PUNJAB STATE ELECTRICITY REGULATORY COMMISSION
SCO NO. 220-221, SECTOR 34-A, CHANDIGARH

Petition No.41 of 2013
(On remand by APTEL)
Date of Order: 02.12.2014

In the matter of: Petition under Section 86 (1) (f) of the Electricity Act, 2003 for adjudication of disputes and for directions.

AND

In the matter of: Punjab State Power Corporation Limited, The Mall, Patiala.

Versus

1. Talwandi Sabo Power Limited, Banwala, Mansa – Talwandi Sabo Road, District Mansa, Punjab.

2. Sterlite Energy Limited, SIPCOT Industrial Complex, Madurai By Pass Road, T.V. Puram P.O. Tuticorin 628002.

Present: Smt.Romila Dubey, Chairperson
Shri Virinder Singh, Member
Shri Gurinder Jit Singh, Member

ORDER

Punjab State Power Corporation Limited (PSPCL) had filed this petition under Section 86 (1) (f) of the Electricity Act, 2003 for adjudication of disputes and for directions in matter to pass on the financial benefits availed by Talwandi Sabo Power Limited (TSPL) on account of Mega Power Status granted to its Power Plant

(660x3 MW=1980 MW) at Banawala, District Mansa, after the cut off date (16.06.2008 i.e. 7 days before the Bid Deadline which was 23.06.2008) which amounts to 'Change in Law' in terms of Article 13 of the Power Purchase Agreement. TSPL did not dispute the fact that it did not qualify to be a Mega Power Project (MPP) under the Mega Power Policy, 2006, which was in force on the cut off date. It, however, submitted that non-Mega Power Projects (Non-MPP) were also eligible to the benefits under Deemed Export Scheme of Foreign Trade Policy (FTP) and Concessional Rate of Custom Duty under Project Imports Scheme under the Customs Tariff Act on the cut off date. There is an express stipulation under clause 2.7.2.2 read with para 3 of Annexure 9 of RfP, which requires all bidders to consider all applicable laws etc. while submitting the bid. TSPL submitted that it considered the benefits under FTP available to Power Project at Banawala, District Mansa and factored in these benefits while quoting the bid price. TSPL further submitted that it is a settled principle of law that in the event a person is eligible for more than one benefit, he is at liberty to choose any of the benefits as per his discretion. Availing of benefits under one scheme does not mean that other scheme was not available.

The Commission, after considering the submissions of the petitioner (PSPCL) and respondents [(TSPL) and Sterlite Energy Limited (SEL)], in its Order dated 27.12.2013 in this petition, allowed as under:-

> **"**The Commission is of the considered view that holistic reading of the relevant extracts of the Foreign Trade Policy, as prevalent at the time of bidding, the

interpretation/clarifications of Policy Interpretation Committee (PIC) vide its Meetings dated 15.03.2011 and 09.09.2011 and the clarification issued by the Director General of Foreign Trade vide Circular letter dated 27/28.04.2011 and Notifications of the Ministry of Commerce and Industry dated 28.12.2011 and 21.03.2012, make it very clear that the benefits under FTP were not available to the Project of TSPL. Probably for this very reason, the petitioner did not rely upon the FTP for claiming the benefits. The Commission notes that in case FTP benefits were thought to be available to the Respondent No.1, it would not have waited for Mega Power Status to its project through subsequent change of Mega Power Policy by Government of India to avail benefits thereunder. The interpretation given by the Policy Interpretation Committee (PIC) is clarificatory in nature. It was to clarify that FTP as it existed was being wrongly interpreted to confer benefits of Deemed Export duty drawback to non-mega power projects, which were not otherwise eligible to such benefits and if such duty drawback has been refunded wrongly to ineligible projects, the same were liable to be recovered from such projects. No change in FTP was made at any stage. In such a situation even if TSPL had drawn some benefits under FTP, the same were liable to be recovered from it. Resultantly, the Commission is of the opinion that benefits under FTP were not available to TSPL. Once it is held that these benefits were not available to TSPL under FTP as claimed, there remains no question of any off-set of the benefits, it has actually availed under modified Mega Power Policy conferring Mega Power Status to its

Project w.e.f. 19.08.2010. Even if, for the sake of argument, it is assumed that the benefits were available to the Project under the FTP on the date seven days before the date of submission of the bids, TSPL has forfeited its right to subsequently claim the benefit under FTP by opting out of it and having actually claimed the benefits under Mega Power Policy. The factum of the pendency of cases challenging the interpretation/clarifications of FTP as it stood and subsequent withdrawal of the benefits by DGFT/GoP wrongly given to non-mega power projects, does not alter the position at this stage until the same is held illegal by the Hon'ble High Courts/Supreme Court. The Commission is, therefore, not inclined to consider the pendency of the Writ Petitions at this stage. For the Commission, to decide the issue of availability of FTP benefits to the respondents, it is pertinent that Competent Authorities of GoI, have held that these were not available to non-mega power projects at any time. The Commission therefore, decides that FTP benefits were not available to TSPL Project at any stage i.e. before or after the relevant date of 16.06.2008 and no 'Change in Law' has taken place so far as FTP is concerned.

In view of above discussion and findings, the Commission holds that the grant of the Mega Power Status to the Project (3x660=1980 MW) of TSPL at Banawala, District Mansa, Punjab, amounts to 'Change in Law' in terms of Article 13 of the PPA dated 01.09.2008 executed between PSPCL and TSPL. The Commission also holds that TSPL (Respondent No.1) is liable to pass on all the benefits to PSPCL that ought to have accrued to the Respondent No.1

on account of grant of the Mega Power Status to its Project. The Commission therefore directs the TSPL to render true and full account of all benefits that ought to have accrued to it on account of grant of mega power status to its Project. **”**

2. TSPL and SEL, respondents in the petition filed Appeal No.55 of 2014 before Hon’ble APTEL against the Order dated 27.12.2013 of the Commission. The Hon’ble APTEL decided the said Appeal vide Judgment dated 25.07.2014 remanding back the matter to the Commission as under:-

“The same issue raised in this Appeal has been raised in another Appeal No.29 of 2013, which has been decided by the Judgment dated 30.06.2014, whereby we have remanded the matter to the State Commission for fresh consideration on that issue.

After hearing the learned counsel for the parties, we feel that the Order passed in Appeal No.29 of 2013 directing for remand to the State Commission for fresh consideration, would apply to the present case also. The relevant direction given in Appeal No.29 of 2013 at Para No.105 (ii) of Page 55 is as follows:

‘We find that the State Commission has not analyzed 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 the light of the submissions made by both the parties without being influenced by its earlier decision'.
>
> In the light of the above direction, this Appeal is also disposed of with the similar directions. Accordingly, we remand the matter regarding the Change in Law with respect to the benefits under Foreign Trade Policy to the State Commission for fresh consideration. The State Commission shall give priority to this matter and dispose of the same as expeditiously as possible after hearing the parties, preferably within a period of two months from today. "

Period of two months was got extended by two months vide Hon'ble APTEL Order dated 09.10.2014.

3. The Commission decided to revive the petition to re-hear the parties in the matter regarding eligibility of the respondents to the benefits available under FTP and 'Change in Law' with respect to these benefits under Foreign Trade Policy for fresh consideration as per the directions of Hon'ble APTEL in its Judgment dated 25.07.2014 in Appeal No.55 of 2014. Notice dated 30.07.2014 was accordingly issued to the parties to make their submissions before the Commission on 14.08.2014. TSPL and PSPCL made detailed oral submissions on 14.08.2014 and after hearing, the Commission directed PSPCL vide Order dated 19.08.2014 to file written submissions by 02.09.2014 with a copy to TSPL. TSPL was

directed to file reply to the written submissions of PSPCL by 08.09.2014 with a copy to PSPCL. PSPCL was directed that it may file rejoinder, if any, by 11.09.2014. Hearing was fixed on 12.09.2014.

4. PSPCL filed written submissions on 04.09.2014. PSPCL briefly made out its case as under:-

(i) Benefits of Deemed Export under FTP 2004-09 were not available to TSPL as on relevant date i.e. 16.06.2008, which is the cut off date under Article 13.1 of the Power Purchase Agreement (PPA) dated 01.09.2008. FTP 2009-14 came into effect from 27.08.2009 and hence is not applicable to the case of TSPL. TSPL is wrongly relying on FTP 2009-14. The applicable FTP as on cut off date is FTP 2004-09.

(ii) Scheme for Deemed Export benefits is laid out in Chapter 8 of FTP. Clause 8.1 defines the term 'Deemed Exports'. The categories of supply of goods are specified under clause 8.2; sub clause (a) to (i). Benefits available under 'Deemed Export' for Non-MPP are provided under category 8.2 (g) as under:

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

There is specific condition at the bottom of clause 8.2 which says:

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

PSPCL submitted that if the supply is not made under International Competitive Bidding (ICB), then clause 8.2 of FTP will have no application. Consequently, there is no question of considering clause 8.3 or clause 8.4**;** in particular clause 8.4.4 (iv).

(iii) Admittedly, TSPL has not procured or intended to procure the supply of goods for power plant under ICB. Therefore, the threshold condition for applicability of clause 8.2 (g) of FTP is missing and the same disable TSPL from making any claim to the benefits under FTP.

(iv) PSPCL further submitted that clause 8.4.4 (iv) provides that the ICB procedure can be followed at the stage of Independent Power Producer (IPP) or at the stage of Engineering and Procurement Contract (EPC) and it means that supply of goods which are covered under clause 8.2 will be eligible for Deemed Export benefits specified in clause 8.3, in the event that such supply of goods is to the Power Project Developer or to the Engineering and Procurement Contractor. The basic condition of International Competitive Bidding for procurement of goods is not in any manner modified or done away with the above provision in clause 8.4.4 (iv).

(v) The conduct of Talwandi Sabo Power Limited also clearly establish that the claim made for FTP is an afterthought. The fact that TSPL did not consider claiming the benefits under FTP is clear from (a) if it was so, there was no need for TSPL to have sought Mega Power Project Status as

TSPL would have in any event got the benefits under FTP (b) there was no question of TSPL giving undertakings dated 31.08.2010 and 08.09.2010 offering to pass on the benefits to be availed as MPP and (c) there was not a whisper of the entitlement to benefits under FTP till the year 2013. The undertakings were voluntary.

(vi) There was misuse of FTP by certain project developers who were illegally claiming the benefits of exemption from TED even though they were not MPP. The position was clarified in the Policy Interpretation Committee meeting held on 15.03.2011. In the communication of the Director General of Foreign Trade (DGFT) dated 27/28.04.2011, it was clarified that refund of Terminal Excise Duty (TED) for non-mega power projects under para 8.3 (c) is not available for such supplies. The same was to be recovered, if already made by mistake or otherwise.

(vii) There was no provision in the FTP at any time to allow the benefit to Non-MPPs. There is no Change in Law within the meaning of Article 13 of the PPA as Law remained the same. It is not even the case of DGFT or any other Government authority interpreting the prevalent law as allowing benefit to Non-MPP at any time. There was no such interpretation of the Policy. The project developers cannot take advantage of their own wrong by a wrong interpretation and thereafter claim that there was a Change in Law when the concerned authorities pointed out the erroneous interpretation and claimed that all the money should be adjusted/claimed back. Accordingly, TSPL was

not entitled to avail the refund of TED in terms of FTP as a Non-MPP.

(viii) The reliance placed by TSPL on amendments issued by DGFT on 28.12.2011 and 21.03.2012 to contend that Deemed Exports were earlier available to TSPL under FTP is misplaced. The amendments are not with reference to clause 8.2 (g) of the FTP. The circular dated 28.12.2011 amending the FTP did not make any difference to the present case as even earlier the benefits were available without fulfilling ICB at IPP/EPC stage to mega power projects.

(ix) The pendency of the writ petitions before Hon'ble High Courts and Hon'ble Supreme Court challenging interpretation / clarification by the Authorities of FTP has no implication as the same relates to the recovery of the money wrongly allowed under FTP benefits and do not deal with the eligibility of a person to take the FTP benefits for the supply of goods where the project had been awarded through ICB.

(x) PSPCL submitted that there is no merit in the contention of the respondents that it was eligible for similar benefits under FTP.

(xi) PSPCL is seeking the adjustment of actual customs duty, excise duty and other remissions which TSPL became entitled to by virtue of the grant of Mega Power Status. The amount is quantifiable and PSPCL is entitled to claim the

same by virtue of the specific provision contained in Article 13 of the PPA.

5. TSPL filed reply dated 08.09.2014 to the written submissions of PSPCL. TSPL submitted **:**

(i) that pursuant to the remand Order dated 25.07.2014 passed by Hon'ble APTEL, the Commission is required to decide the question of law as to whether the benefits under Foreign Trade Policy (FTP) were available to TSPL as on cut off date i.e. 16.06.2008, which were withdrawn subsequently by Government of India by clarification / notification and whether this would amount to 'Change in Law' under Article 13 of PPA.

(ii) that it was entitled for the deemed export benefits as per the legislative framework and interpretation in force as on cut off date. The position of DGFT as communicated vide PIC minutes dated 15.03.2011 / 09.09.2011 constitute a change in interpretation and hence a 'Change in Law' under the PPA.

(iii) that the clarification dated 15.03.2011 / 09.09.2011 is based on the interpretation of the FTP provisions qua the non-mega power projects by Policy Interpretation Committee (PIC). Based upon the prevailing interpretation of provisions of FTP prior to PIC meeting, there was legitimate basis for the bidder, Respondent No.2 that TSPL project would be eligible to avail the FTP benefits and consequently had factored such benefits while submitting its bid. It was legitimate expectation of the bidder (SEL – Respondent No.2) that such benefits would indeed be granted to its project by the office

of DGFT. Subsequently, on notification of its project as a MPP, it became entitled to the benefit of exemption from duties. This benefit was neutralized on account of withdrawal of the benefits under the FTP post the cut off date vide PIC minutes dated 15.03.2011 / 09.09.2011. Therefore, it was a 'zero sum game' as refund / drawback of duties stood replaced by exemption from duties. This, therefore, did not cause any change in the economic position of TSPL. Even though there is a change in law owing to grant of MPP status to TSPL, there is no alteration in its economic position warranting it to pass on any duty benefits upon being notified as a MPP.

(iv) that, for availing benefits under para 8.2 (g) read with para 8.4.4 (iv) of the FTP, the following conditions were required to be fulfilled:

(a) supply is made under the International Competitive Bidding (ICB) procedure which may be followed at the Independent Power Producer (IPP) or the Engineering and Procurement Contract (EPC) stage.

(b) The goods on which benefits are proposed to be availed must fall within the definition of capital goods and

(c) the goods supplied by the main / sub-contractor must be manufactured in India.

The Respondent No.1, fulfilled the pre-condition that ICB procedure may be followed at IPP or the EPC stage and therefore, was eligible for DBK benefits as the bids floated by the petitioner for procurement of power was by way of ICB. This reasoning stands fortified by the Policy

Circular No.29 (RE-08) 2004-2009 dated 20.08.2008 issued by DGFT office wherein it has been clarified that if the power procurement has been tied up through ICB procedure or ICB procedure has been followed up at EPC stage, it will amount to following up of ICB at IPP or EPC stage. The provisions of FTP are required to be read as a whole and provisions can not be read in isolation. Law should be interpreted in a harmonious manner. Any interpretation which renders some part of statute superfluous or otiose should be avoided. It would be of particular relevance to note that para 8.2 does not even start with a non-obstante clause so as to override explicit provisions of para 8.4.4 (iv) of the FTP.

(v) that without prejudice to the fact that Respondent No.1 has duly complied with the condition regarding ICB, following ICB is not a condition, fulfillment of which, in any case, may determine the eligibility of the Respondent No.1 to the deemed export benefits as on the cut off date. The petitioner has stated that the Respondent No.1 was not entitled to the deemed export benefits as the ICB procedure was not followed at the IPP/EPC stage. To say it otherwise, the Respondent No.1 would have been eligible to deemed export benefits, if it would have procured goods under the ICB procedure. Now, this is an event that can take place only after the cut off date. Accordingly, it is beyond understanding as to how an event that has to take place much after the cut off date can determine the eligibility of the bidders to the deemed export benefits as on cut off date. If the law allows certain

benefits to the bidder but the bidder does not exercise this option, the same cannot change the law prevalent as on cut off date. It was always open for TSPL to comply with the ICB conditions and avail the deemed export benefits and in such case, there could be no demand from the PSPCL under 'Change in Law' provisions. Merely because TSPL did not opt to avail the said benefits and accordingly, did not fulfil one of the subsequent conditions, that cannot change the law as on the cut off date and accrue any right in favour of PSPCL under the 'Change in Law' provisions of the PPA.

(vi) that TSPL was eligible for duty drawback benefits as it met the pre-condition that the deemed exported products must be capital goods. At the bidding stage, it had considered the entire power plant being constructed by it to be a deemed export product in relation to which the deemed export benefits would be available with regard to the domestic as well as import inputs that were to be used for constructing such plant. Para 9.12 of the FTP defines 'capital goods' to cover any plant required for production, directly or indirectly of goods and includes power generating sets.

(vii) that it was eligible for duty drawback as it met the pre-condition that the deemed exported products must be manufactured in India. It was clarified by DGFT vide Circular bearing F. No. 8/AM-2001/DBK Cell dated 05.12.2000 that drawback is available where goods are supplied directly at site and are used in assembly, testing etc. at site which would be regarded as 'manufacture in

India'. It was further clarified that for all directly supplied items used in the project, the condition for 'manufacture in India' a pre-requisite for grant of deemed exports benefit, is satisfied in view of the fact that the activities being undertaken at site constitute 'manufacture' as per the definition given in para 3.31 of the EXIM Policy (as it was then referred to; pari materia to para 9.37 of FTP) and accordingly the duties suffered on such goods shall be refunded through the duty drawback route.

(viii) that the deemed export benefit is either available to the main / sub-contractor or to the recipient of goods i.e. TSPL, subject to production of suitable disclaimer from the supplier i.e. main / sub-contractor. In this regard, para 8.3.1 of the Handbook of Procedures which prescribes the procedure for claiming deemed export benefits reads as under:

> "8.3.1 An application in ANF 8 along with prescribed documents, shall be made by supplier to RA concerned. Recipient may also claim benefits on production of a suitable disclaimer from supplier along with a self declaration in Appendix 22C of HBP v.1 regarding non-availment of CENVAT credit in addition to prescribed documents."

Therefore, from the scheme of the Policy, it is clear that deemed export benefit is available either to the supplier of the goods or where the supplier issues a disclaimer the

benefit can be claimed by the recipient of the goods. There are many instances where these benefits were accorded to the recipient / developer / generator by the office of DGFT. The procedural claim of deemed export benefits by the supplier is not relevant in determining the availability of the said benefits to Non-MPP.

(ix) that TSPL was entitled to factor deemed export benefits as a Non-MPP while submitting its bids and had adopted a view that it would also be granted duty drawback by the DGFT as per the practice prevailing at that time.

(x) that there was long-standing view of granting deemed export benefits to Non-MPPs. The duty drawback benefits are not granted under self-assessment scheme. Application goes through various stages for final approval of DGFT after which these benefits are granted.

(xi) that PIC minutes dated 15.03.2011 and letter of Deputy Director, DGFT dated 27/28.04.2011 are inapplicable to the present case as change in interpretation is required to be applied prospectively. The present matter is required to be decided solely on the FTP provisions and practice prevalent as on the cut off date i.e. 16.06.2008. The respondent has relied upon the case of Patel Engineering Limited vs UOI (WP6846 of 2012) decided by the Hon'ble Bombay High Court holding that decision taken by the PIC meeting dated 15.03.2011 can not be applied to matters which have been concluded prior thereto. The respondent has also relied upon the decision of Hon'ble Gujarat High Court in the case of Alstom India Limited vs UOI [2014 (301) ELT446 (Guj.)].

(xii) that Notification No. 92(RE-2010)/2009-2014 dated 28.12.2011 restricted the deemed export benefits to Non-MPPs only under para 8.3(a) of the FTP and Notification No.107(RE-2010)/2009-2014 dated 21.03.2012 decided that supplies to Non-MPPs shall not be entitled to any deemed export benefits. These notifications are prospective in operation and are not required to be applied retrospectively to the facts of the present matter.

(xiii) that as on cut off date, the Respondent No.1 was entitled to DBK benefits i.e. refund / drawback of duties and subsequent to grant of Mega Power Project status, it became entitled to outright exemption from duties. Thus there had been no change in its economic position and consequently even if there has been a 'Change in Law' owing to grant of Mega Power Project Status to the respondent No.1, there is no alteration in its economic position. Resultantly, there is no occasion for passing on of any assumed benefit by way of reduction in the tariff to the petitioner.

The respondent No.1 has refuted all the written arguments filed by the petitioner in its parawise counter to the same on the basis of its own written arguments summed up in the foregoing sub-para (i) to (xiii) and needs no repetition. Consequently, respondent has submitted that the demand of the petitioner to pass on benefits availed under Mega Power status granted to the TSPL project, is devoid of any merit and may be rejected.

6. The arguments on behalf of the petitioner and respondents were heard on 12.09.2014. After hearing the arguments of the parties at length, the Commission directed them to file reply to the following queries of the Commission by 19.09.2014 **:**

"1. Clause 8.2 of the FTP provides certain categories of supply of goods which shall be regarded as "Deemed Exports", under FTP provided the goods are manufactured in India. The developer / generator to confirm whether the goods in respect of which the deemed export benefits are being claimed have been manufactured in India.

Locus standi of TSPL to claim 'Deemed Export' benefit under FTP as the said benefit is available for supply of goods by main/ sub contractor's (to the Project) ?

2. The parties are directed to produce appropriate authorities / case laws for interpreting the phrase "ICB procedures have been followed at Independent Power Producer (IPP) stage". It may be clarified whether benefits under FTP be available if ICB is held**,**

a) at the time of bidding of the Project; and/or

b) at the time of Procurement of Material and Equipment after allocation of Project

3. TSPL shall file a detailed note to establish that benefits available under FTP and Mega Power Policy were identical, as claimed in their pleadings."

The Commission further directed the parties to file 'Written Note of Arguments' by 19.09.2014. Order was reserved.

TSPL filed reply to the queries dated 15.09.2014 and Written Note of Arguments on 30.09.2014. PSPCL filed Final Submissions on 01.10.2014. TSPL has also annexed 'Opinion' of Shri Gopal Subramaniam, Senior Advocate, Supreme Court of India, with the Written Note of Arguments. PSPCL filed Additional Submissions dated 13.10.2014**;** interalia, submitted:

"4. Quite apart from the above, the opinion has been signed by Mr. Gopal Subramaniam as Senior Advocate on 27th September, 2014. The opinion is to TSPL. Further, the index to the filing done refers to the opinion as a Former Solicitor General of India. All these have been done by TSPL to create an impression that TSPL has a case to succeed in the matter.

5. The attempt to produce such opinion is to play undue influence in the minds of the Hon'ble Commission in a pending matter. Further, PSPCL had no opportunity to deal with the contents on such opinion.

6. PSPCL, therefore, respectfully submits that the written submissions alongwith the Opinions filed by TSPL be either rejected and the case be considered on the oral submissions of TSPL and pleadings on record, or in the alternative an opportunity be given to PSPCL to deal with the contents of the arguments based on the opinion given."

The Commission, after considering the additional submissions dated 13.10.2014 of PSPCL, decided that it shall be just and fair to re-open the hearing of the petition to let the parties to re-argue the case on the issue. The re-hearing was fixed for

31.10.2014. The Commission heard in detail the views / arguments on behalf of TSPL and PSPCL on the issue of filing of 'Opinion' by TSPL with its Written Note of Arguments on 31.10.2014. After hearing, the Commission directed PSPCL to file written submissions in this respect by 07.11.2014 with copy to TSPL. Hearing of the petition was closed and Order was reserved. PSPCL filed additional submissions with regard to propriety of filing or referring to the legal opinion of Shri Gopal Subramaniam vide memo No. 4813 dated 07.11.2014 and reiterated its principal objection that TSPL ought to have taken back the legal opinion and reference to the opinion and name of the author of the said opinions should also have been struck off from the record of the case, PSPCL, however, treating the contents of the legal opinion as arguments of TSPL, made the submissions with regard to the contents of the opinion. This is in accordance with prayer in the Additional Submissions dated 13.10.2014 filed by PSPCL that it may be allowed to deal with the contents of the opinion.

7. The Commission has carefully examined the remand Order of Hon'ble APTEL dated 25th July, 2014 in Appeal No.55 of 2014 and I.A. 99 of 2014 and Order of Hon'ble APTEL in its Judgment dated 30.06.2014 passed in Appeal No.29 of 2013. The Commission has also considered the written submissions of the parties with regard to the eligibility of the respondent No.2 SEL, the successful bidder to the Deemed Export Benefits as on cut off date under the applicable Foreign Trade Policy 2004-09, PPA dated 01.09.2008 and all other facts and circumstances of the case. The Commission has also considered the inquiries made by it and averments of the parties.

8. Hon'ble APTEL in its Order dated 25.07.2014 in Appeal No. 55 of 2014 and I.A. No. 99 of 2014 filed by TSPL against Order dated 27.12.2013 passed by the Commission in this petition, while referring to the direction given in Appeal No. 29 of 2013 at Para No. 105 (ii) of page 55, remanded the matter regarding Change in Law with respect to the benefits under Foreign Trade Policy to the Commission for fresh consideration. The contents of Para No. 105 (ii) referred to above are as follows:

> "We find that the State Commission has not analyzed 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 the light of the submissions made by both the parties without being influence by its earlier decision."

Accordingly, the Commission needs to decide whether the benefits under the Foreign Trade Policy were available to respondents as on the cut off date i.e. 16.06.2008, which were subsequently withdrawn by the Government of India by clarification / notification and whether this would amount to 'Change in Law' under Article 13 of the PPA?

9. Before taking up the issue, brief background of the case is summed up as under:

(i) The erstwhile PSEB now PSPCL intending to procure power through competitive bidding invited bids from power project developers to set up the project. In terms of the competitive bidding guidelines, a Special Purpose Vehicle i.e. TSPL was incorporated by PSEB to act as its authorized representative for carrying out pre-bid obligations on its behalf. Accordingly, TSPL issued bidding documents for selection of developer through tariff based competitive bidding process for procurement of power on long term basis. The bids were invited in accordance with the Government of India guidelines. The bid deadline was 23.06.2008 and the cut off date, for consideration for Change in Law provision under Article 13.1 of the PPA, was 16.06.2008. After the bid process was over, SEL was selected as a successful bidder for development of the power project. In view of the same, PSEB issued the letter of intent in favour of SEL on 04.07.2008. Subsequently, in line with the bid documents/guidelines, Share Purchase Agreement was executed between PSEB and SEL on 01.09.2008 for transfer of 100% shares of TSPL by PSEB to SEL. The Power Purchase Agreement (PPA) was then signed between PSEB and TSPL on the same day i.e. 01.09.2008.

(ii) On 11.12.2009, Notification was issued by Government of India under sub section (1) of section 25 of the Customs Act, 1962 amending the Customs Notification No. 21/2002 dated 01.03.2002 in regard to the nature of power projects which

are entitled to customs duty benefits. On 14.12.2009, an office memorandum was issued by the Ministry of Power, Government of India providing for revised policy guidelines and the modified Mega Power Policy. The Ministry of Power granted Mega Power Status to the power project of TSPL on 19.08.2010.

(iii) TSPL, while executing the project, imported the goods and vide letters dated 30.08.2010 and 08.09.2010 requested Principal Secretary (Irrigation and Power), Government of Punjab for issuance of recommendation letter for zero customs duty under project import Chapter 98.01 of customs Notification No. 21/2002 dated 01.03.2002 and provided an undertaking that it would pass on the benefits from the grant of Mega Power Status to PSPCL as per Article 13.2 (a) of the PPA.

(iv) PSPCL had filed the petition no. 41 of 2013 praying to the Commission to declare that the grant of Mega Power Status to TSPL amounts to Change in Law in terms of Article 13 of the PPA and that TSPL is liable to pass all benefits to PSPCL that ought to have accrued to TSPL on account of the same. In response, TSPL had submitted that on the relevant date of 16.06.2008, though it did not qualify for benefits from the grant of Mega Power Status, it was entitled to the similar and equivalent benefits i.e. Deemed Export benefits under the Foreign Trade Policy of the Central Government formulated under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 and that these benefits had actually been factored in the bid at the time of submission of the bid. The Commission, in its

Order dated 27.12.2013 had decided that benefits under FTP were not available to TSPL Project at any stage i.e. before or after the relevant date of 16.06.2008 and no Change in Law has taken place so far as FTP is concerned. The Commission had further held that grant of Mega Power Status to TSPL's project amounts to Change in Law in terms of Article 13 of the PPA and also held that TSPL is liable to pass on all the benefits to PSPCL that ought to have accrued to it on this account.

10. **Findings and Decision of the Commission**

(i) Perusal of the relevant paras 8.1, 8.2, 8.3 and 8.4 of the FTP 2004-09 brings out that **'Deemed Exports' refers to those transactions in which goods supplied** do not leave the country and the payment for supplies is received either in Indian rupees or in free foreign exchange (para 8.1). **Further, the supply of goods by main/sub-contractors shall be regarded as 'Deemed Exports' provided goods are manufactured in India and benefits of deemed exports shall be available under para 8.2(g) (purportedly applicable in the instant case) only if supply of goods is made under procedure of ICB (para 8.2)**. Para 8.3 lists out the benefits for Deemed Exports i.e. Advance Authorization [8.3(a)], Deemed Export Drawback [8.3(b)] and exemption from terminal excise duty where supplies are made against ICB and refund in other cases [8.3(c)]. Further, under paragraph 8.4.4(iv), **it is mentioned that supply of capital goods to power projects in terms of paragraph 8.2(g) shall be entitled**

for deemed export benefits provided ICB procedures have been followed at Independent Power Producers (IPP) / Engineering and Procurement Contract (EPC) stage. It is further brought out in this paragraph that supplier shall be eligible for benefits enlisted in paragraph 8.3(a) and 8.3(b) whichever is applicable. As such, the deemed export benefits under FTP were available subject to compliance of certain conditions / provisos. **The entitlement of deemed export benefits under the FTP is incumbent upon meeting these condition(s).**

(ii) As the Commission understands, **classification of certain transactions as deemed exports allows them status of export thereby enabling a supplier (manufacturer of such goods including contractor or sub contractor) to get duty drawback benefits or refund of terminal excise duty so as to be competitive with suppliers of imported goods.** In other words, when locally manufactured goods are supplied duly classified as deemed exports, it provides a level playing field to such manufacturer/supplier by allowing drawback of duty paid on such goods.

(iii) **The Commission notes that paras 8.1 and 8.2 of the FTP make it clear that for a transaction to be qualified as deemed export, the following essential ingredients / constituents must be present i.e. (i) that the goods supplied do not leave the country (ii) that the goods are necessarily to be manufactured in India in respect of categories mentioned in paras 8.2(a) to 8.2(j) if supplied by main/sub contractor are regarded as**

deemed exports (iii) these goods have to be necessarily manufactured in India. Further, benefit of deemed export shall be available under paragraphs (d), (e), (f) and (g) only if the supply is made under the procedure of International Competitive Bidding (ICB) except in cases of MPPs.

(iv) The Commission further notes that **as per paras 8.4.1 to 8.6.2, these benefits are available to a supplier of goods manufactured in India**. The entire purport of the benefits conferred under Chapter 8 is keeping in view the supplier of goods manufactured in India. Perusal of para 8.4.4(i) makes it clear that in respect of supplies made under paras 8.2(d), (f) and (g) of FTP, supplier shall be entitled to benefits listed in paras 8.3 (a), (b) and (c), whichever is applicable.

(v) As the Commission understands, **if a project authority imports goods from the supplier abroad and accordingly the goods have not been manufactured in India, it cannot contend that the project be granted benefit of duty drawback by relying upon the definition of 'manufacture' contained in the FTP stating that power plant has been assembled at its site/premises. The FTP does not envisage any benefit being conferred upon a project authority who is recipient of the goods and not the supplier.** Once the project authority enters into contract with a firm for supply/setting up of a project, it is not supposed to import machinery etc. itself. **If the project authority directly imports the goods, it cannot be termed as supply by main/sub-**

contractor. Minutes of PIC meeting held on 15.03.2011 also, in para 3, clarified that if the Bill of Entry is in the name of project authority then deemed export benefits would not be available (such cases will be ineligible for grant of deemed export benefits). **If the goods are imported directly by the project authority itself, then such supplies do not become deemed exports under Chapter 8 of FTP. Deemed Export is essentially supply of goods manufactured in India. Deemed Export benefits under FTP are basically for import substitution and when the project authority directly imports the goods, there is no import substitution.**

(vi) **Import of capital goods by Non-MPP is subjected to 5% Basic Customs Duty. If a project authority imports the capital goods directly, pays 5% customs duty and takes it back as deemed export drawback, by adopting one mechanism or the other, it would defeat the purpose of imposition of 5% Basic Customs Duty on such import.**

(vii) In the case of TSPL, it imported the goods and after seeking recommendation/essentiality certificate from the Government of Punjab paid zero customs duty due to it having been granted MPP status. However, as a Non-MPP, it was liable to pay 5% customs duty and the same was not refundable as a Deemed Export benefit under the FTP considering the discussion above.

(viii) Further, TSPL relying upon para 8.4.4(iv) has contended that ICB procedures are not required to be followed at EPC stage if the IPP has been selected through ICB as in this

case. The Commission is of the view that this is applicable in case of MPPs only. To examine as to whether it is mandatory to follow ICB procedures at EPC stage or in case ICB procedures have been followed at IPP stage for selection of a Non-MPP, then the former is not required, the following relevant extracts of various documents were perused:

a) Foreign Trade Policy, 2004-09

"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) .....

.....

(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;

.....

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 up to 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 1000 MW or more; or

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

b) Mega Power Policy, 2006

"Fiscal concessions / benefits available to **Mega Power Projects**

.....

Deemed Export Benefits: Under Chapter 8(f) of the Foreign Trade Policy, Deemed Export Benefits is

available to domestic bidders for projects both under public and private sector on following the stipulations prescribed therein."

c) Policy Circular No.29(RE-08)/2004-2009 dated 20.08.2008 – Clarification regarding Grant of Deemed Export Benefits for supplies to Mega Power Projects.

……

"3. The representative from Department of Economic Affairs concurred with the viewpoint raised above. Accordingly, it is clarified that deemed export benefits are available on supply of goods to **Mega Power Projects**:-

(i) If power procurement from such projects has been tied up through ICB procedure;

OR

(ii) If ICB procedure has been followed by such projects at Engineering and Procurement Contract stage.

Accordingly, the ICB procedure may be either at the stage of IPP or EPC."

d) Revised/Modified Mega Power Policy, 2009

……..

"(v) There shall be **no further requirement of ICB for procurement of equipment for mega projects** if the requisite quantum of power has been tied up or the project has been

awarded through tariff based competitive bidding as the requirements of ICB for the purpose of availing deemed export benefits under Chapter 8 of the Foreign Trade Policy would be presumed to have been satisfied. In all other cases, ICB for equipments shall be mandatory."

From the conjoint reading of the relevant extracts of various documents brought out above, it can be inferred that the benefits of deemed exports under FTP are not available to Non-MPPs unless the goods are supplied/procured through ICB. The requirement of goods to be supplied/procured through ICB is waived of only in case of MPPs if power procurement for such projects has been tied up through ICB procedure.

(ix) TSPL has stated that, **at the bidding stage, the bidder had considered the entire power plant being constructed by it to be a deemed export product in relation to which the deemed export benefits would be available with regard to the domestic as well as import inputs that were to be used for constructing such plant.** TSPL, relying on the Circular dated 05.12.2000, has contended that it was entitled to deemed export benefits under the FTP as the goods imported by it were used for assembly of the power plant at its site, which would be regarded as manufacture in India.

The Commission is of the view that this contention of TSPL is not correct. The aforementioned Circular dated 05.12.2000 has to be regarded as applicable to

the then existing EXIM policy and the same cannot apply to FTP 2004-09. Perusal of the same indicates that its scope is restricted mainly to supply of goods/services to civil construction projects. Further, as per Central Board of Excise and Customs Circular No. 58/1/2002-CX dated 15.01.2002, excise duty is not payable on power plants erected on the project site as the same is not leviable on immovable property. As per the definition of 'goods' in the Customs Act, immovable property cannot be considered as 'goods'. FTP provides for payment of drawback on supply of goods. Therefore, deemed export drawback of duty paid on inputs of power plant set up at the project site is not available. Accordingly, TSPL's contention in this regard is not tenable.

(x) As per para 8.4.4(iv) of FTP, supply of capital goods and spares up to 10% of FOR value of capital goods to power projects in terms of para 8.2(g), shall be entitled for deemed export benefits provided the International Competitive Bidding procedures have been followed at Independent Power Producer (IPP) / Engineering and Procurement (EPC) stage. **In case of TSPL, goods were planned to be and have been directly imported by it and there is no supply of capital goods/spares, thus it is not a case of deemed exports. If the project authority directly imports goods, it cannot be termed as supply by main/sub-contractor. The essential requirement as per para 8.2(a) of the FTP i.e. Supply of goods by the main contractor/sub-contractor and**

goods should have been manufactured in India is not complied with.

(xi) **The Commission is of the opinion that duty drawback is not admissible to TSPL even by invoking the Handbook of Procedures, Vol. I as the said Handbook cannot make provisions not contained in the FTP. It is meant to be subservient to the provisions and cannot in itself confer eligibility on a person not intended to be conferred with the benefit. Moreover, only a disclaimer of the contractor is not sufficient to confer benefit to be claimed by TSPL in capacity of recipient since to enable the recipient to claim benefit, besides the disclaimer, there has to be a declaration regarding non-availment of CENVAT credit along with other requisite documents. In this case, the requirement of disclaimer along with a declaration regarding non-availment of CENVAT cannot be complied with since there is no supplier of goods manufactured in India as the goods were planned to be and have been imported directly.**

(xii) **The Commission is of the view that if TSPL is to be considered entitled for granting benefit of duty drawback, it would violate statutory provisions of the Customs Act. The intent of levying concessional rate of customs duty on the imported goods in the Customs Act cannot be annulled by permitting TSPL to claim duty drawback.** In other words, if TSPL is considered entitled to benefit of duty drawback, the very purpose of subjecting imports made by project authority to

concessional rate of duty would stand defeated. **TSPL cannot be equated with that of a supplier of goods manufactured in India who only is entitled to claim benefit of deemed export duty drawback. TSPL cannot be both an importer and deemed exporter.** In other words, essential requirements of existence of supplier based in India and goods being supplied by manufacturer in India are not satisfied.

(xiii) The Commission is further of the view that TSPL's contention that the condition/proviso with regard to goods having been manufactured in India and following ICB procedure for the purpose was required to be done later and could not be done prior to the cut off date, is not tenable as **projects of such nature, with huge investments cannot be conceived and planned unless the costing of the project is done prior to bidding considering the source of equipments/goods i.e. whether from outside country/within country. Unless broad outline of the various costs including the source of major equipments/goods is decided prior to the bidding, it may not be possible to bid for such a project. TSPL has not placed on record any documentary evidence or quotations etc. received from prospective suppliers of goods in support of its contention that the deemed export benefits had been factored in by the bidder at the time of preparing / submission of the bid.**

This view of the Commission is corroborated by the submissions of TSPL as brought out in para 5(vi)

that TSPL, at the bidding stage i.e. on or about the cut-off date of 16.06.2008 which is 7 days prior to the bid deadline, had considered the entire power plant being constructed by it to be a deemed export product in relation to which the deemed export benefits would be available with regard to the domestic as well as import inputs that were to be used for constructing such a plant.

(xiv) The Mega Power status was granted to TSPL on 19.08.2010. Vide letter dated 30.08.2010 followed by letter dated 08.09.2010, TSPL requested Government of Punjab for issuance of recommendation letter for zero customs duty under project import Chapter 98.01 of customs Notification No. 21/2002-Customs dated 01.03.2002. **While seeking letter of recommendation from Government of Punjab as mentioned above, the undertaking that benefit of Mega Power status would be passed on as per Clause 13.2(A) of Article 13 of the PPA was given voluntarily without reserving its right to claim benefits under FTP.** This conduct of TSPL indicates that they did not factor in the deemed exports benefits under FTP at the time of bidding, being not eligible.

(xv) As regards the submissions of TSPL while citing the judgment of the Hon'ble High Court of Gujarat in the case of Alstom Projects India Ltd., the Commission has learnt on inquiries from the office of the DGFT that the Special Civil Appeal No.2569 of 2013 of Alstom was remanded back by the Hon'ble High Court of Gujarat at Ahmedabad

directing the appellant to make a detailed representation to DGFT against the impugned order of Jt. DGFT Baroda for making a speaking order. **The DGFT vide his order dated 24.09.2013 has ruled that Non-Mega Power Projects are not eligible for deemed export benefits under the Foreign Trade Policy.** Appeal against the order of the DGFT lies with the Central Govt. under provisions of FTDR **Act and it appears no such appeal has been filed and is now time barred.**

In the meanwhile, Alstom moved the Hon'ble High Court of Gujarat vide SCA 11031 of 2013 challenging the powers of the DGFT to issue the order to his junior officers, to make and amend rules and pass orders for recovery of dues already refunded. The Hon'ble High Court allowed this application vide order dated 13.02.2014. The **Union of India and the DGFT have filed an SLP against this order of Hon'ble High Court which is pending in the Hon'ble Supreme Court of India. It would also be pertinent to add that all such cases pending before various courts have been called by the Hon'ble Supreme Court**.

In view of the above, order of the DGFT that Non-Mega Power Projects are not eligible for deemed export benefits under the FTP is final, untill the power of the DGFT to make this order is struck down by the Hon'ble Supreme Court in the pending cases.

Considering the discussion in sub-paras (i) to (xv) above, the Commission holds that benefits for deemed exports under FTP 2004-09 were not available to the

respondents as on the cut off date i.e. 16.06.2008. In view of the above decision, the Commission has not examined whether the clarifications dated 27/28.04.2011 and the subsequent notifications dated 28.12.2011 and 21.03.2012 issued by DGFT amount to 'Change in Law' under Article 13 of the PPA. As a result, the respondents are liable to pass on the benefits actually availed under Mega Power Policy 2009 to the petitioner.

The petition is disposed of in terms of above without assigning any costs to either of the parties.

Sd/-
(Gurinder Jit Singh)
Member

Sd/-
(Romila Dubey)
Chairperson

Chandigarh
Dated: 02.12.2014

I respectfully disagree with the findings arrived at in this Order. I shall dwell upon the issues in my Order separately.

Sd/-

(Virinder Singh)
Member

PUNJAB STATE ELECTRICITY REGULATORY COMMISSION
SCO NO. 220-221, SECTOR 34-A, CHANDIGARH

Shri Virinder Singh, Member

ORDER

I have gone through the above majority order of Chairperson and Member/G running from page 1 to page 37 in the matter pertaining to the judgment given by the Hon'ble APTEL in its remand order dated 25.07.2014 in Appeal No. 55 of 2013. With due regard to the analysis of the issues and findings in the said order of Chairperson and Member/ G, I am recording my dissent Order. To avoid repetition of the detailed facts submitted by the Petitioner and the Respondents, I base my findings on the facts as brought out in the above order of my learned colleagues.

OBSERVATIONS AND FINDINGS

I. The matter has been remanded by the Hon'ble APTEL in Appeal No. 55 of 2014 while observing that "*The same issue raised in this Appeal has been raised in another Appeal No. 29 of 2013*" and that "*the Order passed in Appeal No. 29 of 2013 directing for remand to the State Commission for fresh consideration, would apply to the*

present case also". The Hon'ble APTEL has given directions to the Commission exactly as given in Appeal No. 29 of 2013 at para no. 105(ii) of page 55 already mentioned that para no. 2 page 4-5 of the above majority decision.

II. (a) It would thus the desirable to keep in mind the following conclusive and binding findings given by the Hon'ble APTEL in Appeal No. 29 of 2013.

"97. ***This reasoning, in our view, does not show that the State Commission adopted a judicial approach with reference to the alternative claim.*** *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. In that case, the State Commission would be expected to analyse the question as to whether the benefits under the Foreign Trade Policy were available to the Appellant as on the cut off date (02.10.2009) which were withdrawn subsequently by the Govt. of India by a clarification/notification and whether this would amount to 'Change in Law' under Article 13 of the PPA.*

98. The State Commission has not gone into this aspect. Instead, the State Commission has simply stated that since the Petitioners never opted for FTP Policy benefits originally, it is debarred from seeking the alternative claim.

99. We are at loss to understand under what basis and under what provision the Appellant would be prevented to seek other alternative claim.

100. ***It is relevant to note that when the Appellant is held to be not entitled to Mega Power Project benefits, it cannot be straightway held that the Appellant***

would not be entitled for the FTP benefits also. Similarly, merely because the Appellant at the time of bidding claimed for Mega Power benefits alone, it cannot be straightway held that it was not entitled to FTP benefits in the absence of the claim for the same at the time of bidding itself." *(Emphasis supplied)*

(b) Further, while analyzing the above mentioned issues, this Commission is also required in terms of the Hon'ble APTEL's observations, to examine the argument put forth by the PSPCL which is based on the premise that - "*since the supplies of plant and machinery required for the Project were not procured by the Petitioners through International Competitive Bidding (ICB), the Petitioners would not qualify to claim the FTP benefits in the first place under Para 8.2 of the FTP and consequently, they cannot claim 'Change in Law' with respect of the FTP benefits*".

III. The legal analysis of the issues remanded to this Commission, within the legal framework determined by the Hon'ble APTEL, requires this Commission to determine the following issues:

(A) Were Respondents (TSPL/SEL) eligible to Deemed Export benefits as on the relevant date?

(B) Was such Deemed Exports benefit withdrawn post the cutoff date?

(A) **WERE RESPONDENTS (TSPL/SEL) ELIGIBLE FOR DEEMED EXPORT BENEFITS AS ON THE RELEVANT DATE?**

On this issue, my observations and findings are as under:

(i) The DGFT office is the appropriate authority which has the competence to ascertain eligibility or otherwise of benefits conferred under the Foreign Trade Policy. Since the year 2000 by way of circular (**Circular bearing F. No. 8/AM-2001/DBK Cell dated 05.12.2000)** issued by them, the following was clarified by them:

> *"Representations have been received regarding admissibility of duty drawback (DBK) and terminal excise duty (TED) on supplies made to turnkey projects, considered as deemed exports in terms of the Exim Policy, especially civil construction projects as referred to in the Policy Circular No. 32(RE:98)/1997-2000 dt. 20.08.1998. Some Regional Licensing Offices have also sought clarification with regard to the admissibility of DBK/TED in such cases. The matter has been deliberated upon in the Policy Review Committee.*
>
> *It is noted that it is not possible for a single contractor to manufacture himself all the items required for completion of such projects and hence certain items, either imported or indigenous have necessarily to be procured from the other sources. These items are often directly supplied to the project for assembly, commissioning, erection, testing, etc. at site.* ***It is, therefore, clarified that for all such directly supplied items whether imported or indigenous as are used in the project, the condition of***

"manufacture in India", a pre-requisite for grant of deemed export benefits, is satisfied in view of the fact that the aforesaid activities being undertaken at the project site constitute 'manufacture' as per the definition given in para 3.31 of Exim Policy and accordingly the duties (customs and central excise) suffered on such goods shall be refunded through the DBK route."

(ii) The above, clearly establishes that the view of the DGFT at that time and until reversed in 2011 (by way of the PIC minutes of March 2011), was to grant deemed export benefits to turnkey projects of the kinds eligible under the prevailing policy (which included Non mega power projects) irrespective of whether they were imported or sourced domestically and directly shipped to site for constructing the power plant. This aspect comes out clearly from the portion of the circular which has been supplied emphasis in para A (i) above.

(iii) That apart, I have also noticed from the various documents submitted by TSPL that it has been the consistent practice of the office of the DGFT to grant such benefits regularly to various non mega power projects without any whine or a whimper, until the PIC minutes of 2011 were issued. Attention was also brought to Commission's notice that attempt by the

DGFT to recover such benefits that were granted prior to the issuance of the PIC minutes of March 2011 have been quashed in a few high court decisions, details of which I have elaborated subsequently in this order.

(iv) I have also taken notice of the fact that it was the stated position of the DGFT vide Norms Committee (NC-I) in 2008 (ie **Minutes of M. No. 01/80 dated 15.04.2008 of Norms Committee (NC-I) (DES.I Section), where the following decision was taken**:

> *"----------Committee noted that clarification sought from Policy Division has been received. They had clarified with the approval of DG as under:*
>
> *"Advance Authorization Scheme is meant to allow duty free import of inputs, which are physically incorporated in the export product, fuel, oil, energy, catalysts for manufacture of the export the product. Further, paragraph 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 inputs of the power project.*

(v) Once such a view has been taken by the DGFT under one scheme of the FTP (ie Advance Authorization) then the same view ought to be applied for purposes of

Deemed Exports as well, considering the fact that benefits under both the schemes are conditional upon manufacture in India. That is to say, it would be appropriate to resonate the same reasoning as adopted in the case of Advance Authorization for purposes of deemed exports as well to hold that generator, turbine etc. being individual capital goods become inputs for manufacture of the power project. That being the case, PSPCL cannot contend that there is no manufacture of power plant by TSPL and such a contention has necessarily to be repelled. Consistency of interpretation of a given provision of law is the cornerstone of our legal system and deviations from them ought not to be resorted to unless the provisions of law prescribe otherwise. I do not see any reason to deviate from the said position, given that the meaning of the term manufacture is the same for both Advance Authorization as also Deemed Exports.

(vi) It is rather logical that a bidder would take into consideration the prevalent interpretation and conduct of the regulators/tax authorities that deal with a given subject to come to a view on whether or not a benefit ought to be factored by them or not. By this measure, it was logical and appropriate for TSPL to consider deemed export benefits by relying on the aforementioned circular of 2000 and also the conduct of the DGFT in granting these benefits to other non

mega power projects. Subsequent change of view by the same regulator (ie the office of the DGFT), first via the PIC minutes of March 2011 and September 2011 and statutory amendments made to the FTP (which lead to initially partial withdrawal and subsequently complete withdrawal of these benefits) in December 2011 and March 2012 was certainly change in law as per the PPA in as much as the PPA considers not only statutory amendments as change in law but also change in interpretation of any Law by an Indian Governmental Instrumentality provided Instrumentality is final authority under law for such interpretation. Considering the fact that under clause 2.3 of the FTP, any interpretation rendered by the DGFT (aided by the PIC), is final and binding on all authorities operating under the FTP, it is clear that such an interpretation if changes the earlier position, would tantamount to change in interpretation by a governmental authority, who is a final authority on the matter. Once that is the position, it is clear that TSPL being eligible for deemed export benefits as on the relevant/cutoff date, stood denuded of such benefits post such relevant/cut-off date and therefore its economic position stood altered (unfavorably). However, the factum of they being notified as Mega Power Project (thereby being eligible to duty exemptions), can be said to have mitigated such unfavorable economic position post the cutoff date. On a cumulative assessment of both of these events, it is clear that loss on account of withdrawal of

deemed export benefits stood mitigated by gain on account of being notified as a mega power project – result it was a zero sum game. Accordingly, it is appropriate to hold that on an overall basis, grant of mega power status did not lead to alteration of the economic position of TSPL (as required under the PPA), in a manner such that tariff reductions can be ordered.

(vii) That apart, in so far as PSPCL's contentions that the ICB condition did not stand satisfied in the instance case, that appears to be without any merit whatsoever. ICB condition has been adequately clarified by the DGFT themselves in their **Policy Circular No. 29(RE-08)/2004-2009 dated 20.08.2008**, wherein it has been clarified that if the power procurement has been tied up through ICB procedure or the ICB procedure has been followed at the EPC stage, it will amount to following-up of ICB at IPP or EPC stage and consequently, the deemed export benefits would be available. Though the said circular has been issued in the context of mega power projects, the same amply clarify the meaning of the phrase "ICB procedures have been followed at Independent Power Producer (IPP) or Engineering Procurement and Contract (EPC) stage". Relevant portion of the Circular dated 20.08.2008 is extracted herein below for ready reference:

*"Department of Power has raised an issue that as per existing provisions in chapter 8 of Foreign Trade Policy, deemed export benefits to Mega Power Projects are available where either power procurement has been tied up though ICB procedure **or** if ICB procedure has been followed at Engineering and procurement contract (EPC) stage……*

3. The representative from Department of Economic Affairs concurred with the viewpoint raised above. Accordingly, it is clarified that deemed export benefits are available on supply of goods to Mega Power Projects: -

(i) If power procurement from such projects has been tied up though ICB procedure;

OR

(ii) If ICB procedure has been followed by such projects at Engineering and procurement contract (EPC) stage.

Accordingly, the ICB procedure may be either at the stage of IPP or EPC."

(viii) In this regard, I agree with the Learned Counsel of Respondents, that the aforesaid circular amply clarifies that ICB procedure can be followed either at Independent Power Producer (IPP) or Engineering and procurement contract (EPC) stage. Therefore, deemed export benefits continue to be available even if ICB procedure has been followed at IPP stage or at EPC

stage. I also agree with the Learned Counsel of Respondents that even though the aforesaid interpretation by the Circular is in the context of Mega Power Projects, the scope of the phrase "ICB procedures have been followed at IPP or EPC stage" gets clarified beyond doubt that ICB procedure may be either at the stage of IPP or EPC. Accordingly, in so far as non mega power plants are concerned, there is no warrant to accord a meaning to the phrase "ICB at IPP Stage" entirely different from that which has been accorded for mega power projects.

(ix) In any case, it is a reasonable proposition canvassed by the Learned Counsel of Respondents that the objective of the FTP to grant such benefits to power projects was essentially to make sure that benefits accrue to the consumers by way of tariff being kept at economical levels. This objective would be more than satisfied if the ICB is followed while awarding the Project through international competitive bidding, as has been done in the present case, and there should be no further requirement to procure the assets, machines etc once again via ICB process by the generator. This is so, because once the project owner has factored the deemed export benefits in its tariff, regardless of whether or not it follows ICB at the capex procurement stage, the consumers would not suffer. The very purpose of ICB in general is to seek the

lowest price that is competitive and where such ICB process is followed while discovering the tariff at which power is to be sold to the consumers, this objective is more than satisfied. Therefore, the phrase, ICB at IPP stage, can and should only mean, procurement of power by consumers from a generator (ie an Independent Power Project) by following ICB process ie a competitive bidding process, which is precisely what has been followed in the present case, once the terms of the PPA are read along with the RFP and the Bidding Guidelines dated 19/1/2005, which was required to be followed by every bidder and the awardee of the project. Any other view would be constrained and unwarranted.

Keeping in view the above observations and findings on this issue, I hold that, the Respondents were eligible for the deemed export benefits as on the relevant date.

(B) **Was such Deemed Exports benefit withdrawn post the cut off date?**

On this issue, my observations and findings are as under:

(i) In exercise of powers under clause 2.3 of the FTP, the DGFT (with the aid of the PIC), took a view, contrary

to its earlier position holding that deemed export benefits ought not to be available to non mega power project. Without going into the proprietary of such action (unlike what has been assiduously canvassed by TSPL pleading its impropriety), it is apparent that in so far as the DGFT was concerned, the benefits stood withdrawn once the PIC minutes of March 2011 were issued.

(ii) I have noticed that post the PIC minutes of March, 2011, directions were passed by the DGFT in April, 2011, to seek recovery of deemed export benefits that were earlier granted to non mega power projects. This at the face of it suggests that the intention of the DGFT was to hold a view that these benefits were never available ab-initio. However, on a careful consideration of the entire gamut of the factual matrix, it is relevant to note that, the legislative amendment to the FTP, withdrawing the deemed exports benefits (initially partially and then entirely), took place only in December 2011 and March 2012. Considering the fact that (a) DGFT is a regulator with no powers to amend the FTP and (b) such powers to amend the FTP vests exclusively within the domain of the Central Government as per Section 5 of the FTP, it is abundantly clear that the DGFT could not have by way of clarification sought to amend the policy. Equally important to note is the fact that the notification issued by the Central Government (for amending the FTP) in

December 2011 while partially withdrawing the benefits qua non mega power project, specifically uses the words “henceforth”, it is abundantly clear that the intention of the legislature was to withdraw such benefits prospectively. That in itself presupposes that the benefits existed prior to such amendment. Under such a situation, it would be appropriate to repel any argument suggesting that ab-initio these benefits were not available to a non mega power projects and it would be more appropriate to hold that they stood withdrawn post the PIC (assuming the same was legally valid), if not, most certainly on and from the date notification of December 2011 and March 2012 was issued by the Central Government. I have also taken notice of the fact that in the case of Simplex Infrastructure Ltd. v. UOI [W.P. (C) 4455/2013 dtd. 26.02.2014], the Hon’ble Delhi High Court as well as in the case of Patel Engineering Ltd. v. UOI (W.P. 6846 of 2012) dated 21.07.2014, the Hon’ble Bombay High Court, had held in favour of the assesses, where attempts were made by the DGFT office to recover/deny duty drawback benefits, granted/issued prior to the PIC minutes, was quashed. I have also taken notice of the fact that in the case of Alstom India Ltd v. UOI [2014 (301) ELT 446 (Guj.)], the Hon’ble Gujarat High Court had held certain key provisions of the Hand Book of Procedure, as ultra vires, which formed the very basis of the DGFT to seek recovery of duty benefits granted earlier. Once these decisions are

relied upon, the inevitable conclusion that arises is through the circular of April 2011, the DGFT could not have sought to recover any past benefit; thereby retrospective application of such a change in interpretation can never be brought to bear.

(iii) Overall, I am of the view, that the PPA, itself accords that change in interpretation by a government instrumentality (who is a final authority on a matter) per se amounts to change in law. Admittedly, DGFT has been and remains the ultimate authority in so far as interpretation of the FTP is concerned, as prescribed in clause 2.3 of the FTP. Under such a situation, reversal of the earlier interpretation, even though arguable to apply retrospectively (to which I have already held that it does not), would itself qualify as a change of law qua the bidder and thus offer appropriate protections under the PPA. Under such a situation, it would be reasonable to hold that for purposes of the PPA, there was a change, in view of the withdrawal of the deemed export benefits. Subsequent grant of mega power benefits merely neutralized the loss suffered by TSPL on account of withdrawal of the deemed export benefits, therefore causing no alteration of the economic position of TSPL, warranting any tariff reduction as per the provisions of the PPA, specifically Article 13 in its entirety.

(iv) I now proceed to deal with certain specific contentions of PSPCL, which have not been dealt with in the preceding paragraphs of this order.

(v) It has been the contention of the Learned Counsel of PSPCL that unless condition of clause 8.2 (g) is satisfied, there is not warrant to rely on provisions of 8.4.4(iv) to contend that the supplies were made under ICB procedures contemplated under the said 8.4.4(iv) of the FTP. I do not see any merits in such a contention. I agree with the arguments of the Learned Counsel for Respondents, that it is an established point of law that a statute has to be read in its entirety. He has rightly relied upon the decision of the Supreme Court, in the case of Philips India Limited v Labour Court, Madras & Others AIR 1985 SC 1034, where their Lordships had held that "**No canon of statutory construction is more firmly established than that, the statue must be read as a whole**". On this consideration alone, it would be necessary to read not only 8.2 (g) but also 8.4.4 (iv) and other provisions of the FTP, to arrive at the true construct of the phrase supplies made under ICB. That is to say, one cannot ignore the specific construct of how the ICB may be done as provided in 8.4.4(iv) for being eligible to the deemed export benefits. I have already held that this prescription so provided in the said 8.4.4(iv) has been adequately met by TSPL given that the power

purchase took place via international competitive bidding. I also agree with the arguments of Learned Counsel of Respondents, in so far as his plea that the concept of "specific provision" overruling general provision, should apply in as much as 8.4.4 (iv) being specific to non mega power projects, should be considered as opposed to generic provisions contained at the bottom of 8.2(g) in so far as the issue of ICB is concerned. In arriving at this conclusion, reliance is also placed on the decision of the Supreme Court in the case of Bharat Petroleum Corporation Limited v P. Kesavan & Anr AIR 2004 SC 2206, where it has been held that the maxim "generalia special bus non derogant", meaning thereby that general things do not derogate special things.

(vi) In so far as the contention of the Learned Counsel of PSPCL that the conduct of TSPL also clearly establish that the claim made for FTP is an afterthought, the fact that TSPL did not consider claiming the benefit under the FTP is clear from (a) if it was so there was no need for TSPL to have sought Mega Power Status as TSPL would have in any event got the benefit under FTP; (b) there was no question of TSPL giving undertakings dated 31.08.2010 and 08.09.2010 offering to pass on the benefits, being irrelevant points and cannot be sustained. It is not at all necessary to look at the purported extraneous conducts of TSPL in order to

interpret whether certain benefits were available under the legislative provisions or not. Law is what it is and there can be no estoppel in law. It is a settled law of the land that it is the prerogative of the person to choose any benefit amongst the two and mere exercise of such discretion does not mean nor does it tantamount to ineligibility of the other. Support in this regard can be found in the ***Share Medical Care vs. UOI 2007 (209) ELT 321 (SC)*** & ***Super Cassettes Industries Limited vs. Commissioner of Customs, Mumbai 2006 (202) ELT 739 (SC)***. Therefore, the arguments of the Learned Counsel of PSPCL in this regard are rejected.

(vii) The Learned Counsel of PSPCL further submitted that there was misuse of the FTP by certain project developers who were illegally claiming the benefits of exemption from terminal excise duty even though they were non mega power projects. To clarify the position on the eligibility of the exemption for projects, in the Policy Interpretation Committee meeting held on 15.03.2011 it was stated that as the FTP 2009-14 clearly stipulated that the benefit of refund of Terminal Excise Duty was not available to non-mega power projects, the same ought not to be given. In the communication of the Director General of Foreign Trade dated 27/28.04.2011, it has been clarified that Para 8.4.4(iv) of the FTP 2009-14 clearly stipulates that

the benefit of refund of TED under para 8.3 (c) of the Policy is not available for such supplies. Thus, even if by mistake or otherwise the benefit was given to the non-mega power projects, the same was to be recovered from such projects. This contention is also liable to be repelled, in as much as, nowhere in the PIC minutes, do I notice any averment of the officials of the DGFT indicating that any such malpractice existed, nor any concrete evidence has been submitted by PSPCL to support such a contention. Under such a situation, it would not be appropriate for me to consider such a contention or rule on it. Equally relevant is the fact that there are three high court decisions namely that of Gujarat, Delhi and Bombay in the case of Alstom, Simplex and Patel Engineering, discussed earlier in this order, where the High Courts have seemingly protected the rights of the claimants, who were granted such benefits, prior to the PIC minutes of 2011, and quashed recovery action of the DGFT against grant of such benefits. Notable amongst these cases, is that of the decision of Hon'ble Bombay High Court (dated July 21, 2014) in the case of **Patel Engineering Ltd. v. UOI (W.P. 6846 of 2012)**, where the following was held::

"19. A bare perusal of this clarification shows that the meeting of the Policy Interpretation Committee was held. A Zonal Joint Director and some of the Regional Authorities were invited to obtain response from them and particularly their experience in processing export

goods. In paragraph 2 of the minutes which has been stated that these authorities pointed out their inability to settle the deemed export claims due to inadequate budgetary provisions. These difficulties are noted in paragraph 2 further and there is a reference to Public Notice issued on 1st March 2011……

21. Thus, from paragraphs 3 to 6 of the show cause notice and copies of which are annexed as Annexure 'I' onwards, we have no doubt that the foundation or basis of the allegation therein is the decision of the Policy Interpretation Committee dated 15th March 2011 and the interpretation placed on the Policy therein. We are of the clear opinion that unless and until the clarification could have been applied to cases which are already concluded and where refund has already been sanctioned and granted, the Petitioner could not be proceeded against if paragraph 6 of the minutes do not contain anything contrary to paragraph 8.2(d) of the Foreign Trade policy. These minutes cannot override the same. We are of the opinion that the Department having clarified and interpreted its policy for the first time in March 2011, it could not have relied upon such clarification to reopen the concluded cases or review them as attempted. This is a clear case of afterthought. If the Policy was earlier applied and to cases including that of the Petitioner, as pointed out in the petition itself, then, that having not been reopened at any time, reliance on such clarification or interpretation cannot

take the case of the Department any further. The Department may have been called upon to interpret the Policy in the light of the several difficulties and particularly the objectionable provision but that should not have been the basis for reopening the case of the present Petitioner or review it merely on the strength of the policy or the interpretation placed thereon. The Petitioner could not have been called upon to refund the amount duly paid and disbursed to them.

22. As a result of the above discussion, writ petitions succeed, show cause notices referred to in prayer clause (a) of the Petitions are quashed and set aside. ***It is declared that the decision taken by the Policy Interpretation Committee in its meeting on 15th March 2011 cannot be applied to the Petitioner's case and which has been concluded prior thereto.*** *Rule is made absolute in the above terms with the above terms with no order as to costs.*

……

24. Having clarified and adequately declared that the Petitioner's case and pertaining to supplies prior to 15th March 2011, the interpretation placed on 15th March 2011 by the Policy Interpretation Committee would not govern or apply to them, we have no doubt that such cases would be processed by the authorities in accordance with the policy prevailing and as clarified but prior to 15th March 2011." (Emphasis supplied)

(viii) Had there been a blatant malpractice as alleged by PSPCL, none of the Hon'ble High Courts would have entertain the petitions of the claimants. It is an established principle of law that no equity courts, exercising powers under Article 226, permit petitions, where the petitioners have not come with clean hands, nor can a court be seen to be endorsing illegal activities. On this basis, the entire contention of PSPCL, as enumerated above, would fail.

(ix) The judgments of Hon'ble Gujarat High Court in the case of **Alstom India Ltd v. UOI [2014 (301) ELT 446 (Guj.)** and Hon'ble Delhi High Court in the case of **Simplex Infrastructure Ltd. v. UOI (W.P. (C) 4455/2013 dated 26.02.2014)** also strengthens the case of TSPL to the limited extent that prior to the PIC of March 2011, vested rights accrued to various claimants under the deemed export scheme, which right could not be taken away in a manner that has been sought to be done by the DGFT. Consequently, PSPCL cannot be permitted to contend that conferment of such vest rights, were illegal in nature.

Keeping in view the above observations and findings on this issue, I hold that, the Respondents were eligible for the deemed export benefits as on the cut off date.

DECISION

Based on the specific analysis and findings made by me as above, I am of the view that PSPCL's petition cannot succeed.

Benefits under the FTP, were available to the Respondents as on the relevant/ cut-off date (16.06.2008) which stood withdrawn subsequently leading to a change in law in itself. This change was neutralized by conferment of Mega Power Project Status to TSPL and thus, it was a zero sum game, which did not lead to any alternation of the economic position of TSPL. Consequently, the specific conditions prescribed under Article 13.2 does not stand satisfied and, therefore there is no warrant for TSPL to offer any tariff reduction on this account.

Sd/-
(Virinder Singh)
Member

Chandigarh
Dated: 02.12.2014