for the Appellants to assume that they can import goods to install a power project of 660/700 MW generating units and shall be entitled to claim Deemed Export benefits. In this respect, the disclaimer contained in the RFP documents is relevant (See Paras 2.7.2.1 and 2.7.2.2).

(w) The contention of TSPL and NPL that though the claim of Deemed Export benefits may have been allowed to other projects wrongly and illegally, TSPL

and NPL were entitled to assume that they are also entitled to claim Deemed Export benefits is misplaced. Such plea of 'negative equality' has been consistently rejected by the Supreme Court. (See ***Coromandal Fertilizers Ltd. v. Union of India.***[59], ***Union of India & Ors. v. M.K. Sarkar***[60] and ***Chandigarh Admn. v. Jagjit Singh***[61].)

(x) Reliance on the doctrine of 'Contemporanea Exposito' is also misplaced in view of the above judgments.

(y) Reliance on ***Alstom India Ltd.***, ***Simplex Infrastructure Ltd.*** and ***Patel Engineering Ltd. v. Union of India***[62] is misplaced because those judgments only dealt with jurisdictional issue.

(z) On the other hand in ***Saikala***, the Karnataka High Court has dealt with the similar claim on merits and rejected it.

[59] 1984 (Supp.) SCC 457
[60] (2010) 2 SCC 52
[61] (1995) 1 SCC 745
[62] Judgment dated 21/07/2014 passed by Bombay High Court

(aa) Reliance on Norms Committee Meeting dated 15/04/2008 is misplaced. The Norms Committee was dealing with the input goods being used to manufacture another Capital Goods and such Capital Goods becoming a part of the power project.

(bb) The conduct of DGFT officers allowing some projects to get the benefit in the day to day administration cannot be taken as interpretation by Indian Government instrumentality. PIC Minutes dated 15/03/2011 are clarificatory in nature, hence, there is no change in law. (See: ***Atul Commodities Pvt. Ltd. v. Commissioner of Customs***[63]***, Tamil Nadu Electricity Board & Anr. v. Status Spinning Mills Limited***[64] and ***CEE, Shillong v. Wood Craft Product Limited***[65].)

(cc) Reliance on the Calcutta High Court's judgment in ***Bharat Heavy Electricals Ltd. v. Union of***

[63] (2009) 5 SCC 46
[64] (2008) 7 SCC 353
[65] (1995) 3 SCC 454

India[66] is misplaced. The issue before the High Court was supply of cement and steel and the High Court held that prior to the specific amendment in the FTP in June, 2012, Cement and Steel were included for the FTP benefits and the circular to that extent was set aside being contrary to the FTP benefits.

(dd) The Delhi High Court's judgment in ***KSK Energy Ventures v. Union of India***[67], is not applicable to this case, because the High Court had not considered the provisions of the FTP requiring a supply by main/sub-contractor.

(ee) The case before this Tribunal is whether conditions contained in Para 8.2 read with Para 8.4.4(iv) of the FTP have been satisfied in the case of TSPL and NPL to be eligible for Deemed Export benefit. The case of PSPCL is that TSPL and NPL are not entitled to Deemed Export benefits in terms of Para 8.2 read

[66] 2015 (316) ELT 466 (Cal.)
[67] Order dated 14/10/2011 in Writ Petition (C) No.7457 of 2011

with Para 8.4.4(iv) for Non Mega Power Projects and, therefore, nothing was taken away from them with the grant of Mega Power status or due to amendments in the FTP. The Mega Power status conferred upon TSPL and NPL a monetary benefit in the form of exemption from custom duty, excise duty, etc. which being a Change in Law after the cut-off date, the benefit of the same need to be passed on to PSPCL.

(gg) ***New Central Jute Mills Company Ltd.*** and ***Oriental Traders*** are cases which deal with legislation by incorporation. PSPCL's case is not that there is any incorporation by reference in the FTDRA. PSPCL's case is that the relevant terms have to be interpreted keeping in view the scheme, objective and purpose of the FTDRA and the FTP as well as the common commercial sense.

(hh) In view of the above the appeals are liable to be dismissed.

15. Having given the gist of submissions of the parties, we now need to state the central issue involved in these appeals, which falls for our consideration. The PPA executed between PSPCL and TSPL is dated 01/09/2008. Cut-off date specified in Article 13 of the PPA dealing with 'Change in Law' is 16/06/2008. Mega Power status was conferred on TSPL on 19/08/2010 by the Government of India. The PPA executed between NPL and PSPCL is dated 18/01/2010. Cut-off date specified in Article 13 of the PPA dealing with 'Change in Law' is 02/10/2009. Mega Power status was conferred on NPL on 30/07/2010 by the Government of India.

16. It is the case of PSPCL that grant of Mega Power status to TSPL and NPL amounts to a 'Change in Law' in terms of Article 13 of the PPA between the parties and TSPL and NPL are liable to pass all the benefits accrued to them on account of grant of Mega Power status to PSPCL in the form of reduction in tariff. On the other hand, it is the case of TSPL and NPL that as Non-

Mega Power Projects, they were entitled to Deemed Export benefits as on cut-off date as per the extant FTP. Those benefits were subsequently withdrawn by the decision of the PIC dated 15/03/2011, by the clarification issued by the DGFT through their Circular dated 28/04/2011 as well as by the notifications of the Ministry of Commerce and Industry dated 28/12/2011 and 21/03/2012. This would amount to 'Change in Law' under Article 13 of the PPA. It is their case that the gains of Mega Power Project benefits after the cut-off date are counter balanced by the loss of the FTP benefits of the same value. That is to say conferment of the Mega benefit post the cut-off date stood neutralized by the withdrawal of Deemed Export benefits post the cut-off date. This scenario leads to a zero sum game, where the economic situation of TSPL and NPL neither improved nor deteriorated. It remained the same. Under such a situation, TSPL and NPL are not required to pass on benefits of Mega Power status to PSPCL because unless their economic position had improved there is no requirement to reduce tariff as per Article 13.2(a) of the PPA. According to PSPCL, TSPL and NPL were not entitled to

Deemed Export benefits as on the cut-off date as Non Mega Power Projects and, hence, there is no question of those benefits being withdrawn. Therefore, the crucial question which first needs to be addressed is whether TSPL and NPL were entitled to Deemed Export benefits as Non Mega Power Projects prior to the cut-off date.

17. Basically the controversy relates to Deemed Export benefits under Chapter 8 of the FTP. Chapter 9 contains definition of certain terms which are relevant. The case of TSPL is that FTP 2004-09 was applicable to it as on cut-off date 16/06/2008. The case of NPL is that FTP 2009-14 was applicable to them as on cut-off date 02/10/2009. The relevant provisions of these policies are similar. We shall reproduce the relevant provisions.

18. Chapter 8 relates to Deemed Exports. Relevant provisions thereof are as under:

"Categories *8.2 Following categories of supply of goods*

of Supply

by main / sub-contractors shall be regarded as "Deemed Exports" under FTP, provided goods are manufactured in India:

(a) Supply of goods against Advance Authorisation / Advance Authorisation for annual requirement / DFIA;

(b) Supply of goods to EOUs or STPs or EHTPs or BTPs;

(c) Supply of capital goods to holders of Authorisations under EPCG Scheme;

(d) Supply of goods to projects financed by multilateral or bilateral agencies / Funds as notified by Department of Economic Affairs (DEA), MoF under International Competitive Bidding (ICB) in accordance with procedures of those agencies / Funds, where legal agreements provide for tender evaluation without including customs duty;

Supply and installation of goods and equipment (single responsibility of turnkey contracts) to projects financed by multilateral or bilateral agencies / Funds as notified by DEA, MoF under ICB, in accordance with procedures of those agencies / Funds, which bids may have been invited and evaluated on the basis of Delivered Duty Paid (DDP) prices for goods manufactured abroad;

(e) Supply of capital goods, including in unassembled / disassembled condition, as well as plants, machinery, accessories, tools, dies and such goods which are used for installation purposes till stage of commercial production, and spares to extent of 10% of FOR value to

fertilizer plants;

(f) Supply of goods to any project or purpose in respect of which the MoF, by a notification, permits import of such goods at zero customs duty;

(g) Supply of goods to power projects and refineries not covered in (f) above;

(h) Supply of marine freight containers by 100%EOU (Domestic freight containers-manufacturers) provided said containers are exported out of India within 6 months or such further period as permitted by customs;

(i) Supply to projects funded by UN agencies; and

(j) Supply of goods to nuclear power projects through competitive bidding as opposed to ICB.

Benefits of deemed exports shall be available under paragraphs (d), (e), (f) and (g) only if the supply is made under procedure of ICB.

Benefits for Deemed Exports *8.3* *Deemed exports shall be eligible for any / all of following benefits in respect of manufacture and supply of goods qualifying as deemed exports subject to terms and conditions as in HOB v1:-*

(a) Supply of goods against Advance Authorisation / Advance Authorisation for annual requirement/ DFIA.

(b) Deemed Export Drawback.

(c) *Exemption from terminal excise duty where supplies are made against ICB. In other cases, refund of terminal excise duty will be given.*

8.4.4 (i) *In respect of supplies made under paragraphs 8.2(d), (f) and (g) of FTP, supplier shall be entitled to benefits listed in paragraphs 8.3(a), (b) and (c), whichever is applicable.*

(ii) *xxx xxx xxx*

(iii) *xxx xxx xxx*

(iv) *Supply of Capital goods and spares upto 10% of FOR value of capital goods to power projects in terms of paragraph 8.2(g), shall be entitled for deemed export benefits provided the ICB procedures have been followed at Independent Power Producer (IPP) / Engineering and Procurement Contract (EPC) stage. Benefit of deemed exports shall also be available for renovation / modernization of power plants. Supplier shall be eligible for benefits listed in paragraph 8.3(a) and (b) of FTP, whichever is applicable. However, supply of goods required for setting up of any mega power projects as specified in S.No. 400 of DoR Notification No. 21/2002-Customs dated 1.3.2002, as amended, shall be eligible for deemed exports benefits as mentioned in paragraph 8.3(a), (b) and (c) of FTP, whichever is applicable, if such mega power project is :*

(a) *an inter state Thermal Power Plant of capacity of 1000MW or more; or*

(b) *an inter state Hydel Power Plant of capacity of 500 MW or more.*

Supplies to be made by the main / sub-contractor *8.6.1 In all cases of deemed exports, supplies shall be made directly to designated Projects / Agencies / Units / Advance Authorisation / EPCG Authorisation holders. Sub-contractor may, however, make supplies to main contractor, instead of supplying directly to designated projects / agencies. Such Supplies shall be eligible for deemed export benefits as per procedure laid down in paragraph 8.4 of HOB v1."*

19. Following provisions of Chapter 9 are relevant:

"9.12 "Capital Goods" means any plant, machinery, equipment or accessories required for manufacture or production, either directly or indirectly, of goods or for rendering services, including those required for replacement, modernisation, technological upgradation or expansion. It also includes packaging machinery and equipment, refractories for initial lining, refrigeration equipment, power generating sets, machine tools, catalysts for initial charge, equipment and instruments for testing, research and development, quality and pollution control. Capital goods may be for use in manufacturing, mining, agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture and viticulture as well as for use in services sector.

9.16 "Consumer Goods" means any consumption goods, which can directly satisfy human needs without further processing and includes consumer durables

and accessories thereof.

9.37 "Manufacture" means to make, produce, fabricate, assemble, process or bring into existence, by hand or by machine, a new product having a distinctive name, character or use and shall include processes such as refrigeration, re-packing, polishing, labelling, Reconditioning repair, remaking, refurbishing, testing, calibration, re-engineering. Manufacture, for the purpose of FTP, shall also include agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture, viticulture and mining."

20. Para 6.04(b) of the HBP notified by the DGFT under Para 2.4 of the FTP needs to be noted. It reads thus:

"(b) Capital goods, whether new or second-hand, including inter alia following and their spares.

(c) DG sets, captive power plants, transformers and accessories for all above."

21. Interpretation of provisions of the FTP is crucial to this case. The FTP is notified by the Central Government under Section 5 of the FTDRA. The question is, what are the principles to be applied while interpreting the provisions of the FTDRA and the FTP. The FTDRA read with the FTP is a complete code on the aspect of Deemed Exports. While TSPL and NPL contend that since they are a complete code, they

cannot be influenced by or controlled by legislations / notifications issued by the Ministry of Finance / Department of Revenue such as the Central Excise Act, PSPCL contends that there is no such prohibition and provisions of harmonious statutes can always be called in aid.

22. It is pertinent to note that expressions used in the FTP such as 'Goods' are not defined in the FTP. Expressions such as 'Manufacture' are defined in the FTP, but it is pointed out by PSPCL that the Supreme Court has in several decisions explained this term to mean "bringing into existence a new product of distinct name, character or use". If these judgments relate to harmonious statutes, having regard to the settled legal position to which we shall soon advert, we see no difficulty in taking their help while interpreting provisions of the FTP. Because the FTDRA read with the FTP are a complete code, there is no embargo on making reference to harmonious statutes while interpreting their provisions. Having considered the provisions of the FTDRA, the FTP, the Customs Act and the Central Excise Act, we are of the opinion

that they form part of one harmonious statutory scheme. Following observations of the Delhi High Court in ***Greatship India Ltd***. explain the concept of harmonious statutory scheme:

> *"The present case reveals the impasse brought about on account of the inability of two ministries of the central government viz., the Commerce Ministry and the Finance Ministry, to reconcile their differences about permitting alienation of goods imported under the SFIS. Just as it is important to protect the revenues of the central government it is essential to honour the commitments to importers and exporters in the form of the various measures set out in the FTP which has the force of law having been made in exercise of the powers under the FTDR Act. It is therefore imperative that the FTDR Act, FTR Rules, the FTP, the HOB, the CA and notifications issued under the CA are viewed as forming part of one harmonious statutory scheme. They ought to be operationalised in a manner that is coordinated and harmonious and not at cross-purposes."*

23. It is true that on facts, as pointed out by the counsel for TSPL, the Delhi High Court found that the impugned notification dated 11/09/2009 issued by the DoR under Section 25(1) of the Customs Act and the amendment to Para 3.12.7 of the FTP 2009-14 and Para 2.43 of the HBP cannot co-exist. But pertinently, the Delhi High Court held that the said circular issued under Section 25(2) of the Customs Act to the extent it restricts the transfer / sale of goods imported

from SFIS duty certificates / scrips for the purpose of payment of customs duty, even where such goods satisfy the criteria for transferability under the FTP and HSB, is in violation of the FTDRA, the FTP Rules as well as FTP 2004-09 and FTP 2009-14. This conclusion flows from the observation of the Delhi High Court that the FTDRA, FTR Rules, the FTP, the HBP, the Customs Act and notifications issued under the Customs Act are viewed as forming part of one harmonious statutory scheme and they ought to be operationalised in a manner that is coordinated and harmonious and not at cross-purposes. It strengthens the said observation.

24. It is submitted by the Appellants that decision of the Delhi High Court in ***Greatship India Ltd***. is not applicable to this case because that decision does not refer to the Central Excise Act and therefore the Central Excise Act cannot be considered a harmonious statute vis-a-vis the FTDRA. We are unable to accept this submission. There is always some difference in the facts of two cases. What is to be applied is the principle that emerges from a decision. The Appellants are

trying to delink the Central Excise Act from the FTDRA by saying that the Central Excise Act pertains to collection and recovery of the taxes or that the Central Excise Act is a fiscal statute or that it deals with a manufacturer while the FTDRA pertains to regulation of export and import; that it is not a taxing statute and that it deals with exporter or importer. It is not possible to accept this submission. It is pertinent to note that while Clause 8.3(a) of the FTP is in respect of the Customs Act, Clause 8.3(b) is in respect of goods manufactured in India and duty drawbacks. Mere importation of goods will not give Deemed Export benefits for the custom duty unless such imported goods become a part of another goods manufactured in India subsequent to such import. Similarly duty drawbacks generally relate to Central Excise paid on the manufacture of goods. The FTP deals with drawback of excise duty paid under the Central Excise Act. Therefore, the Central Excise Act is a part of a harmonious statutory scheme which includes the FTDRA, FTP and the Customs Act. The term "Manufacture' defined in the FTP has to be understood consistent with the manner in which it is dealt with under the Central Excise Act

except for any deemed fiction created under the definition in the FTP. In our opinion, the Central Excise Act and the FTDRA are in accord with each other. They are cognate statutes. Observations of the Delhi High Court in ***Greatship India Ltd*** would therefore be attracted to this case.

25. It is submitted that nothing prevented the legislature from incorporating the definition of the term 'Manufacture' as found under the Central Excise Act by reference into the FTP. Indeed the legislature could have done that. But that is no reason why the definition of the word 'manufacture' in the Central Excise Act, which is a harmonious statute vis-a-vis the FTDRA, cannot be looked into while dealing with the definition of 'Manufacture' in the FTP. In such situations, the courts can apply the settled principles of interpretation while construing a term. NPL has placed reliance on the judgments of the Supreme Court in ***New Central Jute Mills Company Limited*** and ***Oriental Traders*** which deal with legislation by incorporation. But it is not PSPCL's case that the definition of the term 'Goods' or the definition of the term 'Manufacture' as

appearing in other legislations including the Central Excise Act has been incorporated by reference in the FTDRA. The case of PSPCL is that the term 'Goods' has not been defined in the FTDRA or in the FTP and therefore needs to be interpreted keeping in view the scheme, objective and purpose of the FTDRA and the FTP, the common commercial sense, the common parlance test and other well settled principles of interpretation. PSPCL has also contended, and in our opinion, rightly, that in such case it is appropriate to look into harmonious statutes. Reliance placed on ***New Central Jute Mills*** and ***Oriental Traders*** is therefore misplaced.

26. In ***Ahmedabad Private Primary Teachers Association***, the Supreme Court was considering whether teachers fall within the definition of 'employee' as contained in Section 2(e) of the Payment of Gratuity Act, 1972. The Supreme Court had to interpret Section 2(e). While coming to the conclusion that teachers are not covered by the definition of the term 'employee' found in Section 2(e) of the Payment of Gratuity Act, 1972, the Supreme Court interpreted the term 'employee'

with the aid of the definition of the term 'employee' in the Minimum Wages Act, the Provident Fund Act and the Industrial Disputes Act on the view that on the doctrine of 'pari materia', reference to other statutes dealing with the same subject or forming part of the same system is a permissible aid to the construction of provisions in a statute. Following are the relevant paragraphs of the judgment.

> ***12.*** *We have critically examined the definition clause in the light of the arguments advanced on either side and have compared it with the definitions given in other labour enactments. On the doctrine of "pari materia", reference to other statutes dealing with the same subject or forming part of the same system is a permissible aid to the construction of provisions in a statute. See the following observations contained in Principles of Statutory Interpretation by G.P. Singh (8th Edn.), Syn. 4, at pp. 235 to 239:*
>
> > *"Statutes in pari materia*
> >
> > *It has already been seen that a statute must be read as a whole as words are to be understood in their context. Extension of this rule of context permits reference to other statutes in pari materia i.e. statutes dealing with the same subject-matter or forming part of the same system. Viscount Simonds in a passage already noticed conceived it to be a right and duty to construe every word of a statute in its context and he used the word context in its widest sense including 'other statutes in pari materia'. As stated by Lord Mansfield 'where there are different statutes in pari materia though made at different times, or even expired, and not referring to each other, they shall be taken and*

construed together, as one system and as explanatory of each other'.

* * *

The application of this rule of construction has the merit of avoiding any apparent contradiction between a series of statutes dealing with the same subject; it allows the use of an earlier statute to throw light on the meaning of a phrase used in a later statute in the same context; it permits the raising of a presumption, in the absence of any context indicating a contrary intention, that the same meaning attaches to the same words in a later statute as in an earlier statute if the words are used in similar connection in the two statutes; and it enables the use of a later statute as parliamentary exposition of the meaning of ambiguous expressions in an earlier statute."

27. In support to the contention that since the FTDRA read with the FTP is a complete code on the aspect of Deemed Export, no external aid can be taken from other statutes while interpreting the provisions thereof reliance was placed on ***Furest Day.*** In our opinion, the said judgment has no application to this case. In ***Furest Day,*** the Supreme Court was considering the question whether an order though not appealable under Section 50 of the Arbitration & Conciliation Act, 1996 ("the Arbitration Act") would nevertheless be subject to appeal under the relevant provision of the Letters Patent of

the High Court. The Supreme Court observed that the Arbitration Act being a self contained code, a letters patent appeal would be excluded by the application of one of the general principles that where the special Act sets out a self-contained code, the applicability of the general law or procedure would be impliedly excluded. In our opinion, this judgment does not lay down an absolute principle that when a statute is a code by itself, under no circumstances, external aid from other statutes can be taken for interpreting its provisions if necessary. Ultimately, the duty of the court is to interpret the provisions of a statute correctly. The Supreme Court has not stated that in case of any doubt, aid from harmonious statutes cannot be taken. The concept of 'harmonious statutes' was not relied upon and consequently not discussed by the Supreme Court. The Supreme Court has also not discussed the doctrine of "*in pari materia*' which as held by the Supreme Court in ***Ahmedabad Private Primary Teachers*** extends to other statutes dealing with the same subject or forming part of the same statute. It is true that while interpreting provisions of a statute which is a complete

code, borrowing expressions or definitions from other statutes which are totally of a distinct character may not be permissible. But in a given case provisions of a harmonious statute or a statute which is *in pari materia* can serve as a guiding light.

28. Reliance placed by the Appellants on ***Qazi Noorul*** is misplaced. In that case, the Appellant therein was directed to make contribution under the Employees State Insurance Act 1948 ("the Employees Act"). The question before the Supreme Court was whether the Appellant who was petrol pump owner was covered by the Employees Act. The Employees Act stated that it shall apply to all factories. The Supreme Court therefore referred to the definition of 'manufacturing process' in the Factories Act which stated that 'pumping oil' is a manufacturing process. The Supreme Court in the circumstances held that the Appellant was covered by the Employees Act. It appears that the attention of the Supreme Court was drawn to the definition of the term 'manufacture' in the Central Excise Act. The Supreme Court noted that under

the Central Excise Act, it means bringing into existence a different commodity. Against the backdrop of the above facts, the Supreme Court observed that the definition of 'manufacturing process' in one statute cannot be applied to another statute. It must be noted that the Central Excise Act and the Employees Act can, by no stretch of imagination, be said to be forming part of one harmonious statutory scheme. This judgment, therefore, can have no application to the present case.

29. In this connection, other well established principles of interpretation can also be revisited. While interpreting a statute, effect must be given to its plain and general meaning. The intention of the legislature and purpose and objective of the statute are most relevant. While interpreting the FTP provisions, objectives of the FTP must be kept in mind. In this connection, following paragraph from ***G.P. Singh's Principles of Statutory Interpretation***[68], is noteworthy.

[68] Thirteenth Edition, 2012

> *"The intention the Legislature thus assimilates two aspects: In one aspect it carries the concept of 'meaning', i.e., what the words mean and in another aspect, it conveys the concept of 'purpose and object' or the 'reason and spirit' pervading through the statute. The process of construction, therefore, combines both literal and purposive approaches. In other words, the legislative intention i.e. the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed.*[48] *This formulation later received the approval of the Supreme Court and was called the "cardinal principle of construction".*

30. It is submitted that import substitution is not the objective of the FTDRA or the FTP. We shall, therefore, turn to the Preamble of the FTDRA and the FTP. The Preamble of the FTDRA states that it is an Act to provide for the development and regulation of foreign trade by facilitating imports into, and augmenting exports from, India and for matter connected therewith or incidental thereto. The FTP is formulated under Section 5 thereof. Preamble to the FTP 2004-09 *inter alia* states that imports which are required to stimulate the economy are to be facilitated. It further states that coherence and consistency among trade and other economic policies is important for maximising the contribution of such policies to development. Objectives of the FTP are stated as under:

"OBJECTIVES:

Trade is not an end in itself but a means to economic growth and national development. The primary purpose is not the mere earning of foreign exchange but the stipulation of greater economic activity. The Foreign Trade Policy is routed in this belief and built around two objectives. These are:

(i) To double our percentage share of global merchandise trade within the next five years;

(ii) To act as an effective instrument of economic growth by giving a thrust to employment generation."

31. These objectives are proposed to be achieved by stated strategies. The strategies *inter alia* are facilitating development of India as a global hub for manufacturing, trading and services and identifying and nurturing special focus area which would generate additional employment opportunities. Thus, economic growth and national development is to be achieved by stimulating greater economic activity. Manufacturing in India which would generate employment opportunities has to be encouraged. Thus incentivizing indigenous manufacture in India is certainly the objective. It is implicit in this that this will lead to import substitution. The goal is to facilitate imports which stimulate the economy and achieve coherence and consistency in trade.

These objectives have to be kept in mind while interpreting the FTP. Common parlance test or commercial sense meaning can also be called in aid if necessary (See: ***Moti Laminates (P) Ltd.***).

32. We shall now go to the relevant provisions of the FTP. Admittedly, the FTP divides the power projects as Mega Power Projects and Non-Mega Power Projects and Para 8.2(f) covers Mega Power Projects and Para 8.2(g) covers Non-Mega Power Projects. From the provisions which we have quoted hereinabove, we need to find out whether TSPL and NPL were entitled to Deemed Export benefits as Non-Mega Power Projects prior to Mega Power status being conferred on them. A perusal of the above provisions indicates that there are certain pre-conditions for entitlement to Deemed Export benefits. We shall delineate those preconditions along with relevant extracts of the FTP provisions.

(a) Deemed Export Benefits relate to goods. They cannot be claimed in respect of things which are not goods. The goods supplied do not leave the country.

Deemed Exports	*8.1*	*"Deemed Exports" refers to those transactions in which goods supplied do not leave country, and payment for such supplies is received either in Indian rupees or in free foreign exchange.*
Categories of Supply	*8.2*	*Following categories of supply of **goods by main / sub-contractors** shall be regarded as "Deemed Exports" under FTP, provided goods are manufactured in India:* *……*

(b) To get benefit of Deemed Exports, there must be an act of supply of goods to Power Projects.

Categories of Supply	*8.2*	*Following categories of supply of goods by main / sub-contractors shall be regarded as "Deemed Exports" under FTP, provided goods are manufactured in India:* *(a) xxx* *(b) xxx* *(c) xxx* *(d) xxx* *(e) xxx* *(f) xxx* *(g) Supply of goods to power projects and refineries not covered in (f) above;*

8.4.4 (i) xxx

(ii) xxx

(iii) xxx

(iv) Supply of Capital goods and spares upto 10% of FOR value of capital goods to power projects in terms of paragraph 8.2(g), shall be entitled for deemed export benefits provided the ICB procedures have been followed at Independent Power Producer (IPP) / Engineering and Procurement Contract (EPC) stage. Benefit of deemed exports shall also be available for renovation / modernization of power plants. Supplier shall be eligible for benefits listed in paragraph 8.3(a) and (b) of FTP, whichever is applicable. However, supply of goods required for setting up of any mega power projects as specified in S.No. 400 of DoR Notification No. 21/2002-Customs dated 1.3.2002, as amended, shall be eligible for deemed exports benefits as mentioned in paragraph 8.3(a), (b) and (c) of FTP, whichever is applicable, if such mega power project is :

(a) an inter state Thermal Power Plant of capacity of 1000MW or more; or

(b) an inter state Hydel Power Plant of capacity of 500 MW or more.

(c) Goods to be supplied must be manufactured in India.

Categories of Supply *8.2 Following categories of supply of goods by main / sub-contractors shall be regarded as "Deemed Exports" under FTP, provided* ***goods are***

manufactured in India*:*

……
……..

(d) Supply of goods is by main / sub-contractor to the project.

Categories of Supply	*8.2*	*Following categories of supply of goods by main / sub-contractors shall be regarded as "Deemed Exports" under FTP, provided* ***goods are manufactured in India****:*
		…… *……..*
Supplies to be made by the main / sub-contractor	*8.6.1*	*In all cases of deemed exports, supplies shall be made directly to designated Projects / Agencies / Units / Advance Authorisation / EPCG Authorisation holders. Sub-contractor may, however, make supplies to main contractor, instead of supplying directly to designated projects / agencies. Such Supplies shall be eligible for deemed export benefits as per procedure laid down in paragraph 8.4 of HOB v1.*
	8.6.2	***Supplies made by an Indian sub-contractor of an Indian or foreign main contractor directly to the designated projects / agencies****, shall also be eligible for deemed export benefits provided sub-contractor is indicated either originally or subsequently in the contract, and payment certificate is issued by project authority in the name of sub-contractor as in Appendix 22C of HOB v1.*

(e) Supply is made under the procedure of ICB.

Categories of Supply	*8.2*	*xxx*	*xxx*	*xxx*

Benefits of deemed exports shall be available under paragraphs (d), (e), (f) and (g) only if the supply is made under procedure of ICB.

(f) ICB procedure can either be at Independent Power Producer (IPP) stage or at Engineering and Procurement, Contract (EPC) stage.

"8.4.4 (iv). Supply of Capital goods and spares upto 10% of FOR value of capital goods to power projects in terms of paragraph 8.2(g) shall be entitled for deemed export benefits provided the ICB procedures have been followed at Independent Power Producer (IPP)/Engineering and Procurement Contract (EPC) stage. Benefit of deemed exports shall also be available for renovation/modernisation of power plants. Supplier shall be eligible for benefits listed in paragraph 8.3(a) and (b) of FTP, whichever is applicable. However, supply of goods required for setting up of any mega power projects as specified in S.No.400 of DoR Notification No.21/2002-Customs dated 1.3.2002, as amended, shall be eligible for deemed exports benefits as mentioned in paragraph 8.3(a), (b) and (c) of FTP, whichever is applicable, if such mega power project is:

(a) an inter state Thermal Power Plant of capacity of 1000 MW or more; or

(b) an inter state Hydal Power Plant of capacity of 500MW or more.

33. We shall now discuss each of the preconditions of entitlement to Deemed Export benefits.

34. The first precondition is that Deemed Export benefits relate to goods. They cannot be claimed in respect of things which are not goods. The term 'Goods' has not been defined in the FTP. The term 'Capital Goods' and 'Consumer Goods' are, however, defined. In common parlance, goods means things which are moveable. In this connection, we may usefully refer to ***Quality Steel Tubes***. The question which the Supreme Court was considering in that case was whether the tube mill and wielding head erected and installed by the Appellant therein for manufacture of tubes and pipes out of duty-paid raw material was assessable to duty being excisable goods within the meaning of the Central Excise and Salt Act, 1944. While holding that they were not exigible to duty, the Supreme Court observed as under:

> *"5. In several decisions rendered by this Court commencing from Union of India v. Delhi Cloth and General Mills Co. Ltd. to Indian Cable Co. Ltd. v. CCE the twin test of exigibility of an article to duty under Excise Act are that it must be goods mentioned either in the Schedule or under Item 68 and must be marketable. In Delhi Cloth Mills[1] it having been held that the word 'goods' applies to those goods which can be brought to market for being bought and sold it is implied that it applies to such goods as are moveable. The requirement of the goods*

being brought to the market for being bought and sold has become known as the test of marketability which has been reiterated by this Court in CCE v. Ambalal Sarabhai Enterprises. The Court has held in Union Carbide India Ltd. v. Union of India that even if the goods was capable of being brought to the market, it would satisfy the test of marketability. The basic test, therefore, of levying duty under the Act is twofold. One, that any article must be goods and second, that it should be marketable or capable of being brought to market. Goods which are attached to the earth and thus become immovable and do not satisfy the test of being goods within the meaning of the Act nor it can be said to be capable of being brought to the market for being bought and sold. Therefore, both the tests, as explained by this Court, were not satisfied in the case of appellant as the tube mill or welding head having been erected and installed in the premises and embedded to earth ceased to be goods within meaning of Section 3 of the Act."

35. In ***Mittal Engineering***, the Supreme Court was considering whether mono vertical crystallizers are exigible to excise duty. While holding that they are not, the Supreme Court observed as under:

9. Upon the material placed upon record and referred to above, we are in no doubt that the mono vertical crystalliser has to be assembled, erected and attached to the earth by a foundation at the site of the sugar factory. It is not capable of being sold as it is, without anything more. As was stated by this Court in the case of Quality Steel Tubes (P) Ltd. the erection and installation of a plant is not excisable. To so hold would, impermissibly, bring into the net of excise duty all manner of plants and installations.

10. The Tribunal took an unreasonable view of the evidence. It was the case of the appellants, not disputed by

the Revenue, that mono vertical crystallisers were delivered to the customers in a knocked-down condition and had to be assembled and erected at the customers' factory. Such assembly and erection was done either by the appellants or by the customer. Where it was done by the appellants, fabrication materials of the customer were used and the customer sent to the appellants debit notes in regard to their value. Where the assembly and erection was done by the customer, there was no occasion for it to send to the appellants a debit note. The fact that there was no debit note in respect of one customer could not reasonably have led the Tribunal to conclude that in the case of that customer a complete mono vertical crystalliser had left the appellants' factory and that, therefore, mono vertical crystallisers were marketable. The Tribunal ought to have remembered that the record showed that mono vertical crystallisers had, apart from assembly, to be erected and attached by foundations to the earth and, therefore, were not, in any event, marketable as they were.

11. Having regard to the material on record, we come to the conclusion that mono vertical crystallisers are not 'goods' within the meaning of the Act and, therefore, not exigible to excise duty."

36. In ***Triveni Engineering***, the Supreme Court was considering whether excise duty can be imposed on a turbo alternater under the Central Excise Act. While holding that it cannot be 'excisable goods', the Supreme Court referred to ***Quality Steel Tubes*** and ***Mittal Engineering*** and observed that the installation or erection of turbo alternator on the concrete base specially constructed on the land would be

immoveable property and, as such, it cannot be 'excisable goods'.

37. In ***T.T.G. Industries***, the Supreme Court was considering whether mudguns and drilling machines erected at the site were excisable. The Supreme Court observed that mudguns and drilling machines erected at site on a specially made platform at a level of 25 feet above the ground on a base plate secured to the concrete platform, brought into existence not excisable goods but immoveable property which could not be shifted without first dismantling it and then re-erecting it at another site. In light of above judgments, we have no hesitation in concluding that the generating units involved in these cases with Boiler, Turbine and Generator embedded in earth cannot be described as moveable property. They are not goods.

38. We have quoted the definition of 'Capital Goods' as found in Para 9.12 of the FTP. In our opinion, this definition does not include within its scope something which is not goods.

The terms such as 'plant', 'machinery' 'equipment', 'accessories' which follow the expression 'capital good' means and the terms 'packaging machinery and equipment', 'power generating sets' etc. which follow the expression 'includes' will have to be given the scope and meaning in line with the controlling word 'goods' applying the principle of *ejusdem generis*. The above expressions must also be understood as goods and, hence, moveable.

39. Para 6.04 (b) of the HBP needs to be revisited. It reads thus:

> (b) Capital goods, whether new or second hand, including *inter alia* following and their spares.
>
> (i) DG Sets, captive power plants, transformers and accessories for all above.

Thus small units such as DG sets, Captive Power Plants are recognised as capital goods.

40. In the Export Promotion Capital Goods Scheme in the FTP 2015-2020 Captive Plants have been held as Capital

Goods. Para 5.01(g) thereof states that authorisation under the EPCG Scheme shall not be issued for import of any Capital Goods (including Captive Power plants and Power Generator sets of any kind). This makes it abundantly clear that Captive Power Plant whose 'import' is contemplated has to be a Movable Plant. Therefore, Power Plant can be movable or immovable depending on its size. Thus, as stated above applying the doctrine of *ejusdem generis* the term 'Plant' mentioned in the definition of the term 'Capital Goods' found in Para 9.12 of the FTP covers Movable Plants.

41. Reliance placed by TSPL and NPL on ***Zuari Industries*** is misplaced. We may quote the relevant paragraphs thereof.

> *"13. Firstly, on the facts we find that the assessee had given to the sponsoring Ministry its entire project report. In that report they had indicated that for the expansion of the fertilizer project they needed an extra item of capital goods, namely, 6 MW captive power plant. In their application, the assessee had made it clear that the fertilizer project was dependent on continuous flow of electricity, which could be provided by such captive power plant. Therefore, it was not open to the Revenue to reject the assessee's case for nil rate of duty on the said item, particularly when the certificate says so. In the judgment of this Court in Tullow India Operations Ltd. this Court held that essentiality certificate must be treated as a proof of fulfilment of the eligibility conditions by the importer for obtaining the benefit of the exemption notification.*

We may add that, the essentiality certificate is also a proof that an item like captive power plant in a given case could be treated as a capital goods for the fertilizer project. It would depend upon the facts of each case. If a project is to be installed in an area where there is shortage of electricity supply and if the project needs continuous flow of electricity and if that project is approved by the sponsoring Ministry saying that such supply is needed then the Revenue cannot go behind such certificate and deny the benefit of exemption from payment of duty or deny nil rate of duty.

.....

16. The power plant in the conceptual sense or in the technical sense is certainly different from the fertilizer plant. However, when we come to Heading 98.01 of the Customs Tariff Act, 1975, the assessment is for the project. As stated above, Heading 98.01 is the specific entry applicable in the case of the project imports. An item like a power plant could be in a given case an independent plant. Generally, it is a stand-alone equipment. However, when it becomes a part of the entire project/system, the same power plant can also become one of the items of capital goods.

17. The essentiality certificate given by the sponsoring Ministry has treated captive power plant, in this case, as "capital goods" along with 13 other items. The assessee has also treated the captive power plant as one of the capital goods required for the expansion of the fertilizer project. In the above circumstances, all the items in the list annexed to the certificate have been certified and recommended by the sponsoring Ministry as the entire capital goods required for the substantial expansion of the fertilizer project. Therefore, in our view, the assessee is right in its contention that, in this case, 6 MW captive power plant is one of the items out of 14 items constituting capital goods required for the substantial expansion of the fertilizer project, and, therefore, it fell under Serial No. 226(i) as goods required for the fertilizer project entitled to the benefit of nil rate of duty."

It is clear from the above paragraphs that ***Zuari Industries*** was concerned with 6 MW Captive Power Plant

procured for a Fertilizer Project and not with huge Power Projects as in this case. Essentiality certificate was given to the said plant as 'Capital Goods'. It was observed that essentiality certificate was a proof that item like Captive Power Plant in a given case could be treated as Capital Goods for the Fertilizer Project. This case, in fact, supports the case of PSPCL that the term 'Plant' used in the definition of 'Capital Goods' found in the FTP means a Movable Plant or Captive Power Plant. The Power Plant can be movable or immovable depending upon the size and only movable power plant is covered by the term 'Plant' found in the definition of the term Capital Goods given in the FTP. We have quoted Para 6.04(b) of the HBP. It is clear from this provision that the FTP recognizes only small units such as DG sets, Captive Power Plants as Capital Goods and not generating unit of 660 MW as Capital Goods.

42. In our opinion, judgment of the Advance Ruling Authority in ***GSPL India Transco Limited*** and of the Karnataka High Court in ***SLR Steels*** relied upon by the

Appellants are not applicable to this case. In ***GSPL India Transco Ltd***. the definition of the term 'Capital Goods' itself provided that tubes and pipes and fittings thereof used for providing output services were Capital Goods. There the pipeline system embedded in the earth was used for providing output service of gas. The Advance Ruling Authority in the circumstances observed that though the pipes were immovable since they were used for providing output service they were Capital Goods. This judgment does not cover the present case.

43. In ***SLR Steels,*** the Karnataka High Court was considering whether steel and cement used in the manufacture of storage tank is eligible for Cenvat Credit. In that case, the definition of the term 'Capital Goods' specifically included storage tank. Pollution Control equipment was also included within the definition of 'Capital Goods'. Rule 2(k) of Cenvat Credit Rules, 2004 clearly stated that 'input' includes goods used in manufacture of Capital Goods which are further

used in the factory of the manufacturer. It is against the backdrop of these facts that the Karnataka High Court held that once a storage tank and pollution control equipment constitute Capital Goods any duty paid on any raw material purchased for construction of those goods could be utilized as Cenvat Credit. Both these judgments will have to be read in the context of the facts involved therein. The definitions of the term Capital Goods and the issues involved therein are in no way similar to the issues involved in this case.

44. The second precondition for entitlement of Deemed Export benefits is that there has to be a supply of goods to power projects. The recipient of the goods is the power project. In this connection our attention is drawn by PSPCL to TSPL's pleadings. In the appeal paper-book of TSPL it is stated that "*at the stage of bidding it has considered the entire power plant being constructed by it to be the deemed export product*". It is further averred that "*similarly in the present case, the power project of the Appellants falls within the definition of the term "plant"*". It is further averred that "*the*

power project in the present case being a power plant for generation of electricity, was covered within the definition of the term "plant"". Further, even by application for common parlance test, the power plants are known as power plants commercially and, therefore, would qualify as "plant for the purposes of the FTP". TSPL is, therefore, seeking Deemed Export benefit for an immovable property terming the power project as Capital Goods. There is also no supply to power projects. There cannot be a supply of power project to the power project. Therefore, this precondition is also not satisfied.

45. The third precondition for entitlement to Deemed Export benefits is that <u>the goods to be supplied must be manufactured in India</u>. For the sake of convenience it is necessary to again quote Para 9.37 of the FTP (FTP 2004-09)

> *"9.37 "Manufacture" means to make, produce, fabricate, assemble, process or bring into existence, by hand or by machine, a new product having a distinctive name, character or use and shall include processes such as refrigeration, re-packing, polishing, labelling. Re-conditioning repair, remaking, refurbishing, testing, calibration, re-engineering. Manufacture, for the*

purpose of FTP, shall also include agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture, viticulture and mining."

The above definition clearly indicates that there can be no manufacture if the new product which comes into existence does not have a distinctive name, character or use. Bringing into existence a new product having a distinctive name, character or use is the essence of manufacture. Making, producing, fabricating, assembling or processing must result in a new product having a distinctive name, character or use. Mere assembling, producing, fabricating, making does not imply that there is a manufacture. 'Product' occurring in the above definition has also to be movable like goods. There cannot be manufacture of immovable goods. In this connection, we may refer to the judgment of the Supreme Court in ***South Bihar Sugar Mills Ltd.*** The issue involved there was whether the gas generated by the Appellant companies attracted excise duty levied under Item 14-H in Schedule I to the Central Excise and Salt Act, 1 of 1944. After an in-depth study of the technical questions involved in the

case, the Supreme Court held that the gas generated by the Appellant companies is kiln gas and not carbon dioxide as known to the trade i.e. to those who deal in it or use it. The Supreme Court observed that the kiln gas in question therefore is neither carbon dioxide nor compressed carbon dioxide known as such to the commercial community and, therefore, cannot attract Item 14 H in the First Schedule. Following observations of the Supreme Court are material:

> *"11. The Act charges duty on manufacture of goods. The word "manufacture" implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use. The duty is levied on goods. As the Act does not define goods, the legislature must be taken to have used that word in its ordinary, dictionary meaning. The dictionary meaning is that to become goods it must be something which can ordinarily come to the market to be bought and sold and is known to the market. That it would be such an article which would attract the Act was brought out in Union of India v. Delhi Cloth & General Mills Ltd."*

Thus, the term 'Manufacture' connotes a change. But not every change is manufacture. There must be such a transformation that a new and different article emerges having a distinctive name, character or use.

46. In ***Moti Laminates*** the Appellants manufactured laminated sheet. The question before the Supreme Court was whether the intermediate products being resin or resol produced by the Appellants can be considered to be goods for purposes of levy under the Central Excise & Salt Act, 1 of 1944. The Supreme Court observed that the duty of excise being on production and manufacture which means bringing out a new commodity, it is implicit that such goods must be usable, movable, saleable and marketable. The Supreme Court further observed that the obvious rationale for levying excise duty linking it with production or manufacture is that the goods so produced must be a distinct commodity known as such in common parlance or to the commercial community for purposes of buying and selling. The Supreme Court observed that since the intermediate solution was not marketable goods, it cannot be subjected to duty. Following are the relevant observations of the Supreme Court:

"11. Although the duty of excise is on manufacture or production of the goods, but the entire concept of bringing out

new commodity etc. is linked with marketability. An article does not become goods in common parlance unless by production or manufacture something new and different is brought out which can be bought and sold. In Union of India v. Delhi Cloth & General Mills Co. Ltd.[AIR 1963 SC 791], a Constitution Bench of this Court while construing the word 'goods' held as under:

> *"These definitions make it clear that to become 'goods' an article must be something which can ordinarily come to the market to be bought and sold."*

Therefore, any goods to attract excise duty must satisfy the test of marketability. The Tariff Schedule by placing the goods in specific and general category does not alter the basic character of leviability. The duty is attracted not because an article is covered in any of the items or it falls in residuary category but it must further have been produced or manufactured and it is capable of being bought and sold. In South Bihar Sugar Mills Ltd. v. Union of India [AIR 1968 SC 922 : (1968) 3 SCR 21] it was held by this Court:

> *"The Act charges duty on manufacture of goods. The word 'manufacture' implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use. The duty is levied on goods. As the Act does not define goods, the legislature must be taken to have used that word in its ordinary dictionary meaning. The dictionary meaning is that to become goods it must be something which can ordinarily come to the market to be bought and sold and is known to the market. That it would be such an article which would attract the Act was brought out in Union of India v. Delhi Cloth and General Mills Ltd." [AIR 1963 SC 791]"*

In A.P. SEB v. CCE [(1994) 2 SCC 428], this Court reiterated the same principle and observed that marketability was must irrespective of whether it was marketed or not. Reference has already been made to Indian Cable[(1994) 6 SCC 610: (1994) 74 ELT 22]. Thus any goods mentioned in the Tariff Schedule does not attract duty unless it is marketable or capable of being marketed. The test of marketability was relaxed in

Union Carbide India Ltd. v. Union of India [(1986) 2 SCC 547: 1986 SCC (Tax) 443: (1986) 24 ELT 169] and it was held that "in order to attract 'excise duty the article manufactured must be capable of sale to a consumer' ". The question that arose was whether aluminium cans produced by the appellants for the flashlights manufactured by it were goods. It was held: (SCC pp. 550-51, para 7)

> *"The question here is whether the aluminium cans manufactured by the appellant are capable of sale to a consumer. It appears on the facts before us that there are only two manufacturers of flashlights in India, the appellant being one of them. It appears also that the aluminium cans prepared by the appellant are employed entirely by it in the manufacture of flashlights, and are not sold as aluminium cans in the market. The record discloses that the aluminium cans, at the point at which excise duty has been levied, exist in a crude and elementary form incapable of being employed at that stage as a component in a flashlight. The cans have sharp uneven edges and in order to use them as a component in making flashlight cases the cans have to undergo various processes such as trimming, threading and redrawing. After the cans are trimmed, threaded and redrawn they are reeded, beaded and anodised or painted. It is at that point only that they become a distinct and complete component, capable of being used as a flashlight case for housing battery cells and having a bulb fitted to the case. We find it difficult to believe that the elementary and unfinished form in which they exist immediately after extrusion suffices to attract a market."*

It was explained in Bhor Industries Ltd. v. CCE [(1989) 1 SCC 602: 1989 SCC (Tax) 98 : (1989) 40 ELT 280] : (SCC p. 607, para 6)

> *"It appears to us that under the Central Excise Act, as it stood at the relevant time, in order to be goods as specified in the entry the first condition was that as a result of manufacture goods must come into existence. For articles to be goods these must be known in the market as such or these must be capable of being sold in the market as goods. Actual sale in the market is not*

necessary, user in the captive consumption is not determinative but the articles must be capable of being sold in the market or known in the market as goods."

It was reiterated in Hindustan Polymers v. CCE [(1989) 4 SCC 323: 1989 SCC (Tax) 118: (1989) 43 ELT 165]: (SCC p. 334, para 11)

"Excise duty, as has been reiterated and explained, is a duty on the act of manufacture. Manufacture under the excise law, is the process or activity which brings into being articles which are known in the market as goods, and to be goods these must be different, identifiable and distinct articles known to the market as such. It is then and then only that manufacture takes place attracting duty. In order to be goods, it was essential that as a result of the activity, goods must come into existence. For articles to be goods, these must be known in the market as such and these must be capable of being sold or being sold in the market as such."

47. We must deal with certain judgments on which reliance is placed by the Appellants to contend that meaning of the term 'manufacture' under a particular statute cannot be applied to another statute. In ***Ashirwad Ispat Udyog,*** the Supreme Court was considering whether cutting down of iron and steel scraps with the help of machines into strips of the size of 2" to 4" is a process of 'manufacture' within the special definition of 'manufacture' in Section 2(j) of the Madhya Pradesh General Sales Tax Act, 1959. The definition reads thus:

> *"2.(j) 'manufacture' includes any process or manner of producing, collecting, extracting, preparing or making any goods and in respect of trees which have been severed from the land or which have been felled, also the process of lopping the branches, cutting the trunks or converting them into logs, poles or ballies or any other articles of wood, but does not include such manufacture or manufacturing process as may be prescribed;"*

The High Court had, while dismissing the writ petition, relied upon decisions under the Excise Act and other statutes relating to meaning of the word 'manufacture' as used therein and concluded that the activity that was carried on by the Appellants therein was not 'manufacture'. The High Court held that simply cutting of iron scraps will not change the basic character of iron scrap. While setting aside the High Court's order the Supreme Court observed as under:

> *"8. Decisions construing the meaning of the word "manufacture" as used in other statutes do not apply unless the definition of that word in the particular statute under consideration is similar to that construed in the decisions. The plain construction of the special definition of the word in a particular Act must prevail. In the special definition given in Section 2(j) of the said Act "manufacture" has been defined as including a process or manner of producing, collecting, extracting, preparing or making any goods. There can be no doubt whatsoever that "collecting" goods does not result in the production of a new article. There is, therefore, inherent evidence in the definition itself that the narrow meaning of the*

> *word "manufacture" was not intended to be applied in the said Act. Again, the definition speaks of "the process of lopping the branches (of trees), cutting the trunks". The lopping of branches and the cutting of trunks of trees also, self-evidently, does not produce a new article. The clear words of the definition, therefore, must be given due weight and cannot be overlooked merely because in other contexts the word 'manufacture' has been judicially held to refer to the process of manufacture of new articles."*

48. It is clear from the above observations that the definition of the term 'manufacture' in the Madhya Pradesh General Sales Tax Act did not mention 'coming into existence of a new product'. Therefore, the Supreme Court observed that there was inherent evidence in the definition itself that the narrow meaning of the word 'manufacture' was not intended to be applied in the said Act. It is in this context that the Supreme Court observed that decisions construing the meaning of the word 'manufacture' as used in other statutes do not apply unless the definition of that word in the particular statute under consideration is similar to that construed in the decisions. ***Ashirwad Ispat Udyog*** was thus a case where the statute which was under consideration defined a term in a different manner. In such a case external aid of a statute which defines a term in a general way cannot be taken to vary

the definition in the statute under consideration so as to give it an extended or restrictive meaning. It must be noted at this stage that the definition of the term 'Manufacture' in Para 9.37 of the FTP clearly mentions bringing into existence by hand or by machine a new product having a distinctive name, character or use. ***Ashirward Ispat Udyog*** has therefore no application to this case.

49. In ***Venkateshwara Hatcheries,*** the Supreme Court was considering whether the business of hatchery run by the assessee comes within the meaning of the expression 'manufacture or produce or article or things' occurring in Section 32-A(2) and Section 80-J of the Income Tax Act, 1961 (**"IT Act"**). The Supreme Court held that what the assessee by application of mechanical process does in the hatchery is to preserve and protect the eggs at a particular temperature. But the coming out of chicks from the eggs is an event of nature and chicks are not 'articles or things'. The Supreme Court held that the business of hatchery carried out by the assessee does not fall within the meaning of Section 32-A and Section

80-J of the IT Act. Several decisions under the Sales Tax Act and the Central Excise Act were cited to contend that 'articles' include goods and goods could be an animate object and viewed in this light, the hatching of eggs would come within the meaning of the word 'produce' which is of a wider import than the word 'manufacture'. Rejecting this observation, the Supreme Court observed that no doubt several Sales Tax Acts have included animate things for the purpose of levying tax on sales. But the meaning assigned to a particular word in a particular statute cannot be imported to a word used in a different statute. The Appellants have relied on these observations.

50. In our opinion, these observations will have to be read in the context of the facts of the case. Facts of the present case are totally different. Here there is no event of nature. In that case, apart from facts the definitions were completely different. They used expressions like articles or things and not merely goods. Besides, the IT Act cannot be considered as a part of the same statutory scheme as in the case of the FTDRA, the

Central Excise Act or the Customs Act. It is not a part of the harmonious statutory scheme which includes the FTDRA, the FTP, the Customs Act and the Central Excise Act.

51. Reliance is also placed on ***Sonebhadra Fuels*** in support of the contention that it would be erroneous to apply the definition of the term 'manufacture' under the Central Excise Act to the definition of the said term in the FTP. In ***Sonebhadra Fuels,*** the assessee had applied for exemption/rebate of sales tax claiming that coal briquettes are the same commodity as coal which had already been subjected to tax. The Supreme Court considered the definition of 'manufacture' in Section 2(e-1) of the UP Trade Tax Act ("**UP Act**"). It reads thus:

> *"2(e-1) manufacture means, producing, making, mining, collecting, extracting, altering, ornamenting, finishing or otherwise processing, treating or adapting any goods, but does not include such manufactures or manufacturing process as may be prescribed."*

52. It was urged that the coal briquettes are made from coal dust by processing in which coal dust loses its original form,

quality etc., hence, it amounts to 'manufacture'. Reliance was placed on decisions under the Central Excise Act. The Supreme Court observed that the definition of 'manufacture' in Section 2(e-1) of the UP Act includes 'processing, treating or adapting any goods'. Thus, the meaning of 'manufacture' in the UP Act is wider than that in the Central Excise Act. It did not cover within its scope only such activities which bring into existence a new commercial commodity but also activities which do not necessarily result in bringing into existence a new commercial commodity. Following are the relevant observations:

> *"22. We may mention that, as noted above, decisions construing the word "manufacture" in other statutes are not necessarily applicable when interpreting Section 2(e-1) of the U.P. Trade Tax Act. As stated above, the definition of "manufacture" in Section 2(e-1) of the U.P. Trade Tax Act is very wide, which includes processing, treating or adapting any goods. Hence, in our opinion, the expression "manufacture" covers within its sweep not only such activities which bring into existence a new commercial commodity different from the articles on which that activity was carried on, but also such activities which do not necessarily result in bringing into existence an article different from the articles on which such activity was carried on. For example, the activity of ornamenting of goods does not result in manufacturing any goods which are commercially different from the goods which had been subjected to ornamentation, but yet it will amount to manufacture within the meaning of Section 2(e-1) of the U.P. Trade Tax Act since an artificial meaning of "manufacture" is given in Section 2(e-1). Hence, whether the commercial identity*

of the goods subjected to the processing, treating or adapting changes or not, is not very material."

53. This judgment can have no application to this case because here the definition of term 'Manufacture' in Para 9.37 of the FTP clearly uses the words bringing into existence a new product having a distinctive name, character or use. Therefore, the submission made on the basis of this decision that the definition of term 'manufacture' found in the Central Excise Act cannot be borrowed while interpreting the said term found in the FTP or that decisions where similar course is adopted cannot be relied upon must be rejected. What must be clearly understood is that if the target statute defines a term in a different manner, the definition or general way in which the term has been dealt with in other statutes cannot be used to vary the definition of the target statute or otherwise give an extended or restricted meaning to it. The decision relied upon by the Appellants cover situations where the target statute deals with the term in a deemed or specific manner.

54. The fourth basic precondition for entitlement to Deemed Export benefits is that the supply of goods must be by the main/sub-contractor to the project (Para 8.2 read with Para 8.6 of the FTP). We must apply this condition to the facts of the present case. To qualify for Deemed Export benefits, the goods should be manufactured by the main contractor and then supplied by him to the project authority (TSPL/NPL). Alternatively the goods should be manufactured by the sub-contractor and then supplied by him to the project authority (TSPL/NPL) or to the main contractor. Since the goods are to be supplied by the main contractor/sub-contractor the manufacture of the goods is to be by the main/sub-contractor.

55. TSPL in its pleadings has stated that at the stage of bidding it has considered the entire power plant being constructed by it to be the deemed export product. It has again averred ".....power plant proposed to be assembled and erected by the Appellant....." Thus, there is no supply by the main/sub-contractor and Deemed Export benefit is claimed for supply of power project itself which is undertaken by TSPL.

Deemed Export benefit cannot be claimed for any manufacture of goods by the project authority itself.

56. Reliance is placed by the Appellants on the observations of the Delhi High Court in ***KSK Energy Ventures*** where the minutes of PIC Meeting dated 15/03/2011 were challenged. The Delhi High Court on a *prima facie* view of the matter held that the contention that the concession in duty is not available when the company setting up the power project imports the goods itself does not appear to be logical. The Appellants' reliance on this order is misplaced. The Delhi High Court has qualified its observations by the words '*prima facie*'. Besides, the matter was not finally disposed of. Moreover, the High Court has not considered the provisions of the FTP, in particular Para 8.2 thereof regarding supply by main/sub-contractor. This order has therefore no application to this case.

57. The fifth basic precondition for entitlement to Deemed Export benefits is compliance with the requirement of following

International Competitive Bidding ("**ICB**") for procurement of goods as stipulated in Para 8.2 (last part) and Para 8.4.4(iv). Last part of Para 8.2 and Para 8.4.4.(iv) need to be again quoted for convenience:

Categories of Supply	*8.2*	*xxx*	*xxx*	*xxx*

Benefits of deemed exports shall be available under paragraphs (d), (e), (f) and (g) only if the supply is made under procedure of ICB.

8.4.4 (iv) Supply of Capital goods and spares upto 10% of FOR value of capital goods to power projects in terms of paragraph 8.2(g), shall be entitled for deemed export benefits provided the ICB procedures have been followed at Independent Power Producer (IPP) / Engineering and Procurement Contract (EPC) stage. Benefit of deemed exports shall also be available for renovation / modernization of power plants. Supplier shall be eligible for benefits listed in paragraph 8.3(a) and (b) of FTP, whichever is applicable. However, supply of goods required for setting up of any mega power projects as specified in S.No. 400 of DoR Notification No. 21/2002-Customs dated 1.3.2002, as amended, shall be eligible for deemed exports benefits as mentioned in paragraph 8.3(a), (b) and (c) of FTP, whichever is applicable, if such mega power

project is :

(a) an inter state Thermal Power Plant of capacity of 1000MW or more; or

(b) an inter state Hydel Power Plant of capacity of 500 MW or more.

58. The alternate to ICB namely, Tariff Based Competitive Bid adopted for power procurement applies effectively only from 14/01/2010 (by amendment of the FTP). By amendment dated 14/01/2010, the following was added under Para 8.2:

> *"However, in regard to mega power projects, the requirement of ICB would not be mandatory, if the requisite quantum of power has been tied up through tariff based competitive bidding or if the project has been awarded through tariff based competitive bidding."*

59. By further amendment dated 08/02/2010, the following was added in Clause 8.4.4(iv):

> *"However, in regard to mega power projects, the requirement of ICB would not be mandatory, if the requisite quantum of power has been tied up through tariff based competitive bidding or if the project has been awarded through tariff based competitive bidding."*

The above two amendments, needless to say, apply specifically to Mega Power Projects and not to Non Mega Power Projects.

60. The FTP provision before 14/01/2010 when amendment to Para 8.2 was made, and as on the cut-off date of TSPL which is 16/06/2008 and cut off date of NPL which is 02/10/2009 did not have the stipulation of Tariff Based Competitive Bid Process for selection of power developer as an alternate to ICB either for Mega or for Non Mega Power Projects. Accordingly, all projects under Para 8.2(f) and (g) of the FTP were necessarily to follow the procurement of goods through ICB route. Undoubtedly, ICB was mandatory and there was no exception to it.

61. The FTP as applicable on the cut off dates of TSPL and NPL did not recognise or provide for any differential treatment for the power project including the Mega Power Project that may be established in pursuance to any Tariff Based Competitive Bid Process such as the one provided under

Section 63 of the Electricity Act, 2003. Therefore, Deemed Export benefits could be claimed only by following ICB route for procurement of goods. There was no other alternative to this route. PSPCL is therefore right in contending that if TSPL or NPL had not envisaged the procurement of goods through an ICB procedure, there was no question of claiming any Deemed Export benefits.

62. As stated earlier, effective from 14/01/2010, the mandatory condition of ICB was relaxed in the case of Mega Power Projects provided Tariff Based Competitive Bid Process for selection of power producer is followed. The Non Mega Power Projects were not given such relaxation.

63. The relaxation or alternate avenue was provided only to Mega Power Projects by amendment of last part of Para 8.2 and Para 8.4.4.(iv) effective from 14/01/2010. The Central Government did not provide such exemption to Non Mega Power Projects covered by Para 8.2(g). Non Mega Power

Projects were therefore intended not to get the alternate to ICB.

64. Pertinently, Clause V of the modified Mega Power Policy dated 14/12/2009 states that "There shall be no <u>further</u> requirement of ICB for procurement of equipment for mega projects……" (emphasis supplied). This indicates that prior thereto, the requirement of ICB was a necessary requisite for Mega Power Projects as well.

65. It must be remembered that the amendments only make requirement of ICB not mandatory in case of Mega Power Project. Amendments merely provide an alternative to Mega Power Project. Thus despite amendments, conditions of ICB Procedures have been retained for both Mega Power Projects and Non Mega Power Projects. It is absolutely clear therefore that in case of Non Mega Projects, Tariff Based Competitive Bid Process can never be said to satisfy the condition of ICB.

66. According to TSPL, ICB at IPP stage (Independent Power Producer Stage) means where the Independent Power Producer/Developer is being selected by following International Competitive Bidding (ICB), contemplated under Section 63 of the Electricity Act, 2003. This process has been followed in the case of TSPL. SEL has been identified as successful bidder pursuant to ICB and it went on to become the owner of the SPV with the name and style of TSPL. According to TSPL, EPC stage would mean the stage where the Engineering Procurement Contractor is appointed by the Independent Power Producer (IPP) by following International Competitive Bidding (ICB). TSPL contends that the purpose of International Competitive Bidding is to ensure that the consumer interests are protected by ensuring that the sale of power to the distribution licensees is at a competitive price. Thus, where the power procurement has been undertaken through International Competitive Bidding (ICB) there is never any need for appointment of the EPC contractors (Engineering & Power Procurement Contractor) through International Competitive Bidding Process since the consumer interest

stands protected as the power tariff itself was arrived at by following the ICB route.

67. The case of NPL is similar. It is submitted that Independent Power Producer is NPL. At the stage of awarding contract to the Appellants, ICB Procedure was duly followed, hence there is no requirement at all that ICB procedure should be followed at the subsequent EPC stage as well (the stage of appointment of Engineering Procurement Contractors) by IPP/Independent Power Producer. The rationale behind this according to NPL is that as tariff of power to be sold by a generating company to a distribution licensee is getting fixed for the term of the Project under the PPA through tariff based ICB (i.e. ICB at IPP stage) no further purpose would be served by carrying out ICB at EPC stage for procuring supplies.

68. We are not inclined to accept these submissions. The central theme of Deemed Export benefits is supply of goods to power projects. This is clearly evident from last part of Para 8.2 and Para 8.4.4(iv) of the FTP. The Appellants are trying to

link it to the construction of power project or the generation and supply of electricity from the power project to the procurers and are thereby wrongly introducing a new facet to the concept of Deemed Export benefits which is not permissible and not borne out by the relevant provisions of the FTP as applicable to TSPL and NPL at the relevant time. If we read Para 8.2(g) which relates to Non Mega Power Project alongwith Para 8.4.4.(iv), it is clear that the Deemed Export benefits are available only in case of supply of 'Capital Goods'..... to power projects. There is no mention of construction of the power project or generation and sale of electricity from the power project. The provisions of the FTP as applicable at the relevant time give no scope for any other conclusion. Therefore, the provision in Para 8.4.4(iv) i.e "entitled for Deemed Export benefits provided the ICB Procedures have been followed at Independent Power Producers (IPP)/Engineering and Procurement Contract (EPC) stage" needs to be considered keeping in mind the requirement of supply of goods to power projects.

69. The stages have been clearly identified. To get a clear idea it would be necessary to again quote opening part of Para 8.2 for convenience:

> ***Categories of supply*** *8.2 Following categories of supply of goods by main / sub-contractors shall be regarded as "Deemed Exports" under FTP, provided goods are manufactured in India:*

Para 8.2 must be read with Para 8.6. Para 8.6 reads thus:

> ***Supplies to be made by the main / sub-contractor*** *8.6.1 In all cases of deemed exports, supplies shall be made directly to designated Projects / Agencies / Units / Advance Authorisation / EPCG Authorisation holders. Sub-contractor may, however, make supplies to main contractor, instead of supplying directly to designated projects / agencies. Such Supplies shall be eligible for deemed export benefits as per procedure laid down in paragraph 8.4 of HOB v1."*
>
> *8.6.2 Supplies made by an Indian sub-contractor of an Indian or foreign main contractor directly to the designated projects / agencies, shall also be eligible for deemed export benefits provided sub-contractor is indicated either originally or subsequently in the contract, and payment certificate is issued by project authority in the name of sub-contractor as in Appendix 22C of*

HOB v1.

70. If we read opening part of 8.2, Para 8.4.4(iv), last part of Para 8.2 and Para 8.6 of the FTP, it is clear that IPP stage refers to supply to the Project Authority (TSPL/NPL). The EPC stage refers to supply to the EPC Contractor. In other words the IPP stage refers to the main contractor supplying goods to the Project Authority (TSPL or NPL) and EPC stage refers to the sub-contractor supplying goods to the EPC contractor.

71. Tariff Based Competitive Bid Process for procurement of power cannot be equated with ICB (International Competitive Bidding) at Independent Power Producer (IPP) stage for supply of goods. It must be borne in mind that the Tariff Based Competitive Bid Process is not in regard to supply of goods. The essential and basic condition of Para 8.2 is supply of goods. If Competitive Bidding Process adopted at the selection of the Project Developer is equated with the condition of ICB at IPP stage the basic condition of Para 8.2, namely supply of goods will not be satisfied. This contention therefore deserves to be rejected.

72. PSPCL is right in submitting that if the Tariff Based Competitive Bidding for power procurement is the same as ICB at the IPP stage for Mega Project, there was no rationale for amending Para 8.2 proviso and Para 8.4.4.(iv) on 14/01/2010 and 08/02/2010 respectively to state that the requirement of ICB would not be mandatory for Mega Power Projects if the Tariff Based Competitive Bidding Process for power procurement is adopted.

73. In these appeals, IPP stage is the stage where IPP (TSPL/NPL) procures goods for construction of the power plant. The EPC stage is where the EPC Contractor referred to in the PPA procures goods. If there is a contractor for turnkey implementation of Power Projects, the above can be extended to the turnkey contractor procuring goods being at the IPP stage and EPC contractor appointed by the turnkey contractor procuring goods at the EPC stage.

74. TSPL has relied on some inter-ministerial correspondence, recommendations, etc. in support of its

submissions. We are not inclined to take cognisance of the same. We are concerned with the ultimate decision taken by the Government of India that in case of Mega Power Project (not Non-Mega Projects) there will be an alternative to ICB procedure in the supply of goods to the power project, namely, such ICB procedures shall be mandatory if the power is procured through Tariff Based Competitive Bid Process. We have taken note of the fact that the Government of India took a conscious decision not to allow such alternative in so far as Non Mega Projects are concerned.

75. In view of the above we reject the submissions of TSPL and NPL quoted above. We must note that neither TSPL nor NPL have produced any evidence to show that they have adopted ICB procedure for procurement of goods.

76. In the ultimate analysis, we are of the view that none of the basic conditions for entitlement to Deemed Export benefits have been satisfied by TSPL and NPL. We completely endorse the following conclusions drawn by PSPCL.

(a) TSPL and NPL have claimed that their Power Projects with generating units of 600/700 MW each are capital goods. The Power Projects are immovable plants and therefore they cannot be goods and therefore they cannot be capital goods.

(b) None of the goods have been shown to have been manufactured in India either by TSPL or by NPL or by any of the contractor/sub-contractor. The goods have been imported. None of the critical goods like Boiler, Turbine Generator have been manufactured in India.

(c) None of the goods have been supplied by the main contractor/sub-contractor after having been manufactured in India. Goods have been imported from sources outside India and erected at site. The main/sub-contractor in India executing the project never became the

owner of the goods to effect supply to TSPL or NPL.

(d) Neither TSPL nor NPL have produced any evidence of ICB process having been adopted to procure goods. SEL the bidder for the TSPL Project had from the cut-off date intended that SEPCO as the main/sub-contractor to undertake the procurement of goods required for the project. Similarly, L&T, the bidder for NPL intended a negotiated procurement for its joint venture company with Mitsubishi for import.

77. In our opinion, on a plain reading of the relevant provisions quoted by us hereinabove, the Deemed Export benefits under the FTP were not available to TSPL or NPL and therefore they were not entitled to claim that their bids were premised on the availability of Deemed Export benefits.

78. Both TSPL and NPL have given undertakings to PSPCL that they would pass on Mega Power fiscal benefits to PSPCL. It is submitted by TSPL that undertaking given by it was not a carte blanche undertaking as can be seen from the hand-written note stating that the benefits of mega status would be passed on as per Clause 13.2(a) of Article 13 of the PPA. It is submitted by TSPL that PSPCL adopted a high handed approach. Despite requests the recommendation letter was not granted by PSPCL resulting in non-grant of essentiality certificate and because of which imports could not be made without payment of duty. It is submitted that PSPCL is guilty of forcing TSPL to give the limited undertaking to pass on the mega status benefits as per relevant clause of the PPA.

79. The undertaking given by NPL is not conditional. It is submitted that NPL was in need of essentiality certificate. PSPCL was prepared to give recommendation for the same only if NPL submitted the undertaking insisted upon by PSPCL. It is submitted that its covering letter stated that the undertaking was being given under protest and on account of

undue insistence of PSPCL. It is pointed out that this Tribunal in its order dated 30/06/2014 passed in Appeal No.29 of 2013 has stated that NPL had no alternative but to give the said undertakings. It is submitted that the said order is not appealed against and hence has become final. TSPL and NPL therefore contend that undertakings obtained under force and coercion cannot be taken against them.

80. So far as order dated 30/06/2014 passed by this Tribunal is concerned, by the said order this Tribunal had remanded the matter. The entire matter is at large before us. Considering the nature of the controversy involved in this case and the peculiar facts of this case, we are of the opinion that it would be necessary for us to revisit all the facts to arrive at the correct conclusions.

81. Reliance is placed by PSPCL on the judgments of the Supreme Court in ***Sai Renewable***, ***Bishnudeo Narain*** and ***Shanti Budhiya*** to contend that when coercion or undue influence is alleged material particulars have to be given. It is

submitted that TSPL and NPL did not allege coercion immediately or at any time until the filing of the petition and hence this plea must be rejected.

82. It is the basic case of PSPCL that in view of the conferment of Mega Power Status on TSPL and NPL certain fiscal benefits accrued to them, and this being Change in Law, TSPL and NPL were liable to pass on the said benefits to PSPCL. We find substance in the contention of PSPCL that if these undertakings were obtained under coercion as alleged, it was open to TSPL and NPL to allege coercion immediately. In the circumstances of the case, it is difficult to accept TSPL and NPL's case of coercion. In any case, undertakings are not the substratum of this case. There are other telltale circumstances which negate the claim of the Appellants. Hence, it is not necessary to dwell on the undertakings any further.

83. Though on a plain reading of the relevant provisions of the FTP as applicable to the Appellants at the relevant time, we have come to a conclusion that the Appellants were not

entitled to Deemed Export benefits (benefits under the FTP) and, therefore, there is no question of taking away any benefits from them, we will examine their contention as to whether there was any Change in Law under Article 13 of the PPA as alleged on account of minutes of PIC Meeting dated 15/03/2011 and circulars and notifications issued thereafter.

84. The case of the Appellants is that as per Circular dated 05/12/2000 issued by the DGFT, the Appellants were entitled to Deemed Export benefits. Deemed Export benefits were granted on that interpretation to several producers. On 15/03/2011, PIC changed the existing interpretation regarding availability of Deemed Export benefits to the Non Mega Power Projects and clarified that the benefit of IED Refund under Para 8.3(c) of the FTP is not available for supplies made to the Non Mega Power Projects and accordingly such duty should not be refunded in any manner including as drawback under Para 8.3 of the FTP. On 27-28/04/2011, the DGFT issued a circular reiterating the

clarification issued by the DGFT and asked Regional Authorities to initiate recovery wherever benefit was earlier granted contrary to PIC clarification. On 28/12/2011 by a notification, an amendment was made to FTP withdrawing benefits under Para 8.3(b) of the FTP in respect of supplies to Non Mega Power Projects. On 21/03/2012, another amendment was made by a notification, withdrawing benefits under Para 8.3(a) of the FTP in respect of supplies to Non Mega Power Project making such supplies completely ineligible for the Deemed Export benefits. According to the Appellants as per Para 2.3 of the FTP, the DGFT has the power to interpret the FTP and his decision is final and binding and the DGFT being a Government Instrumentality any change in interpretation made by the DGFT would amount to Change in Law as per 'Change in Law' provision under Article 13 of the PPA. It is the Appellant's case that the changes in existing interpretation as reflected in Circular dated 05/12/2000, carried out by the DGFT by giving effect to the PIC minutes of meeting dated 15/03/2011 is 'Change in Law' as per the PPA.

85. There can be no dispute about the fact that a change in the interpretation by the Indian Government Instrumentality is a Change in Law under Article 13.1 read with the definition of the term 'Law'. But having read the DGFT circular dated 05/12/2000 and having gone through the Minutes of the Norms Committee Meeting held on 15/04/2008 we are unable to come to a conclusion that before the cut-off date there was any existing interpretation by the DGFT or any Indian Government Instrumentality that the developer can import the goods and install the same in a power project of immovable nature and can still claim Deemed Export benefits. We are of the opinion that if some of the DGFT officers allowed some projects to get the FTP benefits, that cannot be treated as interpretation of the FTP provisions by the Indian Government Instrumentality.

86. To examine the Appellants' submission, it is necessary to first go to the Circular dated 05/12/2000 issued by DGFT. It reads thus:

"Test of manufacture, for purposes of Deemed Exports (in the case of turnkey projects) stood satisfied, since it is not possible for a single contractor to manufacture himself all the items required for completion of such turnkey projects, hence certain items, either imported or indigenous, have necessarily to be procured from other sources. These items are often directly supplied to the project for assembly, commissioning, erection, testing etc. at site. Therefore, it is clarified that for all such directly supplied items, whether imported or indigenous, as are used in the (turnkey) projects, the condition of "manufacture in India", prerequisite for grant of deemed export benefits, is satisfied in view of the fact that the aforesaid activity, being undertaken at the project site constitute manufacture as per the definition given in para 3.31 of the Exim Policy and accordingly, the duties (customs and central excise) suffered on such goods, shall be refunded through the DBK route.

In the case of civil construction projects, falling under, para 10.2(d) of the exim policy, read with this office circular dated 20.8.99, a doubt has been raised as to whether excise duty paid on items such as cement, steel, etc., supplied to the project authority and used in the construction, could be refunded through the DBK route. In a civil construction project, it is noted that items such as cement, steel etc. are used as compulsory inputs and constitute as material supply, distinct from service portion of supplies. It is therefore, clarified that the excise duty paid, on supply of these inputs, shall be refunded through DBK route in the same manner as in any other case of excisable goods being supplied to any other projects, qualifying for deemed export benefits, subject to the project authority certifying the receipt of use of said inputs in the project."

87. The Appellants have placed reliance on the first part of the above circular which deals with turnkey contracts. It is the case of the Appellants that this circular which also stood out as "Law" as per PPA, the requirement of 'manufacture in

India' stood satisfied when directly supplied items are used in the assembling, commissioning, erection, testing, etc. at the Project site. It is submitted that this circular further clarifies that the test of 'manufacture in India' also stood satisfied even if the directly supplied items are imported.

88. It is further submitted that the above interpretation of the DGFT was further restated in the Minutes of Meeting dated 15/04/2008 of the Norms Committee of the DGFT. Following paragraphs of the minutes may be quoted.

> *"The case regarding ratification of norms in respect of above advance authorization was considered by the Norms Committee (NC-I) in its M. No.01/80 held 15.04.2008 as per the agenda. Committee noted that clarification sought from Policy Division has been received. They had clarified with the approval of DG as under:-*
>
> *"Advance Authorisation scheme is meant to allow, duty free import of inputs, to power project. Further, para 9.37 defines the word "manufacture". Hence, for the manufacture of capital goods, in case, generator, turbine etc., are part of the capital goods, the same can be allowed under advance authorization scheme, because these individual capital goods, become the input of the power project".*
>
> *The Committee decided to advise the firm to appear before the NC to explain the exact items of supply to the project viz a viz the items of imports so as to verify if the imported item are parts the larger capital goods/equipments under supply to the project. The case may be relisted on 27.05.2008."*

89. It is submitted that prior to the cut-off date of the Appellants the FTP benefits were granted to several Non Mega Power Projects. Even after the cut-off dates such benefits were granted and they were approved as late as in 2011. Examples are cited of Rosa Power Supply Co. Ltd., Lanco Anpara Thermal power Project, Lanco Amarkantak Power Project. It is pointed out that in respect of these projects Chinese manufacturers directly supplied equipments at the relevant project sites. The Appellants have also relied upon Show Cause Notice dated 28/02/2012 issued to M/s Simplex Infrastructure by the office of the DGFT Hyderabad, wherein it is mentioned that in respect of application filed under the FTP 2009-14, Deemed Export benefits were given to Simplex on the basis of circular dated 05/12/2000.

90. It is submitted that despite the above the benefit under Para 8.3(b) was withdrawn by the amendment notification dated 28/12/2011.

91. It is submitted that the benefits under para 8.3(a) was withdrawn by the amendment notification dated 21/03/2012. It is submitted that the above withdrawal of benefits on the basis of PIC Circular dated 15/03/2011 is Change in Law in terms of Article 13 of the PPA.

92. It is pointed out on behalf of PSPCL that the circular dated 05/12/2000 does not deal with a situation of total import of capital goods for the power project as has been done by TSPL or import of all machines such as Boiler, Turbine, Generator as has been done by NPL. It deals with certain goods being imported and others being procured from India. The goods to be imported were to form input for manufacture of goods in India. The idea was not to incorporate the imported goods directly in the power project embedded to earth.

93. On a careful reading of the circular we are inclined to agree with this submission of PSPCL. This circular deals with a situation where a single contractor undertakes the work and

he is not able to manufacture himself all inputs required for completion of the project. The word 'certain' used in the circular is important. It speaks about some goods to be imported to manufacture another capital goods by a turnkey contractor. The Appellants cannot rely on the Circular dated 05/12/2000 and contend that it states that they can import all the goods, install them in a power project and claim Deemed Export benefits. No such interpretation allowing Deemed Export benefits for such importation and installation of immoveable power project can be placed on this circular. Therefore, there was no such existing interpretation as alleged.

94. So far as the minutes of the Norms Committee Meeting dated 15/04/2008 which we have quoted hereinabove, it is clear upon a careful perusal of the same that the Norms Committee was dealing with the input goods being used to manufacture another capital goods and such capital goods becoming a part of the power project. This is clear from the latter part of the Norms Committee's observation which calls upon the developer to explain for verification whether the

imported items form part of the larger capital goods/equipments under supply to the project. On the basis of these minutes the Appellants could not have assumed on the cut-off dates that they were entitled to Deemed Export benefits for goods imported and installed under the power project.

95. Minutes of PIC meeting dated 15/03/2011 are clearly clarificatory in nature. The text of the minutes clearly reveals its clarificatory nature. It merely clarifies the DGFT's view as regards entitlement to Deemed Export benefits (See: ***Atul Commodities***). It is submitted by NPL that the dictionary meaning of both 'interpretation' and 'clarification' are broadly "to explain and make understandable or intelligible". It is submitted by NPL that clarification is necessary only to depart from the earlier interpretation which is now considered erroneous. We are unable to agree with this submission. If a need is felt to explain and make understandable or intelligible a statement or averment, the said statement or averment is not necessarily erroneous. A correct statement or averment

may also have to be made more intelligible or understandable. It is further submitted by NPL relying on ***Kesavananda Bharati*** that meaning of any word in the English language depends on the context in which it occurs and also the object and purpose of the provision in question. There can never be any dispute about this proposition. We have already discussed the purport and object of FTDRA and FTP. Our view is in sync with it. The context justifies the said view.

96. It was submitted that the policy circulars are in any event prospective in nature. It is submitted that since these circulars deny Deemed Export benefits to the Appellants they are oppressive in nature and hence they cannot have retrospective operation. As already noted these circulars are merely clarificatory in nature and cannot be described as introducing something which is oppressive. If the relevant provisions of the FTP are construed in proper perspective interpretation sought to be placed on them by the Appellants cannot be accepted. Therefore, this submission of the Appellants will have to be rejected. Observations of the

Supreme Court in ***Suchitra Components*** will not help the Appellants

97. It is submitted that even if it is assumed that earlier interpretation was wrong, but since it was adopted and Deemed Export benefits were given to several others, change in that interpretation is Change in Law particularly when no fraud was alleged by PSPCL. At the cost of repetition it must be stated that no such interpretation as suggested by the Appellant was adopted by the DGFT. Merely because some officers construed the FTP provisions in a particular manner and gave benefits to some developers that cannot be treated as the then prevalent interpretation. We reject the submission that there is any Change in Law. We may also add that treating this as Change in Law will be destructive of the concept of Deemed Export benefits and object and purport of the FTDRA and the FTP.

98. The Appellants have relied on the Calcutta High Court's judgment in ***Bharat Heavy Electricals Ltd. v. Union of***

India[69] to contend that the Policy Circular dated 15/03/2011 has been set aside. Reliance placed on this judgment is totally misplaced. In that case the validity of the said circular was challenged to the extent it stated that cement and steel are not eligible for Deemed Export benefits except as provided under Para 8.2(d) of the FTP 2009-14. The High Court was concerned with availability of Deemed Export benefits to steel and cement. The High Court held that prior to the specific amendment in the FTP in June 2012, the cement and steel were included for the FTP benefits. The High Court held that the very fact that the FTP had to be amended in June 2012 to introduce specific provisions for exclusion of cement and steel makes it clear that cement and steel were included prior to the amendment in June 2012. It is clear from a careful reading of the judgment that the Policy Circular only to the extent it denied Deemed Export benefits to cement and steel was set aside. The Appellants therefore cannot draw any support from this judgment.

[69] 2015(316) ELT 466 (Cal)

99. It is contended by NPL that the bidder was entitled to take into consideration the fact that as on the cut-off date, the DGFT through its officers was following a consistent interpretation of the provisions of the FTP and based on such interpretation had granted FTP benefits to Non Mega Power Projects. Reliance is placed on Circular dated 05/12/2000 and subsequent circulars and notifications which have been discussed by us hereinabove. In this connection, NPL has also placed reliance on Para 2.7.2.2 of the RFP dated 10/06/2009. It is submitted that if after the cut-off date, the DGFT adopted a different interpretation and stopped granting FTP benefits to Non Mega Power Projects, the bidder would be entitled to invoke Change in Law provision contained in Article 13.1.1 of the PPA. It is contended by TSPL that it has factored the Deemed Export benefits as on the cut-off date as per Para 2.7.2.2 of the RFP. The said benefit was withdrawn pursuant to PIC Minutes dated 15/03/2011. Such a loss of benefit stood neutralized by gain accrued under the Mega Power Policy. Therefore, reduction in tariff is not warranted.

100. We have no hesitation in rejecting this submission. We have already held that there was no interpretation of the relevant FTP provisions in existence as suggested by the Appellants and the PIC Minutes dated 15/03/2011 are merely clarificatory. We have already held that there was no shift in the DGFTs interpretation of the relevant FTP provisions. Since the Appellants were not entitled to any Deemed Export benefits, their bids cannot be premised on the availability of Deemed Export benefits on the basis of the alleged prevalent interpretation of the FTP provisions.

101. We must now reproduce Para 2.7.2 of the RFP which contains disclaimer. Para 2.7.2.2 on which reliance is placed by the Appellants falls thereunder.

> ***"2.7.2 Bidder to inform himself fully***
>
> *2.7.2.1 The bidder shall make independent enquiry and satisfy itself with respect to all the required information, inputs, conditions and circumstances and factors that may have any effect on his Bid. While submitting the Bid the Bidder shall be deemed to have inspected and examined the site*

conditions (including but not limited to its surroundings, its geological condition, the adequacy of the road and rail links to the Site and the availability of adequate supplies of water), examined the laws and regulations in force in India, the transportation facilities available in India, the grid conditions, the conditions of road, bridges, ports, etc. for unloading and/or transporting heavy pieces of material and has based its design, equipment size and fixed its price taking into account all such relevant conditions and also the risks, contingencies and other circumstances which may influence or affect the supply of power. Accordingly, the Bidder acknowledges that, on being selected as Successful Bidder and an acquisition of the Seller, the Seller shall not be relieved from any of its obligations under the RfP Project Documents nor shall the Seller be entitled to any extension of time or financial compensation by reason of the unsuitability of the Site for whatever reason.

2.7.2.2 *In their own interest, the Bidders are requested to familiarize themselves with the Electricity Act, 2003, the Income Tax Acts 1961, the Companies Act, 1956, the Customs Act, the Foreign Exchange Management Act, IEGC, the regulations framed by regulatory commissions and all other related acts, laws, rules and regulations prevalent in India. The Procurer/Authorised Representative shall not entertain any request for clarifications from the Bidders regarding the same. Non-awareness of these laws or such information shall not be a reason for the Bidder to request for extension of the Bid Deadline. The Bidder undertakes and agrees that before submission of its Bid all such factors, as generally brought out above, have been fully investigated and considered while submitting the Bid."*

102. At this stage, it would be advantageous to quote Circular dated 15/01/2002 issued by the Central Board of Excise and Customs, Ministry of Finance to which our attention is drawn by Mr. Ramchandran, learned counsel appearing for PSPCL. It reads thus:

> *"In exercise of the power conferred under Section 37B of the Central Excise Act, 1944, the Central Board of Excise and Custom considers it necessary, for the purpose of uniformity in connection with classification of goods erected and installed at site, to issue the following instructions.*
>
> *2. Attention is invited to Section 37B Order No. 53/2/98-CX dt.2.4.98 (F.No.154/4/98-CX4) regarding the excisability of plant and machinery assembled at site.*
>
> *3. A number of Apex Court judgments have been delivered on this issue in the recent past. Some of the important ones are mentioned below:*
>
> *(i) Quality Steel Tubes Pvt. Ltd. Vs. CCE [1995(75)ELT17(SC)]*
> *(ii) Mittal Engineering Works Pvt. Ltd. Vs. CCE Meerut [1996(88)ELT622(SC)]*
> *(iii) Sirpur Paper Mills Limited Vs CCE, Hyderabad [1998(97)ELT3(SC)]*
> *(iv) Silica Metallurgical Ltd. Vs. CCE Cochin [(1999(106)ELT 439(Tribunal)] as confirmed by the Supreme Court vide their order dated 22.2.99 [1999(108)ELT 58A(SC)]*
> *(v) Duncan Industries Ltd. Vs. CCE Mumbai [2000(88)ECR 19(SC)*
> *(vi) Triveni Engineering & Industries Ltd. Vs. CCE [2000(120)ELT273(SC)]*
> *(vii) CCE Jaipur Vs. Man Structurals Ltd. [2001(130)ELT401(SC)]*

4. The plethora of such judgments appear to have created some confusion with the assessing officers. The matter has been examined by the Board in consultation with the Solicitor General of India and the matter is clarified as under:-

(i) For goods manufactured at site to be dutiable they should have a new identity, character and use, distinct from the inputs/components that have gone into its production. Further, such resultant goods should be specified in the Central Excise Tariff as excisable goods besides being marketable i.e. they can be taken to the market and sold (even if they are not actually sold). The goods should not be immovable.

(ii) Where processing of inputs results in a new product with a distinct commercial name, identity and use (prior to such product being assimilated in a structure which would render them as a part of immovable property), excise duty would be chargeable on such goods immediately upon their change of identity and prior to their assimilation in the structure or other immovable property.

(iii) Where change of identity takes place in the course of construction or erection of a structure which is an immovable property , then there would be no manufacture of "goods" involved and no levy of excise duty.

(iv) Integrated plants/machines, as a whole, may or may not be 'goods'. For example, plants for transportation of material (such as handling plants) are actually a system or a net-work of machines. The system comes into being upon assembly of its component . In such a situation there is no manufacture of "goods" as it is only a case of assembly of manufactured goods into a system. This cannot be compared to a fabrication where a group of machines themselves may be combined to constitute a new machine which has its own identity/marketability and is dutiable (e.g. a paper making machine assembled at site and fixed to the earth only for the purpose of ensuring vibration free movement)

(v) If items assembled or erected at site and attached by foundation to earth cannot be dismantled without substantial damage to its components and thus cannot be reassembled, then the items would not be considered as moveable and will, therefore, not be excisable goods.

*(vi) If any goods installed at site (example paper making machine) are **capable** of being sold or shifted as such after removal from the base and without dismantling into its components/parts, the goods would be considered to be movable and thus excisable. The mere fact that the goods, though being **capable** of being sold or shifted without dismantling, are actually dismantled into their components/parts for ease of transportation etc., they will not cease to be dutiable merely because they are transported in dismantled condition. Rule2(a) of the Rules for the Interpretation of Central Excise Tariff will be attracted as the guiding factor is **capability of being marketed in the original form** and not whether it is actually dismantled or not, into its components. Each case will therefore have to be decided keeping in view the facts and circumstances, particularly whether it is practically possible (considering the size and nature of the goods, the existence of appropriate transport by air, water, land for such size, capability of goods to move on self propulsion -ships- etc.) to remove and sell the goods as they are, without dismantling into their components. If the goods are incapable of being sold, shifted and marketed without first being dismantled into component parts, the goods would be considered as immovable and therefore not excisable to duty.*

(vii) When the final product is considered as immovable and hence not excisable goods, the same product in CKD or unassembled form will also not be dutiable as a whole by applying Rule 2(a) of the Rules of Interpretation of the Central Excise Tariff . However, components, inputs and parts which

are specified excisable products will remain dutiable as such identifiable goods at the time of their clearance from the factory or warehouse.

(viii) The intention of the party is also a factor to be taken into consideration to ascertain whether the embedment of a machinery in the earth was to be temporary or permanent. This, in case of doubt, may help determine whether the goods are moveable or immovable.

5. Keeping the above factors in mind the position is clarified further in respect of specific instances which have been brought to the notice of the Board.

(i) ***Turn key projects like Steel Plants, Cement plants, Power plants*** *etc. involving supply of large number of components, machinery, equipments, pipes and tubes etc. for their assembly / installation / erection / integration / inter-connectivity on foundation/civil structure etc. at site, will not be considered as excisable goods for imposition of central excise duty - the components, however, would be dutiable in the normal course.*

(ii) ***Huge tanks made of metal for storage of petroleum products*** *in oil refineries or installations. These tanks, though not embedded in the earth, are erected at site, stage by stage, and after completion they cannot be physically moved., On sale/disposal they have necessarily to be dismantled and sold as metal sheets/scrap. It is not possible to assemble the tank all over again. Such tanks are therefore not moveable and cannot be considered as excisable goods[Reference para 15 of Triveni judgement supra and the case of CCE Chandigarh vs Bhagwanpura Sugar Mills reported in 2001(47)RLT409(CEGAT-Del)]*

(iii) ***Refrigeration/Air conditioning plants*** *. These are basically systems comprising of compressors, ducting, pipings, insulators and sometimes cooling towers etc. They are in the*

nature of systems and are not machines as a whole. They come into existence only by assembly and connection of various components and parts. Though each component is dutiable, the refrigeration/air conditioning system as a whole cannot be considered to be excisable goods. Air conditioning units, however, would continue to remain dutiable as per the Central Excise Tariff.

(iv) ***Lifts and escalators****. (a)Though lifts and escalators are specifically mentioned in sub heading 8428.10, those which are installed in buildings and permanently fitted into the civil structure, cannot be considered to be excisable goods. Such lifts and escalators have also been held to be non-excisable by the Govt. of India in the case of* ***Otis Elevators India Co Ltd reported in 1981 ELT 720 (GOI).*** *Further, this aspect was also a subject matter of C&AG's Audit Para No.7.1(b)/98-99 [DAP NO 186] which has since been settled by the C&AG accepting the Board's view that such lifts and escalators are not excisable goods. Also refer* ***CCE vs Kone Elevators India Ltd reported in 2001(45)RLT 676 (CEGAT- Chen)***

(b) There may, however, be instances of fabrication of complete lifts and escalators which are movable in nature as a whole and can be temporarily installed at construction sites or exhibitions for carrying men or material. Such cases alone would be liable to duty under sub-heading 8428.10 of the Central Excise Tariff.

6. Based on the above clarifications pending cases may be disposed of . Past Instructions, Circulars and Orders of the Board on this issue may be considered as suitably modified.

7. Suitable Trade Notice may be issued for the information and guidance of the trade.

8. Receipt of this order may please be acknowledged.

9. Hindi version will follow.

Sd/
Suraksha Katiyar
Under Secretary to the Govt of India"

103. We have already noted that the Central Excise Act and the FTDRA are harmonious statutes. Therefore, the term 'Manufacture' defined in the FTP has to be understood in the manner in which it is dealt with under the Central Excise Act. Judgments of the Supreme Court interpreting the term 'Manufacture' to mean 'coming into existence of a product having a distinct name, character and use' were taken into consideration while issuing this circular. This circular clearly informs the people in the trade what would and what would not constitute manufacture of goods. As per the above quoted paragraphs of the RFP, the Appellants were expected to familiarize themselves with laws, rules and regulations and judgments, etc. and were required to satisfy themselves in respect of all required information after making independent enquiry. They must be therefore taken to be fully cognizant of

the legal position settled by the Supreme Court in its judgments which we have referred to hereinabove. They ought to have collected relevant information having bearing on their bid, such as circular of the Central Board of Excise and Customs referred to hereinabove. The above quoted paragraphs of the RFP do not support the case of the Appellants, but support the case of PSPCL.

104. In our opinion, the entire controversy is correctly dealt with by the Karnataka High Court in ***Saikala***. In that case the Petitioner therein after having obtained Advance Authorisation from the Jt. DGFT as a main contractor for import of goods had procured goods worth CIF value of Rs.68,27,31,904/- without payment of customs duty against discharge of export obligation of Rs.72,70,00,000/- by supplying the same to the Hydel Project claimed to have fulfilled export obligation. He filed appeal for redemption of advance license and issuance of Export Obligation Discharge Certificate which came to be rejected holding *inter alia* that goods so imported by the Petitioner and supplied to Non Mega

Power Project are not Deemed Export under the FTP. That order was confirmed in appeal. A writ petition was filed before the Karnataka High Court. Similar submissions were advanced before the Karnataka High Court. The Karnataka High Court rejected the writ petition. The following observations of the Karnataka High Court are important and clearly answer all the points raised by the Appellants.

> *"13. A bare reading of paragraph 8.1 and 8.2 of Chapter 8 would clearly indicate that in order that transaction is qualified as Deemed Export, they must necessarily fulfill the following criteria or conditions namely,*
>
> *(i) Deemed Exports are those transactions in which goods supplied do not leave the country;*
>
> *(ii) Goods are necessarily to be manufactured in India in respect of categories envisaged in clauses (a) to (j) of paragraph 8.2 of Chapter 8 of FTP;*
>
> *(ii) Goods are supplied by main/sub-contractor.*
>
> *The words used in clause (g) of paragraph 8.2 are* ***"supply of goods to power projects and refineries..."****. These words have to be read in conjunction with the words* ***"provided goods are manufactured in India"*** *found in clause 8.2 of Chapter 8.*
>
> *14. Petitioner is attempting to justify its claim for obtaining EODC on the ground that after direct import of procurements, it has undertaken the activity of assembly of various parts, fabrication, re-conditioning, erection, installation etc. and as such its claim would fall*

within the word 'manufacture' as specifically defined in paragraph 9.36 of Chapter 9 of FTP.

15. At this juncture itself, it would be appropriate to notice that a circular bearing No.50/2009-2014 (RE 2010) dated 28.12.2011 came to be issued by the department of Commerce, Directorate General of Foreign Trade, New Delhi to All Regional Authorities (RAs),CBEQ, All Commissioners of Customs and Exporting Community clarifying as to the claims relating to Deemed Ex-port benefits and it was clarified thereunder as follows:

> *"(1) Policy Interpretation Committee in its meeting held on 15.03.2011 had inter-alia clarified as under:*
>
> *"Issue of claiming Deemed Export benefits in cases of import made by the project authority was discussed. After detailed deliberation, it was decided that if the Bill of Entry is in the name of project authority deemed export benefits would not be available (such cases will be ineligible for grant of Deemed Export benefits)"*
>
> *(2) Deemed exports benefits are admissible in terms of paragraph of 8.2 of FTP, if goods are manufactured in India. In the case of non mega power projects, for instance, if capital goods such as boilers, turbines, generators (BTGs) are being supplied to project authorities, then deemed export benefits are admissible only if such BTGs are manufactured in India. If these are imported and supplied as such, then such supplies do not amount to deemed exports, and hence deemed export benefits will not be admissible."*
>
> *(3) xxx*
>
> *(4) xxx*

*16. Though above said circular has been assailed by the petitioner before the authorities on the ground that it is only prospective in nature, same was not accepted and rightly so, since said notification is only clarificatory in nature whereunder it has been clarified that in case of capital goods having been imported by the contractors or sub-contractors and supplied as such to project authorities, then custom duties paid on such imports cannot be refunded back as deemed export duty draw back under paragraph 8.3(b). Thus, said circular does not impose any new condition. It would also clarify that Deemed Export benefits are admissible in terms of paragraph 8.2 of FTP, if goods are "**manufactured in India**". It also further clarifies that if capital goods such as Boilers, Turbines, Generators (BTGs) are supplied to project authorities, then deemed export benefits would be admissible if only such BTGs are manufactured in India. It would also clarify that if they are imported and supplied as such, then such supplies do not amount to deemed exports, and hence deemed export benefits will not be admissible.*

17. Deemed Export Policy is basically for import substitution and in the event of the Project Authority is importing the same, then consequently, no import substitution takes place. It is because of this precise reason the appellate authority has rightly observed that, import of capital goods by non mega power projects is subjected to 5% of Basic Customs Duty if supplied as such to the project site and 5% duty to be paid get exempted by taking Advance Authorisation, then, it defeats the very purpose of imposition of 5% Basic Customs duty which observation and conclusion is just, and proper and in consonance with the extant FTP.

18. Now turning my attention back to the core issue, namely, the contention of the petitioner that activity undertaken by it is in terms of the contract entered into with the project authority when examined in the background of the definition of the word "manufacture' as defined under paragraph 9.36, this Court is of the considered view that same will have to be read along with clause 8.2 of FTP.

19. There cannot be any dispute to the fact that the Hydel power plant which is being installed and commissioned by the petitioner is an immovable item which is fastened to the earth and as such, project by itself cannot be construed as deemed export. An item which comes into existence after manufacture by use of the inputs procured under the duty exemption and such goods which come into being for being supplied to the project authority would be covered under the category of Deemed Exports. Thus, claim of the petitioner that it has procured the Capital Goods and same was within the knowledge of the authorities and as such, it had shifted the goods so procured (imported) and shifted to the project site would not satisfy the ingredient of Deemed Exports. In the instance case, petitioner has imported Capital Goods like Turbines, Generators, Oil Tanks, UPS for computer system etc. as could be seen from the Advance Authorisation dated 19.05.2009 & 21.05.2009(Annexure-D & E) and supplied to the power project. Had the petitioner procured the parts of these goods and manufactured at its site and thereafter shifted the same to the project site, then, it would have had the right to claim the benefit of Deemed Export or to put it differently, if the petitioner had used the goods procured by carrying out the manufacturing activity for the purposes of commissioning and installing the power project, it would have been entitled to claim the benefit. Such situation had not arisen inasmuch as, the petitioner having imported the goods had shifted the goods "as such" and thereby not meeting the criteria prescribed under clause 8.2 of FTP namely, "goods are manufactured in India".

"20. Yet another contention of Mr. Shivadass relating to that Jt.DGFT authorities being aware of the nature of goods being imported and Advance Authorisation licence being issued itself precludes them from taking a stand contrary is also without any force inasmuch as, there cannot be estoppels against statute. That apart, petitioner being conscious of the fact that if Advance Authorisation is taken under the Deemed Exports Scheme for Non Mega Power Project, then such Capital Goods to be supplied to the project are required to be manufactured in India and in the instant case, the goods having not been manufactured in India would not be entitled to claim that such goods procured/imported would still fall within the four corners of "Deemed Exports".

'Deemed Exports' benefit for non-mega power project would be available for supply of capital goods if the categories

*of supply of goods by main/sub-contractors as mentioned in para 8.2(a) to 8.2(g), provided '**goods are manufactured in India'**. In the case on hand, capital goods like Turbine, Generators, etc. have been imported and as such, they have been installed in the power project. If the petitioner had undertaken manufacture of such goods procured namely, Turbines and Generators by importing inputs required for manufacture of these goods. Since export policy having been brought for import substitution and if the project authorities were to import the same, then said project authority cannot be heard to contend that imports substitution has taken place. From facts on hand, it is explicitly clear that the goods imported under advance authorization licence have been supplied as such to the project and they have not been manufactured in India and as such, these goods as '**capital goods'** would not be entitled for exemption under advance authorization."*

105. We now need to deal with the submission of the Appellants that acting on the previous interpretation of the FTP provisions certain Non Mega Power Projects like Rosa Power Supply Co. Ltd., Lanco Infratech Ltd. were granted FTP benefits and therefore they are also entitled to the said benefits.

106. This submission deserves to be rejected. It appears that claims of certain Non Mega Power Projects were granted by officers of the DGFT wrongly. The Appellants cannot claim equality in such a situation. The Supreme Court has

consistently rejected the plea of negative equality. In ***Coromandel Fertilizers*** the Supreme Court observed as under:

> *"13. Mr Setalvad made a grievance that the authorities concerned had allowed the benefit of the notification under similar circumstances to a rival company. If the grievance of the appellant is true, the appellant may no doubt have reasons to feel sore about it. We have, however, to point out that the grievance of the appellant even if it is well founded, does not entitle the appellant to claim the benefit of the notification. A wrong decision in favour of any particular party does not entitle any other party to claim the benefit on the basis of the wrong decision. We are, therefore, clearly of the opinion that the fertilizer manufactured by the appellant in respect of which claim for exemption under the notification is made is not a mixed fertilizer within the meaning and scope of the notification and we have no hesitation in rejecting the case of the appellant, expressing our agreement with the reasons stated in the judgment of the High Court."*

107. In ***M.K. Sarkar*** the Supreme Court observed as under:

> *"25. There is another angle to the issue. If someone has been wrongly extended a benefit, that cannot be cited as a precedent for claiming similar benefit by others. This Court in a series of decisions has held that guarantee of equality before law under Article 14 is a positive concept and cannot be enforced in a negative manner; and that if any illegality or irregularity is committed in favour of any individual or group of individuals, others cannot invoke the jurisdiction of courts for perpetuating the same irregularity or illegality in their favour also on the reasoning that they have been denied the benefits which have been illegally extended to others. (See Chandigarh Admn. v. Jagjit Singh [(1995) 1 SCC 745], Gursharan Singh v. NDMC [(1996) 2 SCC 459], Faridabad CT Scan Centre v. D.G. Health Services [(1997) 7 SCC 752], State of Haryana v. Ram Kumar Mann [(1997) 3 SCC 321: 1997 SCC (L&S) 801], State of Bihar v. Kameshwar Prasad Singh*

[(2000) 9 SCC 94: 2000 SCC (L&S) 845] and Union of India v. International Trading Co. [(2003) 5 SCC 437])

26. A claim on the basis of guarantee of equality, by reference to someone similarly placed, is permissible only when the person similarly placed has been lawfully granted a relief and the person claiming relief is also lawfully entitled for the same. On the other hand, where a benefit was illegally or irregularly extended to someone else, a person who is not extended a similar illegal benefit cannot approach a court for extension of a similar illegal benefit. If such a request is accepted, it would amount to perpetuating the irregularity. When a person is refused a benefit to which he is not entitled, he cannot approach the court and claim that benefit on the ground that someone else has been illegally extended such benefit. If he wants, he can challenge the benefit illegally granted to others. The fact that someone who may not be entitled to the relief has been given relief illegally, is not a ground to grant relief to a person who is not entitled to the relief.

Thus the Appellants cannot draw support from the fact that certain Non Mega Power Projects were granted the FTP benefits by some officers on the basis of their interpretation of the FTP benefits.

108. The Appellants have also relied on the legal principle of 'Contemporanea Expositio' which means that contemporaneous understanding of the concerned authorities and the interpretation placed by them on the relevant provisions which they were in charge of implementing and enforcing must prevail. Reliance is placed on judgments of

the Supreme Court in ***Spentex Industries Ltd***, ***Desh Bandhu Gupta, Indian Metal & Ferro Alloys Ltd.*** and other judgments which refer to this doctrine. It is submitted that these judgments lay down that the Government is bound by the said contemporaneous understanding and exposition of the concerned authorities and the court would ordinarily not depart from such contemporaneous understanding. It is submitted that the interpretation which was adopted by the DGFT prior to the cut-off date must therefore not be departed from such contemporaneous understanding. The doctrine of 'Contemporanea Expositio' as explained by the Supreme Court would undoubtedly be applicable in situations where interpretation or understanding of the authorities is not illegal or glaringly incorrect. If the interpretation or understanding is illegal, untenable and unwarranted and continuing the same will have serious adverse impact on the economy, the courts will be duty bound to depart from it. Ordinarily the court will not deviate from such interpretation or understanding but in certain circumstances as are present in this case the court will have to deviate from it. If the interpretation is contrary to the

scheme, objective and purpose of the FTP, to which we have adverted hereinabove, it cannot be accepted. If the interpretation defeats the purpose of the FTP which is to incentivise indigenous manufacture in India and impliedly to promote import substitution, the court will be wary of accepting it. This submission must therefore be rejected.

109. Besides, Circular dated 05/12/2000 does not override the essential conditions which must be fulfilled by anyone who claims Deemed Export benefits such as supply of goods, manufacture in India, and procurement under ICB etc. Any interpretation which glosses over these preconditions is completely *ultra vires* the provisions of the FTP. The Appellants cannot assume that they have a right to Deemed Export benefits because some developers got them even though the Appellants do not fulfil the preconditions for entitlement to Deemed Export benefits. To assume that Deemed Export benefits would be available though the Appellants imported all the essential goods from abroad, their procurement of goods is without following ICB procedure and

they have incorporated goods in the power plant to constitute an immovable property is to completely misconstrue the concept of Deemed Export benefits.

110. The Appellants have placed reliance on order dated 13/12/2014 passed by the Gujarat High Court in ***Alstom India Limited,*** Order dated 26/02/2014 passed by the Delhi High Court in ***Simplex Infrastructure Limited*** and Judgment dated 21/07/2014 passed by the Bombay High Court in ***Patel Engineering Limited v. Union of India.*** It is pointed out that 22 similar cases are pending before the Supreme Court. In our opinion, these decisions have no application to the present case because they state that the power of recovering the refund can only be in terms of Section 16 of the FTDRA and it is with the Central Government and not with the DGFT. The core issue involved in this case is not dealt with in those cases.

111. In the circumstances we have no hesitation in concluding that the Appellants were not entitled to Deemed Export benefits as alleged. Their claim of Change in Law cannot be sustained and is rejected. Consequently, their case that benefit accrued to them on account of conferment of Mega Power status is counterbalanced by the loss of FTP benefits of the same value and, hence, they are entitled to a corresponding set-off or adjustment to the same extent as the gain accruing to them on account of Mega Power status, deserves to be rejected and is rejected. The grant of Mega Power status to the Appellants is a Change in Law within the meaning of Article 13 of PPA. The Appellants are therefore liable to pass on the benefits accrued to them on account of grant of Mega Power status to PSPCL.

112. In view of the above, the appeals are dismissed. Connected IAs, if any, do not survive and are disposed of as such.

113. Pronounced in the Open Court on this 04th day of July, 2017.

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]

√**REPORTABLE/~~NON-REPORTABALE~~**