2012 (2) ECS (140) (Tri-Ban)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL SOUTH ZONAL BENCH AT BANGLORE COURT- I

M/s Samalkot Power Limited & M/s Reliance Infrastructure Limited
Versus
Commissioner of Customs, Visakhapatnam.

Appeal Nos: C/367 & 460/2012

Arising out of Order-in- Appeal No. 01/2012-VII Cus. Dated 16.1.2012 passed by the Commissioner of Customs, Central Excise & Service Tax (Appeals), Visakhapatnam.)

Date of Hearing: 25.04.2012; 26.04.2012
01.05.2012 & 02.05.2012
Date of decision : 31.07.2012

M/s Samalkot Power Limited — Appellant
M/s Reliance Infrastructure Limited

Vs.

Commissioner of Customs — Respondent
Visakhapatnam.

Appearance
For the appellant: S/Shri S. Jaikumar, B Venugopal & M. Karthikeyan, Advocates
For the respondent: S/Shri P.R.V.Ramanan, Special Counsel for the Revenue.

CORAM
SHRI P.G. CHOCKO, HON'BLE MEMBER (JUDICIAL)
SHRI M. VEERAIYAN, HON,BLE MEMBER (TECHNICAL)

FINAL ORDER NO 511& 512/2012

The expression "all goods" used in the two Chapter Notes is significant and so is the expression "all items" used in the text of Heading 9801. The phrase "all items of machinery including ….required for the initial setting up a unit, or the substantial expansion of an existing unit, of a specified…. power project" means, to our mind, that the whole lot of items required for the setting up of a power plant or for the substantial expansion of an existing power plant will constitute a bundle or cluster to be covered by Heading 9801. The Chapter Notes appear to support this legal fiction embodied in Heading 9801. If some of the items/goods are removed from this bundle, the residue will not go to constitute a new power plant or an expanded power plant. Therefore, it is imperative that, for classification under Heading 9801,

the bundle of items/goods must be complete so as to be considered to be "required for the setting up of a power plant". [Para 12 C]

[Order per: P.G. Chacko]

1. Two Bills of Entry Nos.5875426 and 4875427, both dated 10.10.2011, were filed in the name of M/s Samalkot Power Ltd. (SPL, for short) at Customs House Kakinada for clearance of 'gas turbine components' and 'generator transformers', classifying these goods under ' Project Import Heading' 9801 and Sub-Heading 9801 00 13 of the First Schedule to the Customs Tariff Act. 1975, declaring Rs.14,99,01,469/- and Rs65,24,64,057/- respectively as the value of these goods and seeking exemption under Customs Notification No.21/2002 dated _.3.2002 (SI. No.400) as amended by Notification No. 65/2011-Cus dated 21.7.2011. Two Bills of Lading dated 20.6.2011 and 21.8.2011 two commercial Invoices dated 27.6.2011 and 2.9.2011 (with packing lists) and two irrevocable Letters of Credit dated 8.12.2000 and 11.7.2011(Axis Bank Ltd. Dubai) were also filed with the Bills of Entry. The invoices showed M/s Reliance Infra Project International Ltd. British Virgin Islands, as the exporter of the goods. SPL sought provisional assessment of the goods on the basis of a provisional Mega Power Project Status Certificate dated 21.9.2011 issued by the Ministry of Power, Govt. of India. In a letter dated 10.10.2011, they also informed the Deputy Commissioner of Customs that the words "expansion project" in para (a) of the said certificate were subsequently deleted by the Ministry. A copy of the amendment dated 4.10.2011 was also produced by SPL.

2. Earlier, on 24.9.2011, SPL had submitted an application to the Deputy Commissioner of Customs for registration of an EPC Contract dated 31.7.2010 with its amendments under the Project Import Regulations, 1986 (PIR, for short) for the purpose of availing the aforesaid exemption for the goods covered by the two Bills of Entry. The following documents were also produced in support of SPL application:-

(i) Annexure A,
(ii) List of goods certified by Chief Executive Officer,
(iii) Continuity Bond,
(iv) Detailed Project Report,
(v) Engineering Catalogue,
(vi) Undertaking by Samalkot Power Ltd.
(vii) Import and Export Code of Samalkot Power Ltd.
(viii) Consent Order for Establishment –
(viii.1) Order Number APPCB/VSP/RJY/454/CFE/HO/2011/1745, dated 17.9.2011
(viii.2) Order Number APPCB/VSP/RJY/454/CFE/HO/2011/1832, dated 12.10.2010
(viii.3) Order Number APPCB/VSP
(ix) Water Allocation Letter-
(ix.1) G.O.MS. Number 30, dated 30.03.2010,
(ix.2) G.O.MS. Number 55, dated 24.8.2011,

(x). Memorandum of Association and Article of Association for Samalkot Power Ltd.
(xi) Clearance from Ministry of Environment and Forests-
(xi.1) J130212/134/2009-I.A.II (T), dated 21.09.2011,
(xi.2) J130212/37/2009-I.A.II (T), dated 28.05.2011,
(xi.3) J130212/37/2009-I.A.II (T), dated 26.04.2011,
(xii) EPC Contract Copy between M/s Samalkot Power Ltd. and M/s. RELIANCE Infrastructure Limited, along with all amendments.
(xiii) Off shore Supply Contract between M/s RELIANCE Infrastructure Limited and
(xiv) Reliance Infra Projects International Ltd. along with an amendment,
Contract (Ref EOI/23050957), dated 29.07.2011 for supply of Pre-Engineered Power House Building Structures between M/s RELIANCE Infrastructure Limited and M/s Zhejiang Hanxiao Steel Structure Co. Ltd.,
(xv) Provisional Mega Power Project Status Certificate No.4/25/2010-Th-1 dated 21.09.2011,
(xvi) Notification No.65/2011-Cus, dated 21.07.2011,
(xvii) Marine Insurance Held Cover Note Copy of Samalkot Project,
(xviii) Plot Plan of the Samalkot Project.

3. Certain queries made by the Deputy Commissioner apropos of SPL's application were answered by the party in a reply dated 15.10.2011 wherein it was submitted inter alia
(a) that condition No. 86(a) attached to SI No. 400 of Notification No.21/2002-Cus, was not applicable as a provisional Mega Power Project Status Certificate had been issued by the Ministry of Power in terms of Condition No.86(aa), (b) that the final Mega Power Status Project Certificate would be issued by the Ministry of Power only after identification of the power purchasing States and their compliance with distribution norms, (c) that, as per the EPC contract and the amendments thereof, the responsibility of payment of customs duty was on Reliance Infrastructure Ltd. (RIL, for short), (d) that the goods imported earlier for the project were cleared on payment of duty by RIL as importer, (e) that, by virtue of Cus Notfn. 65/2011, the benefit of exemption could be availed only by the project developer/owner, i.e. SPL, (f) that the description of goods under Heading 9801 was relevant to classification only and (g) that the clearance of earlier consignments under the merit assessment did not preclude SPL from getting the project contract registered under PIR and availing exemption for the present consignments.

3. With reference to the above submissions of SPL, further queries were made and additional documents called for SPL by letter dated 19.10.2011 replied to the queries (vide infra) and furnished the required documents (vide infra):

<u>Queries/Documents:</u>

I. Ministry of Power's provisional Mega Power Project Status Certificate dated 21.9.2011. Copies of the documents mentioned in the certificate:
(i) Attested copies of contracts with the manufacturers of main equipment.
(ii) Attested copies of receipt for payment of advance (not less than 10%).

(iii)Tentative schedule for delivery of equipment.

II. Application dated 18.8.2011 made to the Ministry of power for provisional certificate.

III. Application dated 24.09.2011 made to the Ministry of Power seeking amendment to the provisional certificate dated 21.09.2011

IV. Project Import Registration
(i) Who has applied for the registration?
(ii) What are the documents submitted for the registration?

V. Whether the project is in the initial setting up category or expansion category.
(i) The relevant documents/applications submitted for various clearances by Central Government/State Government.
(ii) If any amendments were sought in respect of (i) copies of such applications.
(iii)Clearances given by various Central Government/State Government departments including subsequent amendments concerning (i), (ii) above

VI(i) What is the total project cost and out of the project cost what is the cost related to imports.
(ii) How is the project is being funded?
(iii) If the Bankers/Financial institutions are fully or funding imports, copies of the financial sanctions (loan) sought for and copies of the sanction letters issued by these institutions along with terms and conditions.

VII. The documents showing share holding of Samalkot Power Limited.

5. The goods were subjected to first check procedure on 24.10.2011. The markings on the packages, recorded in the examination report dated 24.10.2011, indicated that the goods had been imported for "Samalkot expansion project"

6. On the basis of the facts gathered from a comprehensive scrutiny of all the records herein before referred to and after considering SPL's replies to queries, the Deputy Commissioner issued noticed dated 25.10.2011 calling upon SPL and RIL to show cause why-

(i) M/s Reliance Infrastructure Limited should not be treated as Importer.

(ii) M/s Samalkot Power Limited's request dated 24.09.2011 for registration of contract dated 31.07.2010 under Project Import Regulations, 1986 should not be rejected as the said project is an expansion project and not an initial setting up category project;

(iii) The goods imported for which Bills of Entry Nos.4875426 and 4875427 both the dated 10.10.2011 have been filed, in respect of which duty exemption under sub-para No.400 (b) of Customs Notification No.21/2002 dated 1.3.2002 read with Customs Notification No 65/2011 dated 21.07.2011 has been claimed should not be rejected as the goods imported are for expansion project and not for initial setting up.

(iv) The provisional Mega Power Project Status Certificate dated 21.09.2011 and the amendment date 4.10.2011 issued by the Ministry of Power should not be treated as not valid document for claiming duty exemption under SI.No. 400(b) of Customs Notification No.21/2002 dated 01.03.2002 read with Notification No.65/2011 dated 21.7.2011 as the said project is an expansion project and not an initial setting up category project.

(v) The registration sought for under CTH sub-heading 9801 and Project Import Regulations, 1986 should not be rejected since, considerable items/goods required for the said project have already been imported and cleared on payment of duty on merits without registering under Project Import Regulations, 1986

(vi)The goods covered under Bills of Entry No. 4875426 and 4875427, both dated 10.10.2011 should not be assessed under their respective CTH sub headings by charging duty on merits.

Both the noticees contested the above proposals by filing detailed replies to the show-cause notice. After hearing SPL (RIL did not want to be personally heard), the Deputy Commissioner of Customs framed the following issues:-

(i) Whether M/s Reliance Infrastructure Limited should be treated as Importer of goods covered under Bills of Entry Nos. 4875426 and 4875427 both dated 10.10.2011

(ii) (a) Whether M/s Samalkot Power Limited's twin requests dated 24.09.2011 for registration, of an EPC contract dated 31.07.2010 with it's amendments, under Project Import Regulations, 1986 and for duty exemption under S.No.400 (b) of Customs Notification No.21/2002 dated 1.3.2002 read with Customs Notification No.65/2011 dated 21.7.2011 are admissible

(b) Whether the provisional Mega Power Project Status Certificate dated 21.9.2011 and the amendment dated 4.10.2011 issued by the Ministry of Power are valid documents for claiming duty exemption under SI. No.400 (b) of Customs Notification No. 21/2002 dated 01.03.2002 read with Notification No.65/2011-Cus dated 21.7.2011.

(iii) Whether M/s Samalkot Power Ltd's request; for classification/assessment under 98.01 of Customs Tariff Act, 1975 and application dt. 24.09.2011 for registration of the aforementioned contract dt. 31.07.2010 with it's amendments under project

Import Regulations, 1986, is admissible when considerable items/goods required for the said project have already been imported and cleared on payment of duty on merits without registering under Project Import Regulations, 1986.

(iv) Whether the goods covered under Bills of Entry No.4875426 and 4875427, both dated 10.10.2011 are to be assessed under their respective CTH sub headings by charging duty on merits.

After elaborate discussion of the facts of the case, appraisal of documentary evidence, examination of legal provisions and consideration of case law, the adjudicating authority answered the first and fourth issues in the affirmative and other issues in the negative vide order-in-original No 10/2011 dated 15.12.2011 whereby SPL's claim were rejected ,RIL was directed to file Bills of Entry in respect of the subject goods, and the goods were ordered to be classified under the respective Headings/Sub-headings of the CTA Schedule and be assessed to duty on merits.

7. On appeals of SPL and RIL, the order-in-original came to be upheld, on all issues, by the commissioner of Customs (Appeals) whose order dated 16.1.2012 is presently under challenge.

8. We have perused the grounds of the two appeals and heard the submissions of the learned counsel for the appellants and the learned Special Consultant for the respondent.

9. <u>The case of SPL</u>

(a) The existing 220 MW gas based power plant at Samalkot is owned by RIL and not by SPL, and the findings to the contra are factually incorrect and even beyond the scope of the show-cause notice. Though initially the 2400MW Samalkot power project was envisaged as an "expansion project" of RIL in relation to the existing 220 MW Power plant and accordingly all necessary clearances from the Ministry of Environment & Forests (MoEF), Govt. of India were obtained by RIL, all such clearances were eventually transferred to SPL and thereby SPL became the developer/owner of the 2400 MW project. The "expansion project" of RIL became a "Greenfield power project" in the hands of SPL on 29.6.2011 when MoEF transferred the clearance to the latter. Though the Provisional Mega Power Project Status Certificate dated 21.9.2011 issued to SPL by the Ministry of Power (MoP), Govt. of India, in respect of the proposed 2400 MW power plant described the project as "expansion project", these words were subsequently deleted by the Ministry by an amendment dated 4.10.2011. In fact, the respondent's request to withdraw the above certificate has been turned down by the MOP in a letter dated 2.4.2012 (copy produced) wherein it has been confirmed that SPL is the owner of the project and the above certificate was issued to them as they complied with the guidelines issued by the Ministry. Customs is bound to accept the above certificate (as amended) issued by the competent Ministry especially in the light of the clarification issued on 2.4.2012. The finding that the amendment dated 4.10.2011 is not valid and therefore the certificate dated 21.9.2011 of the MoP is related to "substantial expansion" of the existing 220 MW power plant is unsustainable.

(b) The existing 220MW power plant and the 2400 MW power project are based on two different technologies and independent of each other. The latter cannot use the transmission lines and other electrical auxiliaries of the former due to the difference in Generation Voltage. The new plant being set up will be a stand-alone power plant of 2400 MW capacity which can independently function even if the old one of 220 MW capacity is shut down. Copies of certificates/letters issued to SPL by experts have been produced- these are authored by (i) Mohan Tahiliani of Black & Veatch Corporation, (ii) H.L. Bajaj former Chairman, Central Electricity Authority and (iii) R.D. Gupta former Director (Commercial) of National Thermal Power Corporation. Therefore the 2400 MW power project cannot be held to be an "expansion project" in relation to be existing 220 MW power plant.

(c) The "Essentiality Certificate" dated 23.9.2011 duly issued by the Principal Secretary (Energy) to Govt. of Andhra Pradesh , qua "Sponsoring Authority" under the project Imports Regulations, 1966 has certified that the power project in question is for "initial setting up" of 2400 MW Samalkot gas based Power Plant.

(d) The authorities below while holding that the provisional Mega Power Status Certificate issued by the MoP was for "substantial expansion" of the existing 220 MW power plant overlooked the fact that the existing power plant and the 2400 MW power project were owned by different legal entities.

(e) The test laid down by Hon'ble Supreme Court to determine whether a unit is to be considered as a new industrial unit or as part of an existing unit should have been applied to the present case by the authorities below. [Commissioner vs. Reckitt Colman of India Ltd.: 1997 (92)E.L.T 457 (S.C.) and Textile Machinery Corporation Ltd vs. CIT:1977 (2) SCC 368 relied on]. If the test is applied to the present case the 2400 MW power project has to be held to be setting up of a new power plant.

(f) In the case of Mangalore Refinery and Petroleum Ltd. vs. Commissioner: 2005 (187) E.L.T. 466 (Tri- Bang), this Tribunal rejected the department's plea that the benefit of Notification No.11/97-Cus. Dated 1.3.97 was admissible only to goods imported for the purpose of setting up a new refinery and not admissible to goods imported for setting up of an additional refinery. The ratio of this decision is applicable to the present case.

(g) The view taken by the authorities below to the effect that the registration of a contract under the PIR should be made before the filing of Bill of Entry is erroneous. Importation is said to be complete when the goods are cleared for home consumption. Though the subject Bills of Entry were filed on 10.10.2011, no order for clearance for home consumption has been made. Therefore SPL's application for registration of the contract under the PIR is not liable to be rejected on the said ground. The cases of Mihir Textiles Ltd. vs. Collector:1997 (92) E.L.T. 9 (S.C) and Dunlop India Ltd. vs Collector :1997 (95) E.L.T. 162 (S.C) relied on by the authorities below are clearly distinguishable inasmuch as, in the instant case, the goods covered by the two Bills of Entry are still under Custom control.

(h) SPL had applied to the Principal Secretary (Energy), Govt. of AP on 23.9.2011 for essentiality certificate. The certificate was not available when they applied for registration of the contract under the PIR. It was not available to SPL even when the order-in-original was passed by the Deputy Commissioner. However, it is produced before the Commissioner (Appeals). The department has given acknowledgement of receipt of the essentiality certificate on 10.1.2012. Therefore the observation made by the learned Commissioner (Appeals) that SPL did not produce the sponsoring authority's recommendation letter is factually incorrect.

(i) It was held by this Bench of the Tribunal in the case of B.E.M.__ vs. Commissioner: 2006 (201) E.L.T 60 (Tri Bang.) that a certificate of registration of contract under the PIR was required to be produced before clearance of goods for home consumption. Therefore, in the present case, the non-production of essentiality certificate along with SPL's application for registration under the PIR cannot be fatal.

(j) There is no requirement for recommendation letter from the sponsoring authority after the insertion of Condition No. 86 (aa) in Notification No. 21/2002-Cus. Which overrides the requirement where the assessment is provisional as in the present case.

(k) M/s Reliance Power Ltd. (RPL, for short) signed the EPC Contract with RIL and the latter subsequently signed an Offshore Equipment Supply Contract with M/s Reliance Infra Project International Ltd., which is, in turn, placed under the M/s General Electric Inc. for supply of the main equipments for the proposed power plant. Later on, through a tripartite agreement between SPL, RPL and RIL, SPL took the place of RPL in the EPC Contract and thereby became the developer/owner of the proposed Samalkot 2400 MW Power Project. The authorities below ought not to have considered the EPC Contract in isolation regardless of the back-to-back contract which RIL had entered into with the foreign supplier. In view of the clear link established by SPL, the EPC Contract ought to have been accepted for registration under the PIR as SPL satisfied the eligibility conditions under Regulation 4 and followed the procedure under Regulation 5 of the PIR.

(l) Registration of the EPC Contract should not have been declined on the ground that some equipments required for the project were already imported and cleared on payment of duty. The only consideration relevant to registration of the project is whether the imported goods are required for the project. Neither CTH 9801 nor the PIR, 1986 barred registration of a project by reason of part of the goods required for the project having already been cleared on payment of duty on merits. In the case of Commissioner vs. Maxxon (l) Ltd.: 2001 (137) ELT 590 (Tri.-Del), it was held by this Tribunal that an importer could not be compelled to claim the benefit of project import even if eligible. To claim the benefit is optional. Therefore, the benefit of project import is not liable to be denied to SPL in respect to the capital goods covered by the subject Bills of Entry on the ground that many other capital goods required for the same power project were already imported and cleared on payment of duty by RIL.

(m) The goods covered by the two Bills of Entry are undisputedly required for setting up of 2400 MW power project certified to be Mega Power Project by the competent authority in the MoP. They fall in the description of goods under CTH 9801. The project has received provisional Mega Power Project Status Certificate of the MoP. SPL is willing to fulfill Condition No. 86(aa) attached to SI No.400 of Notification No.21/2002-Cus. (as amended). Therefore, the benefit of the Notification cannot be denied to SPL.

(n) RIL sold the goods to SPL at the high seas under the agreements in accordance with international trade practice. SPL as the high seas buyer of the goods became the owner of the goods and this fact was also endorsed on the Bills of Lading and thereby SPL became entitled to file the subject Bills of Entry as "importer" of the goods as defined under Section 2(26) of Customs Act. The title to the goods had passed from RIL to SPL. That the endorsed Bills of Lading were not produced by SPL at the time of filing the Bills of Entry is no ground to hold that SPL is not the importer. The foreign Trade Policy permits high seas sales of goods for importation into India. The above sale of goods at high seas by RIL to SPL was lawfully effected in keeping with the requirements of CBEC's Circular No.32/2004-Cus.dated 11.5.2004

10. <u>The Case of RIL.</u>

(a) RIL is not the importer of the goods covered by the two Bills of Entry dated 10.10.2011, for which SPL is the importer as per Section 2(26) of the Customs Act. The title of the goods was passed to SPL by the way of high seas sale of the goods by RIL to SPL. After the high seas sale of the goods, SPL is the owner of the goods. The Bills of Lading were also endorsed in favour of SPL.

(b) Both the Bills of Entry were filed by the high seas buyer qua owner and importer of the goods. Copies of the high seas sale agreements were also furnished. Two per cent loading on the value of the goods as per the relevant Circular of CBEC was also done. Therefore both the Bills of Entry are liable to be assessed in the name of SPL.

(c) RIL was awarded the EPC Contract for setting up the 2400 MW power project. Since the power project is covered by a provisional Mega Power Project Status Certificate, the import of goods for such project would attract the benefit of the Notification.

(d) In case RIL is held to be the importer, the benefit of Notification No.21/2002-Cus. Should be extended to RIL because the benefit of the Notification is qua the goods and not qua the importer. RIL has since filed two Bills of Entry in lieu of SPL,s Bills of Entry dated 10.10.2011 (albeit under protest) claiming the benefit of Notification No.21/2002-Cus dated 1.3.2002 [S.No. 400(b) as amended be Notification No.65/2011-Cus dated 21.7.2011]

11. <u>The case of the respondent</u>

(a) As the scheme of demerger of RIL (scheme to carve out different Divisons ofRIL into separate companies), which was initially allowed by the Hon'ble Bombay

High Court by order dated 24.7.2009 in a batch of Company Petitions, was eventually declared ineffective as per order dated 25.3.2011 on the Hon'ble High Court. Reliance Power Ltd. (RPL) was not a party to the above scheme and therefore could not have assumed ownership of the existing 220 MW power plant of the 2400 MW expansion project. Consequently, they were not competent to enter into EPC Contract with RIL and, for this reason, the assignment of the expansion project to SPL is also invalid. The EPC Contract and its amendments are all legally invalid. Therefore SPL's application for registration of the contract under the PIR was rightly rejected.

(b) Customs has not raised any dispute about the ownership of the 2400 MV power project. Neither the original authority nor the appellate authority has held that SPL is not the owner of the power project. This was not an issue raised in the show-cause notice.

(c) All the approvals/ clearance for the 2400 MW project were obtained by RIL, who actually imported several consignments of capital goods and cleared the same on payment of duty to the tune of Rs. 304 Cr. Between 9.6.2011 and 17.11.2011. Thus, RIL as the party duly authorized to import the goods required for the expansion project, held itself out to be the import of capital goods for setting up the power plant. Therefore both the authorities below rightly held RIL to be importer of the goods covered by the subject Bills of Entry also.

(d) Only in respect of two consignments presents on 10.10.2011 SPL projected itself as the importer and filed Bills of Entry. Obviously they did so after realizing that RIL being only the EPC Contractor was not eligible to claim exemption under Notification No.21/02-Cus as amended.

(e) The original high seas sale agreements were not produced by SPL to substantiate their claim of having purchased the goods from RIL at the high seas. High seas sale was set up to claim the benefit the Notification.

(f) All the approval and clearance had been obtained by RIL from various Government Ministries/Departments/Agencies (MoEF of Government of India/Irrigation Department of Government of Andhra Pradesh/Energy Department of Government of Andhra Pradesh/A.P Pollution Control Board) for an "expansion project" with reference to the existing 220MW power plant. All imports by RIL from June 2011 to November 2011 were made for this purpose only. The transfer of such clearance/approvals from RIL to SPL would not per se alter the nature of the project and make it a "Greenfield project". 2400 MW power project remains an "expansion project" with reference to the existing 220 MW power plant.

(g) An application under the PIR for registration of any EPC contract has to be filed on or before importation. In the present case, the application was submitted after the importation. The contract to be registered should be one between the Indian

importer and the foreign supplier. The EPC Contract between SPL and RIL therefore cannot be registered under the PIR. Moreover, the sponsoring authority's recommendation letter required under Regulation 5(4) of the PIR was not produced. The sponsoring authority's recommendation letter is a requirement under the PIR for registration of a contract for assessment of imported goods under CTH 9801, while the provisional Mega Power Project Status Certificate is for the purpose of claiming exemption under the Notification. As the two requirements are under two different legal provisions, SPL cannot be heard to say that the recommendation letter was not necessary as the provisional certificate had been produced.

(h) The registration of the EPC contract under the PIR and assessment of the goods under CTH 9801 cannot be claimed by SPL for the aforesaid reasons and consequently SPL cannot claim the benefit of exemption under the Notification.

(i) RIL had the option of assessment under CTH 9801 in substantial expansion' category. In fact. In the case of a contemporaneous project of M/s Sasan Power Ltd. RIL opted for such assessment.

(j) On 20.12.2011, the Customs pointed out to the MoP that the provisional certificate was not as per the revised policy guideline (vide Office Memorandum No. A-4/2011-IPC dt 17.8.2011 of the MoP, Gol) issued by the MoP as the EPC contracts funished as SPL to the MoP were not between the developer (SPL) and the manufacturers of the machinery/equipment. The MoP has, in its letter dated 2.4.2012, stated that SPL complied with the guidelines and therefore the provisional certificate could not be withdrawn. Nevertheless, as the EPC Contract and its assignment to SPL are not legally valid, the provisional Mega Power Project Status Certificate issued to SPL by the MoP cannot be accepted as valid.

(k) Only photocopies of high seas sale agreements were produced by RIL. SPL cannot, therefore, be held to have established a title to the goods covered by the subject Bills of Entry.

(l) Even after SPL applied for registration of the contract in September 2011, imports were made by RIL, 32 consignments of capital goods valued at Rs.1259.69 cr. were so imported by RIL and cleared on payment of duty at 'merit' rates.

(m) The expression "all goods" appearing in Chapter 98 of the CTA Schedule implies that the registration should cover all imported goods. The benefit of project import under Heading 9801 should be claimed in respect of all the goods imported for the purpose of the project. The importer has no option to claim the benefit of project import in respect of some consignments and to clear other consignments on payment duty. Once a contract for project import is registered with the Customs House, its de-registration in full or part is not permissible as clarified in CBEC's Circular F.No.528/213/87-Cus. (TU) dated 8.8.1987. The same logic is applicable to non-registration as well. The concept of all the goods

imported for a project having to be considered as a composite unit classifiable under Heading No.84.66 of the CTA Schedule (predecessor to Heading No.98.01) was approved in the case of Appraiser, Madras Customs vs. Tamil Nadu Newsprint Paper Ltd.: 1988 (36) ELT 272 (Mad.). The same concept was embodied in the above Circular dated 8.8.1987. Therefore, what requires to be classified under CTH 9801 is a whole lot of goods imported for the purpose of implementation of a project. A part of this composite unit cannot be classified for assessment as a project import.

12. We have carefully examined the records of the case and have given careful consideration to the rival submissions. The issues raised before us and our findings thereon are as stated hereinafter.

(A)Whether the 2400 MW power project can be considered to be "expansion project" with reference to the existing 220 MW power plant:

(a) It has been submitted on behalf of the respondent that the ownership of the project is not in dispute. Therefore the plea of the appellants that the existing 220 MW power plant is owned by RIL and that SPL is the developer/owner of the proposed 2400 MW power plant has to be accepted. Proceeding on this premise, we hold that the existing power plant and the proposed power plant belong to two different legal entities.

(b) The findings of the authorities below that the 2400 MW power project is an "expansion project" with reference to the existing 220 MW power plant is mainly based on the fact that all the clearances obtained by RIL from the MoEF of the Gol. Irrigation Department of the A.P. Govt., A.P. Pollution Control Board, etc. indicated the same project as an "expansion project" and even the provisional Mega Power Project Status Certificate issued to SPL by the MoP referred by the said project as "expansion project". Both the authorities below refused to accept the amendment dated 4.10.2011 issued by the MoP in relation to provisional Mega Power Project Status Certificate dated 21.9.2011 issued to SPL. Both the provisional certificate dated 21.9.2011 and its amendment dated 4.10.2011 were held to be invalid. We find that the reasoning of the adjudicating and appellate authorities were communicated by the respondent to the MoP and it was respondent urged that the provisional Mega Power Project Status Certificate be withdrawn. The MoP's reply to this request of the Commissioner of Customs and Central Excise, Visakhapatnam-II, has been perused at our end. This letter No.4/35/2010-Th-l (Vol-1) dated 2.4.2012 of the Director (IPC), Ministry of Power, Government of India is seen to have been issued with the approval of the Joint Secretary (Thermal). Going by the tenor of this letter, we find that the MoP has confirmed that SPL complied with the guidelines issued by the Ministry and fulfilled the requirements for provisional Mega Power Certification. The ministry appears to have offered this clarification in consultation with the Central Electricity Authority. The MoP's letter dated 2.4.2012 states inter alia that a thermal power plant of capacity 1000MW or more is eligible for provisional

Mega Power Status irrespective of whether it is an expansion project or a 'Greenfield' project. Accordingly, the Ministry has found it inappropriate to withdraw the provisional Mega Power Status Certificate issued to SPL.

(c) SPL has expressed their willingness to comply with Condition No.86 (aa) introduced by Notification No.65/2011-Cus. Dated 21.7.2011, in the event of the subject Bills of Entry being accepted for assessment. The said condition, which was added to S.No 400 of Notification No.21/2002-Cus. reads thus:

> "(aa) In case of imports for a project for which the certificate regarding Mega Power Project Status issued by and officer not below the rank of Joint Secretary to the Government of India in the Ministry of Power is provisional, the importer furnishes a security in the form of a Fixed deposit Receipt from any Scheduled Bank for a term of thirty six months or more in the name of the President of India for an amount equal to the duty of custom payable on such imports but for this exemption, to the Deputy Commissioner of Customs or Assistant Commissioner of Customs as the case may be, at the time of importation and if the importer fails to furnish the final Mega Power status certificate within a period of thirty six months from the date of importation, the said security shall be appropriated towards duty of customs payable on such imports but for this exemption"
>
> The text of the entry at S.No.400 shorn of irrelevant clause is given below.

400	9801	Goods required for setting up of any Mega Power Project, so certified by an officer not below the rank of a joint Secretary to the Government of India in the Ministry of Power, that is to say- a). a thermal power plant……located in the States of Jammu and Kashmir, Sikkim,	Nil	Nil	86

		Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura; or b). a thermal power plant of a capacity of 1000 MW or more, located in States other than those specified in clause (a) above; or c). ……. d)……			

It is pertinent to note the exemption is admissible to goods falling under Heading 9801 of the CTA Schedule and required for setting up of any Mega Power Project so certified by the special authority. As per condition No.86 (a), the importer should produce another certificate from the same authority to the effect that (i) the power purchasing State has constituted the Regulatory Commission with full power to fix tariffs and (ii) the power purchasing State shall undertake to carry out distribution reforms as laid down by the MoP. This condition is mandatory and hence its applicability is not dependent on other conditions including condition 86(aa). With regard to condition 86(aa), we find that the production of the provisional Mega power Project Status Certificate of the MoP before the Deputy Commissioner of Customs has ipso facto rendered this condition applicable. This condition, apparently, provides for provisional grant of exemption to the importer against production of a provisional Mega Power Project Status Certificate from the MoP and furnishing of a Fixed Deposit Receipt from any Scheduled Bank for a minimum term of 36 months for an amount equal to the duty of customs payable on the imported goods but for the exemption. The importer has to produce the final Mega Power Project Status Certificate within a period of 36 months from the date of importation. SPL is said to be willing to do so.

(d) The text of entry 400 of Notification No.21/2002-Cus. pertains to goods required for setting up of any "Mega Power Project" so certified by the specified authority. The entry classifies the goods under CTH 9801, which takes us to Chapter 98 of the CTA Schedule. Chapter Notes 1 and 2 being relevant are reproduced below.

Notes:

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

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

The text of Heading 9801 reads:

Tariff item	Description of goods
9801	All items of machinery including prime movers, instruments, apparatus and appliances, control gear and transmission equipment, auxiliary equipment (including those required for research and development purpose, testing and quality control), as well as components (whether finished or not a raw materials for the manufacture o the aforesaid items and their components, required for the initial setting up of a unit, or the substantial expansion of and existing unit, of a specified: (1) Industrial plant, (2) Irrigation Project, (3) Power Project, (4) Mining Project, (5) Project for the exploration for oil or other minerals, and (6) Such other projects as the Central Government. May, having regard to the economic development of the country notify in the official Gazette in this behalf; and spare parts, other raw materials(including semi-finished material) or consumable stores not exceeding 10% of the value of the goods specified above provided that such spare parts, raw materials or consumable stores are essential for the maintenance of the plant or project mentioned in (1) to (6) above.

The text of Heading 9801 refers to initial setting up while that of entry 400 of Notification No.21/2002-Cus. refers to setting up. But we do not find any significant difference between the two. Apparently, the word "initial" was used to qualify "setting up" in the text of Heading 9801 only for contradistinction vis-à-vis "expansion" mentioned in the same text. Therefore, in the context of discussing the captioned issue, we find two expressions pitted against each other-"setting up of a Mega Power Project" and "expansion project".

(e) As it is not in dispute that the existing 220 MW power plant is owned by RIL and that SPL is the developer/owner of the 2400 MW power project, it will not be prudent to hold that, in the hands of SPL, the said project is an "expansion" of the existing 220 MW power plant of RIL. The opinion of three experts, brought on record by the counsel for SPL, is unanimous to the effect (a) that the existing 220 MW power plant and the proposed 2400 MW power plant are based on two different technologies (Siemens V94.2 technology and General Electric Frame 9FA technology respectively), (b) that there are no shared mechanical or electrical auxiliaries between the two power plants (c) that the proposed 2400 MW power cannot use the transmission line of the existing 220 MW power plant due to the difference in generation voltage (d) that the 2400 MW power plant cannot use the gas and water pipelines of the existing power plant of small capacity and (e) that any one power plant can independently function even when the other on is shut down. This evidence adduced on behalf of SPL has not been contested before us. Considering the technological, operational and other differences between the two power plants certified by the experts, we hold the view that the 2400 MW power project cannot be considered to be an "expansion project", in the hands of SPL, with reference to the existing 220 MW power plant owned by RIL. It would follow that, as far as SPL is concerned, the 2400 MW power project should be considered to be "setting up of a new power plant"

(f) However, in so far as RIL is concerned, the position is different inasmuch as it has been conceded on behalf of the department that RIL has the option of assessment under Heading 9801 in the "substantial expansion category". If RIL claims the benefit of project import in respect of the 2400 MW power project as a "substantial expansion project", the same can be considered (notwithstanding the technological, operational and other differences between the proposed power plant and the existing one) inasmuch as admittedly, RIL has imported all other goods required for the project and can achieve substantial increase of power production capacity by adding the new plant to the existing 220 MW power plant. The Department is apparently inclined to consider RIL's claim if made. Contextually, we note that, in RIL's appeal, there is an alternative claim to the above effect. We hold that the 2400 MW power project can be considered to be a "substantial expansion project" in the hands of RIL inasmuch as the existing 220 MW power plant is already owned by them and the execution of the proposed power project would add to the power production capacity of RIL.

(B) Whether SPL can be held to be the importer of the goods covered by the subject Bills of Entry dated 10.10.2011:

It is the claim of SPL that they purchased the goods at high seas from RIL. This claim is based on high seas sale agreements. Copies of high seas sale agreements were produced before the original authority and the same were noted in para 47 of the order-in-original. It appears, SPL's claim was not accepted as they had produced only copies of the agreements and not the originals thereof and the Bills of Lading with endorsement in favour of SPL had not been produced. We are of the view that, in the interest of justice, SPL should be given an opportunity to substantiate their claim by producing the original high seas sale agreements and the relevant Bills of Lading with the requisite endorsement. If SPL produces such materials, the original authority shall examine the same in accordance with the relevant guidelines issued by the CBEC and decided afresh on the above issue.

(C) Whether the goods covered by the subject Bills of Entry 10.10.2011 can be classified under CTH 9801 and assessed with grant of the benefit of project import to SPL:

We have already referred to the terms of Heading 9801 and the two relevant Chapter Notes in Chapter 98 of the CTA Schedule. The expression "all goods" used in the two Chapter Notes is significant and so is the expression "all items" used in the text of Heading 9801. The phrase "all items of machinery including ….required for the initial setting up a unit, or the substantial expansion of an existing unit, of a specified…. power project" means, to our mind, that the whole lot of items required for the setting up of a power plant or for the substantial expansion of an existing power plant will constitute a bundle or cluster to be covered by Heading 9801. The Chapter Notes appear to support this legal fiction embodied in Heading 9801. If some of the items/goods are removed from this bundle, the residue will not go to constitute a new power plant or an expanded power plant. Therefore, it is imperative that, for classification under Heading 9801, the bundle of items/goods must be complete so as to be considered to be "required for the setting up of a power plant or for the substantial expansion of an existing power plant". In the present case, it is not in dispute that a substantial part of the material requirements for the 2400 MW power project covered by the EPC contract were imported by RIL and cleared on payment of duty at merit rates. RIL, admittedly, did so from time to time-before the date of issue of the show-cause notice, between that date and the dated of passing of the Order-in-Original and even after the passing of the Order-in-original. Only some items of machinery were covered by the subject Bills of Entry dt. 10/10/2011 filed by SPL. It is not in dispute that these items were also imported for the same project. For the reasons stated by us, these items cannot be classified under Heading 9801. What is classifiable under this heading is the entire bundle of goods/items of machinery, instruments, apparatus, appliance, equipments etc. required for the power project. Most of these items were admittedly imported and cleared on payment of duty by RIL without claiming the benefit of project import.The items presented by SPL under the subject Bills of Entry cannot, by any stretch of imagination, constitute the whole bundle of goods/items of machinery, instruments, apparatus, appliances, equipments etc. "required

for the setting up of a power plant or the substantial expansion of an existing power plant" and hence cannot be classified under Heading 9801. This view is supported by the Hon'ble High Court's decision in the case of Tamil Nadu. Newsprint Paper Ltd. (supra) and the Board's clarification in Circular dated 8.8.1987.

(D) Whether, in the event of SPL giving up their claim for the goods covered by the subject Bills of Entry, RIL's request for clearing the goods can be considered:

The authorities below have already declared RIL to be rightful importer of the goods. They have also held to the effect that RIL has an option to claim assessment of the goods under Heading 9801 is the "substantial expansion category". Therefore, we are of the view that this option should be given to RIL, should SPL abandon the claim for the goods. Needless to say that the burden will be on RIL to prove, by producing documentary evidence, that they are eligible for the benefit of project import in the "substantial expansion category" and the benefit of Notification No.21/2002-Cus. dated 1.3.2002 (S.No.400).

13. In view of the above findings, it is ordered as under:

(i) The question whether SPL acquired title to the goods said to have been sold to them at the high seas is remanded for fresh consideration. They should be given a reasonable opportunity of adducing evidence and of being personally heard.

(ii) The 2400 MW Power Project can be considered to be setting up of new power plant by SPL and cannot be considered to be an "expansion project", in the hands of SPL, with reference to 220 MW power plants.

(iii) The goods covered by Bill of Entry No.4875426 dated 10.10.2011 and Bill of Entry No.4875427 dated 10.10.2011 filed by SPL cannot be classified under CTH 9801 and consequently the benefit of project import and exemption under Notification No. 21/2002- Cus. dated 1.3.2002 [SI. No.400 (b)] read with Notification No.65/2011-Cus. dated 21.7.2011 are not admissible to SPL.

(iv) The goods covered under the aforesaid two Bills of Entry filed by SPL are liable to be assessed to duty under the respective Headings and, upon such assessment, SPL will be liable to pay the duty and clear the goods in accordance with law, subject of course, to decision on the question covered by (i) above.

(v) In the event of SPL giving up their claim for the goods covered by the aforesaid Bills of Entry, RIL's alternative request for clearing the goods has to be considered in accordance with law. If RIL, in particular, claims. The benefit of project import and the benefit of Notification No.21/2002-

Cus. dated 1.3.2002 [S.No.400 (b)], the same shall be examined on its merits in accordance with law after giving the party a reasonable opportunity of adducing evidence and of being heard.

The appeals are disposed of in the above terms.

(Pronounced in Open Court on 31.7.2012)