



29th January, 2023

BSE Limited

P J Towers,
Dalal Street,
Mumbai – 400001.

Scrip Code: 512599

National Stock Exchange of India Limited

Exchange plaza,
Bandra-Kurla Complex,
Bandra (E), Mumbai – 400051.

Scrip Code: ADANIENT

Dear Sir / Madam,

Sub: Submission of Media Release on the subject "Response to Hindenburg Report"

Ref: Disclosure pursuant to Regulation 30 of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015.

Please find enclosed herewith a Media Release on the subject "Response to Hindenburg Report".

Kindly take the same on your records.

Thanking you,

Yours faithfully,
For **Adani Enterprises Limited**

Jaladhi Shukla
General Manager (Secretarial)

Encl: as above

Adani Enterprises Ltd
"Adani Corporate House",
Shantigram, Near Vaishno Devi Circle,
S. G. Highway, Khodiyar
Ahmedabad 382 421
Gujarat, India
CIN: L51100GJ1993PLC019067

Tel + 91 79 2656 5555
Fax + 91 79 2555 5500
info@adani.com
www.adani.com

ADANI RESPONSE

January 29, 2023

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SUMMARY

I. A NOTE OF CAUTION TO OUR STAKEHOLDERS

We are shocked and deeply disturbed to read the report published by the *“Madoffs of Manhattan”* - Hindenburg Research on 24 January 2023 which is nothing but a lie. The document is a malicious combination of selective misinformation and concealed facts relating to baseless and discredited allegations to drive an ulterior motive. This is rife with conflict of interest and intended only to create a false market in securities to enable Hindenburg, an admitted short seller, to book massive financial gain through wrongful means at the cost of countless investors.

It is tremendously concerning that the statements of an entity sitting thousands of miles away, with no credibility or ethics has caused serious and unprecedented adverse impact on our investors.

The mala fide intention underlying the report is apparent given its timing when Adani Enterprises Limited is undertaking what would be the largest ever further public offering of equity shares in India.

This is not merely an unwarranted attack on any specific company but a calculated attack on India, the independence, integrity and quality of Indian institutions, and the growth story and ambition of India.

While we are under no obligation whatsoever to respond to these baseless allegations made in the report, in the spirit of good governance, transparency to our stakeholders and to avoid false market, **we provide our responses to the Report as also the “88 questions” raised in the report.**

There are three key themes from the Hindenburg Report:

- (i) Selective and manipulative presentation of matters already in the public domain to create a false narrative.
- (ii) Complete ignorance or deliberate disregard of the applicable legal and accounting standards as well as industry practice.
- (iii) Contempt for the Indian institutions including the regulators and the judiciary.

II. UNVEILING HINDENBURG’S MOTIVES

The report has been put out with the admitted intent of Hindenburg (holding short positions in various listed companies of the Adani portfolio through U.S. traded bonds and non-Indian-traded derivatives, along with other non-Indian-traded reference securities) to profiteer at the cost of our shareholders and public investors. Hindenburg has not published this report for any altruistic reasons but purely out of selfish motives and in flagrant breach of applicable securities and foreign exchange laws.

The truth of the matter is that Hindenburg is an unethical short seller. A short seller in the securities market books gain from the subsequent reduction in prices of shares. Hindenburg took “short positions” and then, to effect a downward spiral of share price and make a wrongful gain, Hindenburg published a document to manipulate and depress the price of stock, and create a false market. The allegations and insinuations, which were presented as fact, spread like fire, wiping off a large amount of investor wealth and netting a profit for Hindenburg. The net result is that public investors lose and Hindenburg makes a windfall gain.

Thus, the report is neither “independent” nor “objective” nor “well researched”.

The report claims to have undertaken a “2-year investigation” and “uncover evidence”, but comprises of nothing other than selective and incomplete extracts of disclosed information which has been in the public domain for years if not decades, attempts to highlight allegations which have since been judicially determined to be false, narrates as fact what is attributed to hearsay, rumours and gossip spread by unnamed sources such as “a former trader” or “touts” of a “close relationship”, questions the independence of the judicial processes and regulators in the nation, and selectively extracts statements devoid of their context and with no understanding of Indian law or industry practice. It is telling that not one of the allegations is a result of any independent or journalistic fact finding. The allegations and innuendoes made in the Hindenburg report are knowingly false.

Hindenburg’s conduct is nothing short of a calculated securities fraud under applicable law.

III. THE SHOE IS ON THE OTHER FOOT - HINDENBURG’S ACTIVE CONCEALMENT

Ironically for an organization that seeks transparency and openness, nothing much is known about either Hindenburg or its employees or its investors. Its website alleges that the organisation has an experience that “spans decades” and yet appears to have been set up only in 2017.

Despite all its talks of “transparency”, Hindenburg has actively concealed the details of its short positions, the source of its own funding, who is behind them, the illegality underlying the synthetic structures by which they hold such positions, or the profit it has made by holding such positions in our securities.

IV. OUR RESPONSE TO THE ALLEGATIONS

Not one of these 88 questions is based on independent or journalistic fact finding. They are simply selective regurgitations of public disclosures or rhetorical innuendos colouring rumours as fact.

The report seeks answers to “88 questions” - 65 of these relate to matters that have been duly disclosed by Adani Portfolio companies in their annual reports available on their websites, offering memorandums, financial statements and stock exchange disclosures from time to time. Of the balance 23 questions, 18 relate to public shareholders and third parties (and not the Adani portfolio companies), while the balance 5 are baseless allegations based on imaginary fact patterns.

Nonetheless, we have responded to all these questions, summarized below:

1. Disclosed, discredited and disproven allegations: Allegations no. 1, 2, 3, 27, 28, 29, 30, 31, 72, 73, 74, 75, 76, 77, 78, 79, 80 present no new findings and only dredge up allegations (in some cases from a decade ago) which have been judicially determined in our favour and have also been disclosed by us to our investors and the regulators.

By way of an example, there are multiple false narratives being created in relation to certain allegations concerning diamond exports, which matters have all been closed by the Appellate Tribunal (CESTAT) in our favour. This decision has been further confirmed by the Supreme Court itself twice over, a fact which has been deliberately ignored and concealed in the Hindenburg report (which contemptuously raises questions on the competence of the Appellate Tribunal with baseless claims that it has ignored evidence).

2. Baseless allegations around transactions which are in fact, compliant with law, fully disclosed and on proper commercial terms: Allegation no. 9, 15, 19, 24, 25, 32, 33, 35, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57, 58, 59, 60, 61, 81, 82 & 83 are again a selective regurgitation of disclosures from the financial statements of Adani entities to paint a biased picture. These disclosures have already been approved by third parties who are qualified and competent to review these (rather than an unknown overseas shortseller) and are in line with applicable accounting standards and applicable law.

In another instance (allegation 41 of the Hindenburg Report), they have falsely claimed that Emerging Market Investment DMCC gave a loan of USD 1 billion to Mahan Energen. The simple **fact of the matter is that Emerging Market acquired the USD 1 billion “unsustainable debt”** of Mahan Energen from its lenders for USD 100 as part of a resolution plan duly approved by the National Company Law Tribunal under the Indian Bankruptcy Code. These are mala fide attempts to question bona fide transactions, the details of which are fully disclosed and available in the public domain, to create doubt in the minds of our stakeholders and the public.

In fact, the mala fide intent of Hindenburg can be clearly seen from it suggesting structures that would not be in compliance with corporate governance. By way of example, a fully disclosed transaction (see allegation 61 of the Hindenburg Report) of Adani Enterprises **Limited’s subsidiary** with NOXT to pay a standard security deposit (a common feature under long term take or pay contracts) for use of terminals has been questioned. Hindenburg seems to suggest that NOXT (a corporate entity in its own right and subject to its own regulations) should provide Adani Enterprises long term terminals for no charges at all - a transaction that **would amount to providing a benefit to a related party without arm’s length terms.**

3. **Misleading claims around offshore entities being allegedly “related parties” without** regard for applicable law and standards: Allegation no. 4, 36, 37, 38, and 39 from the report are in reference to offshore entities. The queries make reckless statements without any evidence whatsoever and purely on unsubstantiated speculations without any understanding of the Indian laws around related parties and related party transactions.

4. False suggestions based on malicious misrepresentation of the governance practices in Adani portfolio : Allegation no. 34, 62, 63, 64, 65, 66, 67, 68, 69, 70, and 71 use selective information to make insinuations, when in fact, the Adani portfolio has instituted various corporate governance policies and committees including our Corporate Responsibility Committee consisting solely of independent directors tasked with keeping the Board of Directors informed about the ESG performance of businesses. Our ESG approach is based on well-thought out goals, commitments and targets which are independently verified through an assurance process.

An **example of where the report exposes its motives is the question around “convoluted structures” and multiplicity of subsidiaries, while failing to comprehend that in the infrastructure business, especially in a sprawling geography like India, most large corporates operate in a similar fashion because projects are housed in separate SPVs and these need to be ring fenced from a lender perspective for limited recourse project finance and in many cases on account of specific regulatory requirements. As an example, transmission projects in India are awarded under tariff based competitive bidding, in such bidding the successful bidder has to acquire the SPV which is undertaking the project. Hence, it is a regulatory requirement as part of the Electricity Act, 2003 and the regulations of the Central Electricity Regulatory Commission to execute projects in different SPVs**

5. Manipulated narrative around unrelated third party entities: Allegation no. 5, 6, 7, 8, 10, 11, 12, 13, 14, 16, 17, 18, 20, 21, 22, 23, 26 and 52 from the report seek information on our public shareholders. Shares of listed companies on Indian stock exchanges are traded on a regular basis. The listed entity does not have control over who buys / sells / owns the publicly traded shares in the company. A listed company does not have nor is it required to have information on its public shareholders and investors.

Hindenburg deliberately ignores Indian legal processes and regulations in their insinuations against us. For instance, they have raised several questions around the offer for sale undertaken by Adani Green Energy Limited in 2019 while maliciously ignoring the fact that in India the process for OFS is a regulated process implemented through an automated order book matching process on the platform of the stock exchange. This is not a process which is controlled by any entity and the purchasers are not visible to anyone of the platform.

6. Biased and unsubstantiated rhetoric: Allegation no. 84, 85, 86, 87, and 88 from the report are inherently biased statements around our openness to address criticism with a window-dressing to garb them as questions. Criticism does not include the right to make false and defamatory statement which could damage the interests of our stakeholders. We continue to have the right to seek judicial remedy before Indian courts when such interests are threatened, and in all cases, we have exercised these rights in due compliance with law and the judicial process.

Hindenburg has sought to spotlight selective media reporting while deliberately ignoring judicial findings. For instance, in another twisting of facts, Hindenburg questions why we **sought to have a “critical journalist” jailed. The fact of the matter is that he was never jailed** in connection with any proceedings related to us and in fact, a non-bailable warrant had been

issued to him by the judge because he failed to appear before the court despite summons and was not complying with the judicial process.

V. OUR COMMITMENT TO HIGHEST LEVELS OF COMPLIANCE AND CONTINUED GROWTH

We reaffirm that we are in compliance with all applicable laws and regulations. We are committed to the highest levels of governance to protect the interests of all our stakeholders.

The Adani Portfolio also has very strong internal controls and audit controls. All the listed companies of Adani Portfolio have a robust governance framework. The Audit Committee of each of the listed companies is composed of 100% of Independent Directors and chaired by Independent Director. The Statutory Auditors are appointed only upon recommendation by the Audit Committee **to the Board of Directors. Adani Portfolio company's follow a stated policy of having global big 6 or regional leaders as Statutory Auditors.**

The focus of the Adani portfolio and the Adani verticals is to contribute to nation building and take India to the world.

We will exercise our rights to pursue remedies to safeguard our stakeholders before all appropriate authorities and we reserve our rights to respond further to any of the allegations or contents of the Hindenburg report or to supplement this statement.

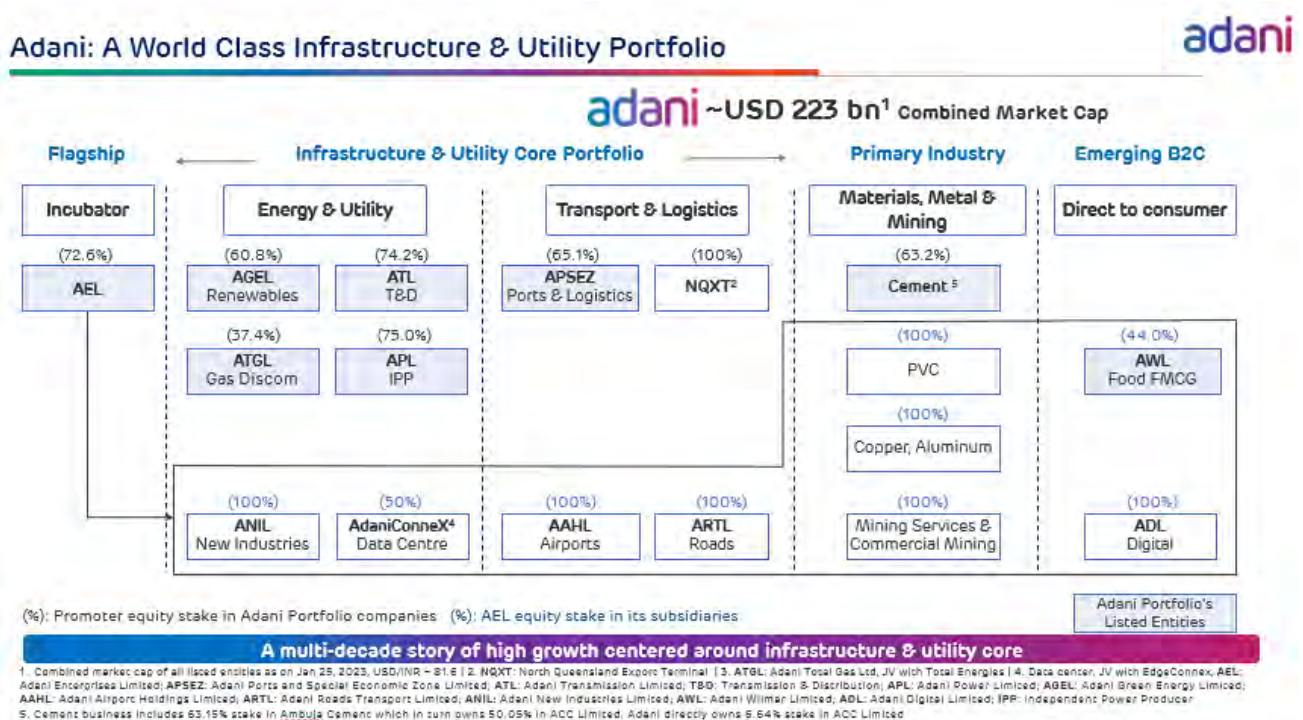
ABOUT ADANI PORTFOLIO

Prior to responding on the specific queries raised in the report, we would like to highlight certain points in relation to the Adani Portfolio.

A. Adani Portfolio presence and business expansion

Adani Portfolio operates in four broad verticals

- The first two verticals are Energy and Utility Vertical, Transport and Logistics vertical, which together form the infrastructure sector businesses of Adani portfolio. The businesses are fully integrated in their respective sectors and present across the entire value chain.
- The third vertical is Primary Industries vertical, which feeds off the strengths of the portfolio across Energy and utility vertical and transport and logistics vertical. For example, the Cement manufacturing business has significant adjacencies to power, energy, resource and logistics businesses of the portfolio.
- The fourth vertical is direct to consumer (Emerging B2C), which includes consumer businesses such as Adani Digital Labs and Adani Wilmar Limited.



It may be further noted that all businesses which require shareholder support are housed under the incubator arm - Adani Enterprises Limited (AEL). These businesses continue under AEL till the time the business is self-sustaining post which they are listed separately creating value for AEL's shareholders. Further, all the listed businesses operate on a strict "no financial accommodation" policy and have independent boards and management.

The businesses operate on a simple yet robust and repeatable business model focused on development and origination, operations and management and capital management plan.

Adani Portfolio: Repeatable, robust & proven transformative model of investment



B. Portfolio credit highlights

Adani Portfolio companies have successfully and repeatedly executed an industry beating expansion plan over the past decade. While doing so, the companies have consistently de-levered with portfolio net debt to EBITDA ratio coming down from 7.6x to 3.2x (Please see Chart A below), EBITDA has grown 22% CAGR in the last 9 years and debt has only grown by 11% CAGR during the same period.

Please see below a table summarizing key financial metrics and ratios for Adani portfolio companies -

Table 1: Key Financial Metrics and Ratios (For the financial year ended 31st Mar 2022)

| Particulars (INR Bn) | AEL | AGEL | APSEZ | APL | ATGL | ATL | Total |
|---|--------|--------|--------|--------|-------|--------|-------|
| EBITDA ⁽¹⁾ | 50.00 | 39.55 | 120.99 | 138.69 | 8.15 | 54.93 | 412 |
| Run Rate EBITDA (RR EBITDA ⁽²⁾) | 87.13 | 66.44 | 130.55 | 154.75 | 8.15 | 60.04 | 507 |
| Unrestricted Cash | 9.12 | 19.53 | 95.63 | 7.80 | 3.89 | 22.95 | 159 |
| Restricted Cash (such as DSRA) | 30.04 | 19.14 | 33.61 | 20.09 | - | 7.72 | 111 |
| Total Cash for Netting off | 39.16 | 38.67 | 129.24 | 27.89 | 3.89 | 30.67 | 270 |
| Gross Debt ⁽³⁾ | 284.83 | 443.90 | 456.37 | 414.18 | 9.95 | 274.91 | 1,884 |
| Net Debt ⁽⁴⁾ | 245.67 | 405.23 | 327.13 | 386.29 | 6.06 | 244.24 | 1,615 |
| Gross Leverage (Gross Debt / EBITDA) | 5.70x | 11.22x | 3.77x | 2.99x | 1.22x | 5.01x | 4.57x |
| Gross Debt / RR EBITDA | 3.27x | 6.68x | 3.50x | 2.68x | 1.22x | 4.58x | 3.72x |

| Particulars (INR Bn) | AEL | AGEL | APSEZ | APL | ATGL | ATL | Total |
|--|-------|--------|-------|-------|--------|-------|-------|
| Net Leverage (Net Debt / EBITDA) | 4.91x | 10.25x | 2.70x | 2.79x | 0.74x | 4.45x | 3.92x |
| Net Debt / RR EBITDA | 2.82x | 6.10x | 2.51x | 2.50x | 0.74x | 4.07x | 3.18x |
| EBITDA / Gross Interest ⁽⁵⁾ | 1.98x | 1.51x | 4.73x | 3.39x | 15.37x | 2.32x | 2.90x |

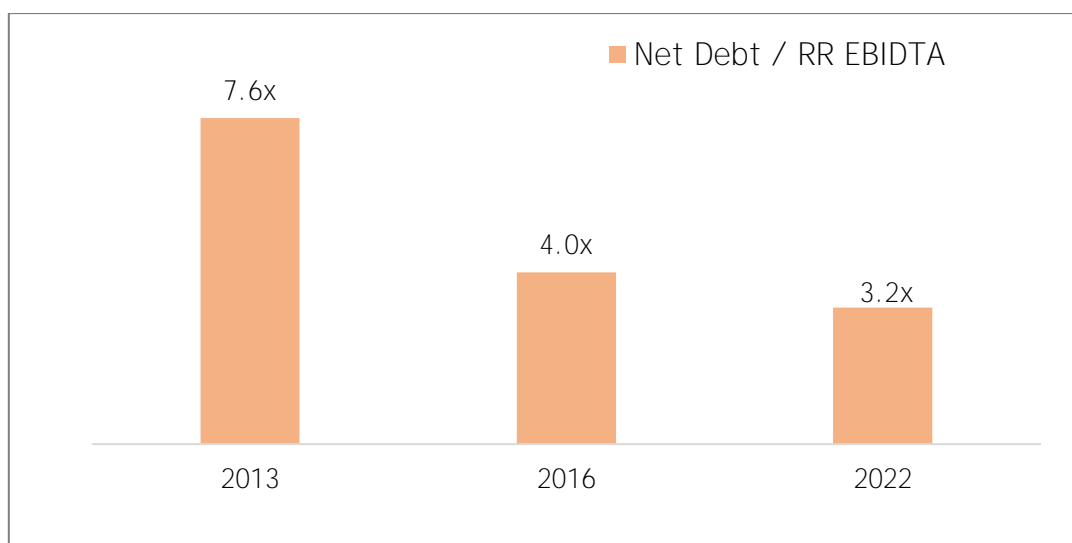
Note: AEL: Adani Enterprises Limited, AGEL: Adani Green Energy Limited, APSEZ: Adani Ports and Special Economic Zone Limited, APL: Adani Power Limited, ATGL: Adani Total Gas Limited, ATL: Adani Transmission Limited

Please refer Annexure 1 for references to above numbers from annual reports of respective companies

1. EBITDA: Earnings before interest, taxes, depreciation and amortization. EBITDA includes other income and is as per numbers reported in audit financials
2. RR EBITDA: Run-rate EBITDA considers annualized EBITDA for assets commissioned after the start of the year. Run rate EBITDA includes other income. AEL Run-rate EBITDA includes annualized EBITDA for Road and Mining Assets which has been operational for partial Period. It also includes the ramp-up based EBITDA of Airport Assets. AGEL Run-rate EBITDA includes the annualized EBITDA for the Assets which has been operational for partial period and also the assets which have been commissioned but not achieved the COD as per PPA. APSEZ Run-rate EBITDA includes the Annual EBITDA of Gangavaram Port which will be consolidated fully post NCLT approval from 1st April 2021 onwards. APL Run-rate EBITDA includes the Annual EBITDA of Mahan Energen and Merchant Revenue being annualized basis market of Q4FY22
3. Gross debt includes term debt and working capital debt and excludes shareholder subordinated debt
4. Net debt = Gross debt less (Cash and cash equivalents). Both restricted and unrestricted cash and cash equivalents are considered
5. Gross interest includes interest corresponding to Gross debt

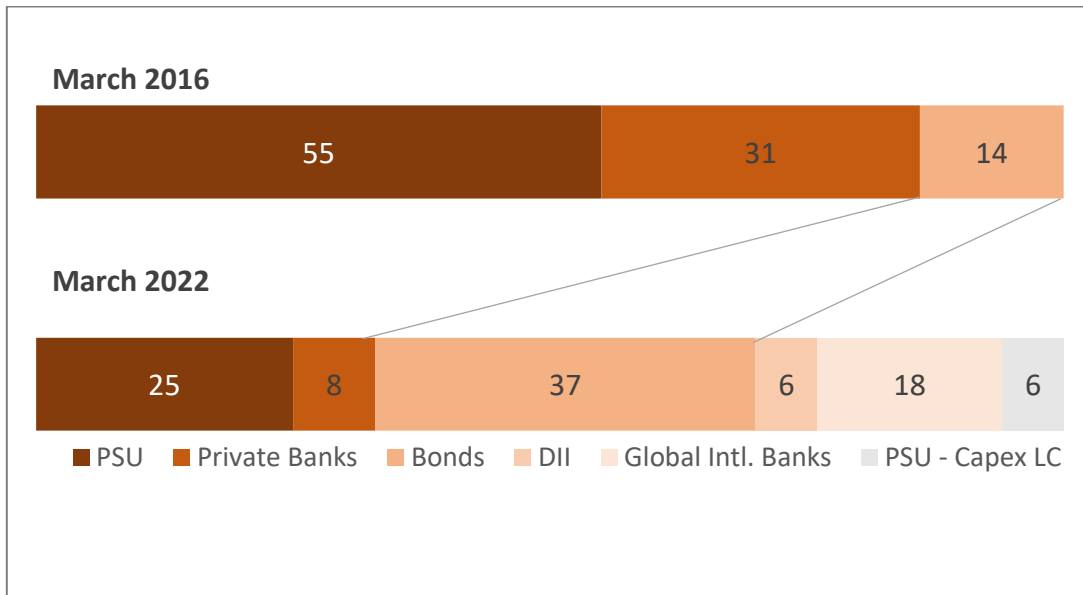
Kindly note that the annotated backup of all the numbers is as attached in Annexure 1 of this document.

Chart A: EBITDA growth is 2X the growth of debt over last 5 years



The leverage ratios of Adani Portfolio companies continue to be healthy and are in line with the industry benchmarks of the respective sectors. Over the last 10 years we have actively worked to improve our debt-metrics through our capital management strategy. Please refer Chart B below for diversification of our long-term debt profile through our capital management strategy.

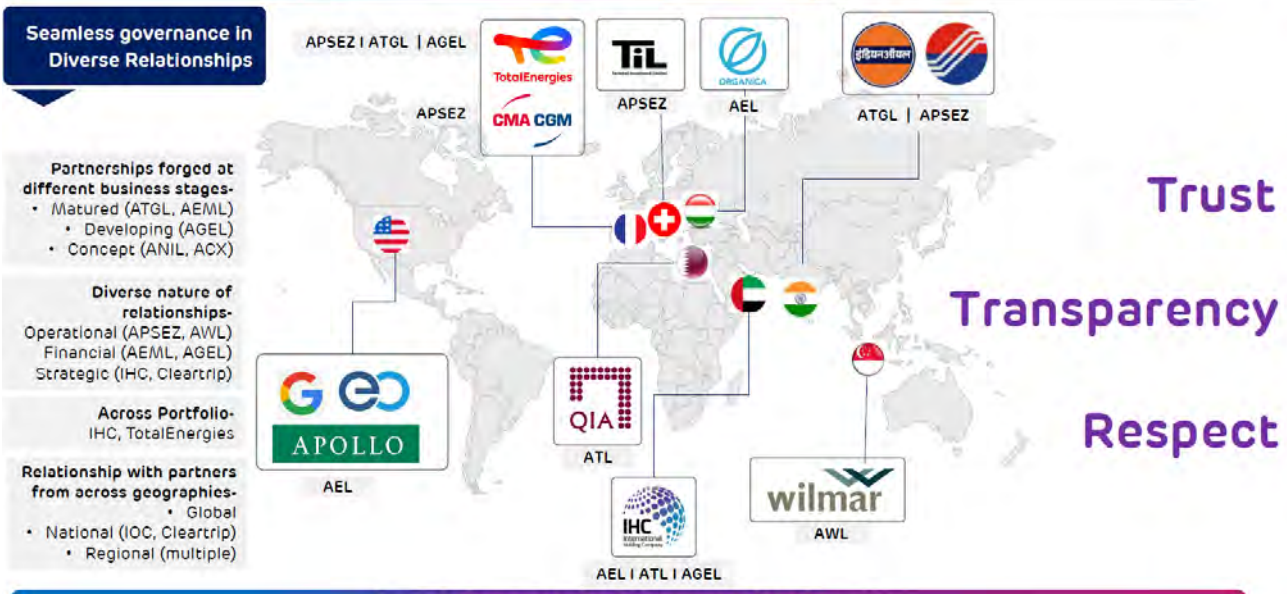
Chart B: Diversifying long term debt profile towards higher share of bonds



The Adani portfolio companies have a full-fledged Capital Management Plan (CMP) which has all credit metrics inbuilt. The CMP of companies are set in a manner to automatically pushing it for deleveraging path.

C. Equity Injection in the Adani Portfolio

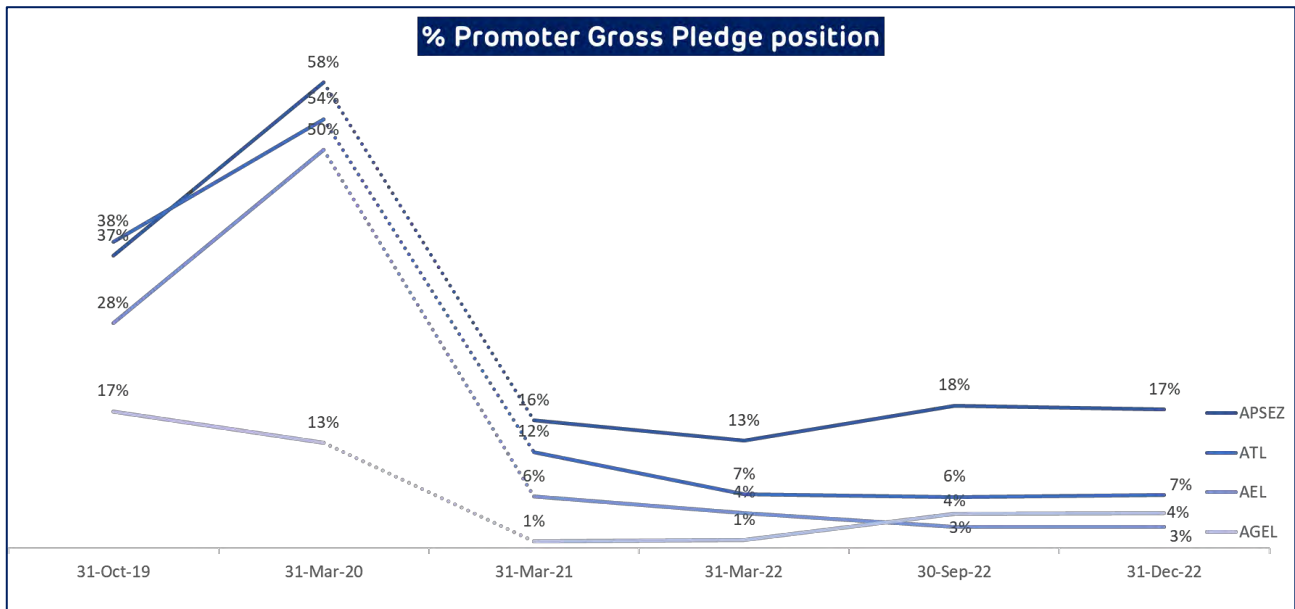
Adani Portfolio has raised USD 16 bn equity under a systematic capital management plan for all the Portfolio companies over the last 3 years as a combination of primary, secondary and committed equity from marquee investors like TotalEnergies, IHC, QIA, Warburg Pincus etc. The overview of our partnership model is as presented below.



AEL - Adani Enterprises Ltd | APSEZ - Adani Ports & SEZ Ltd | ATGL - Adani Total Gas Ltd | ATL - Adani Transmission Ltd | AGEL - Adani Green Energy Ltd | AWL - Adani Wilmar Ltd

This has also resulted in the deleveraging of the Promoter level debt, allowing the reduction in the promoter stake pledge in the listed companies (Please refer Chart C below).

Chart C: Promoter Gross Pledge position



The equity contribution includes the platform level investments made by IHC across 3 of its portfolio companies AEL (USD 1 bn¹), AGEL (USD 500 mn) and ATL (USD 500 mn) totaling to USD 2 bn which was settled in May 2022.

1. Approx INR 77 bn



GCC's most valued firm with a clear objective of enhancing its portfolio through acquisitions, strategic investments and business combinations.

| | | |
|--|--|---|
| <p>1</p> <p>adani</p> <p>AEL</p> <ul style="list-style-type: none"> • May- 22 • 3.53% stake • Biggest Infrastructure Incubator • Value- <p>USD 1 bn</p> | <p>2</p> <p>adani</p> <p>Transmission</p> <p>ATL</p> <ul style="list-style-type: none"> • May- 22 • 1.41% stake • Largest Private Transmission Co. • Value- <p>USD 500 mn</p> | <p>3</p> <p>adani</p> <p>Renewables</p> <p>AGEL</p> <ul style="list-style-type: none"> • May- 22 • 1.26% stake • Largest Renewable Energy Developer • Value- <p>USD 500 mn</p> |
|--|--|---|

Embedding Strategic & Intergenerational relationship with India's largest trading partner

AEL – Adani Enterprises Ltd| AGEL – Adani Green Energy Ltd | ATL – Adani Transmission Ltd | Bn- Billion| Mn – Million | IHC – International Holding Company | GCC–Gulf Cooperation Council

TotalEnergies, one of the leading integrated energy players globally, has strategic alliance with the Adani portfolio across its four verticals, namely LNG Terminal (Adani Total Private Limited), City Gas Distribution (Adani Total Gas Limited), Renewable Power Generation (Adani Green Energy Limited) and Green Hydrogen ecosystem (Adani New Industries Limited) with committed investments of USD 7.3 bn over past 3 years.



One of the largest Energy players in the world with presence across 130 countries

| | | | | |
|---|--|---|---|--|
| <p>1</p> <p>adani</p> <p>Ports and Logistics</p> <p>ATJV</p> <ul style="list-style-type: none"> • Apr-19 • 50:50 JV • 5 MTPA LNG Import Terminal • Value- <p>~ USD 80 mn</p> | <p>2</p> <p>adani</p> <p>Gas</p> <p>ATGL</p> <ul style="list-style-type: none"> • Feb-20 • 50:50 JV • Largest CGD private Co. • Value- <p>~USD 725 mn</p> | <p>3</p> <p>adani</p> <p>Renewables</p> <p>AGE23L</p> <ul style="list-style-type: none"> • Apr-20 • 50% stake • 2.35 GW Solar Portfolio • Value- <p>USD 500 mn</p> | <p>4</p> <p>adani</p> <p>Renewables</p> <p>AGEL</p> <ul style="list-style-type: none"> • Jan-21 • 20% stake • Minority Share holder Right & Board Representation • Value - <p>USD 2 bn</p> | <p>5</p> <p>adani</p> <p>ANIL</p> <ul style="list-style-type: none"> • July-22 • 25% Stake • Green hydrogen business • Value - <p>USD 4 bn*</p> |
|---|--|---|---|--|

Showcasing Intergeneration Partnership between Adani & TotalEnergies across Adani Portfolio

APSEZ – Adani Ports & SEZ Ltd | ATGL – Adani Total Gas Ltd | AGEL – Adani Green Energy Ltd | ANIL – Adani New Industries Ltd | AGEL – Adani Green Energy Twenty Three Ltd | Bn- Billion | Yr – Year | GW – Giga watt | MTPA – Metric Ton Per Annum | LNG – Liquefied Natural Gas | Mn – Million | CGD – City Gas Distribution | * Equity Commitment in initial phase

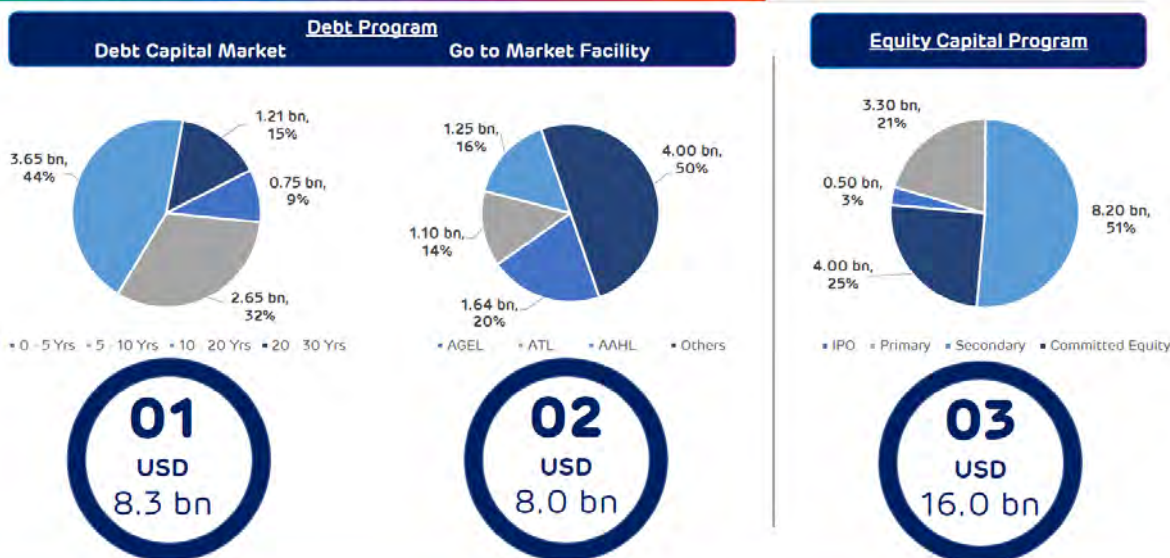
Adani has also successfully concluded the IPO of portfolio FMCG company AWL (Adani Wilmar Limited) amounting to INR 36 bn (USD 450 mn) during the month of February 2022.

Adani portfolio companies have a strong track record of delivering value to shareholders attracting equity investors. For example, INR 150 invested in Adani Enterprises Limited, which was the first IPO (in 1994) out of the Adani portfolio, has generated a market valuation of INR 9,00,000 in the past 28 years that is a 6,000x multiple.

Over the past three years, the Adani portfolio has raised USD 32.3bn capital, which is split into USD 8.3bn in DCM issuances, USD 8bn in Go To market facilities and USD 16bn in Equity Capital program, which is the largest program by any group in India



Adani Portfolio: Track record past 3 Years



Fully funded growth supported by largest Equity Program in India

*Note – ATL Go to Market Facility of \$ 700 Mn is to serve the debt requirement of \$ 1.1 Bn | Bn – Billion | AGEL – Adani Green Energy Ltd. | ATL – Adani Transmission Ltd. | AAHL – Adani Airport Holdings Ltd. | ANIL – Adani New Industries Ltd.

We also refer to a paragraph in the report that “there may be additional, hidden leverage within the Adani empire in the form of pledges on the undisclosed shareholdings described in Part 1”

It may be noted that any encumbrance creation needs to be created through depository participant of respective shareholder. As part of the regulated reporting process, the depository participant reports this to the depository (National Securities Depository Limited / Central Depository Services Limited). The corresponding information automatically gets captured within stock exchange database as well. The above process needs to be followed to ensure that the encumbrance is valid, registered and enforceable. Stock exchanges disclose encumbrance created on both promoter held and public held shares as compiled in the above table. Therefore, there is no possibility of any additional, hidden leverage as referenced in the report.

Below is breakup of the equity share pledge for Adani listed companies as on December 31, 2022, which is also available publicly on the exchange websites on a quarterly basis.

| Company | % Shares publicly held by Promoter Group | % Promoter Shares encumbered | % Public Shares encumbered |
|---------|--|------------------------------|----------------------------|
| AGEL | 60.75% | 4.36% | -% |
| APL | 74.97% | 25.01% | -% |
| ATGL | 74.80% | -% | -% |

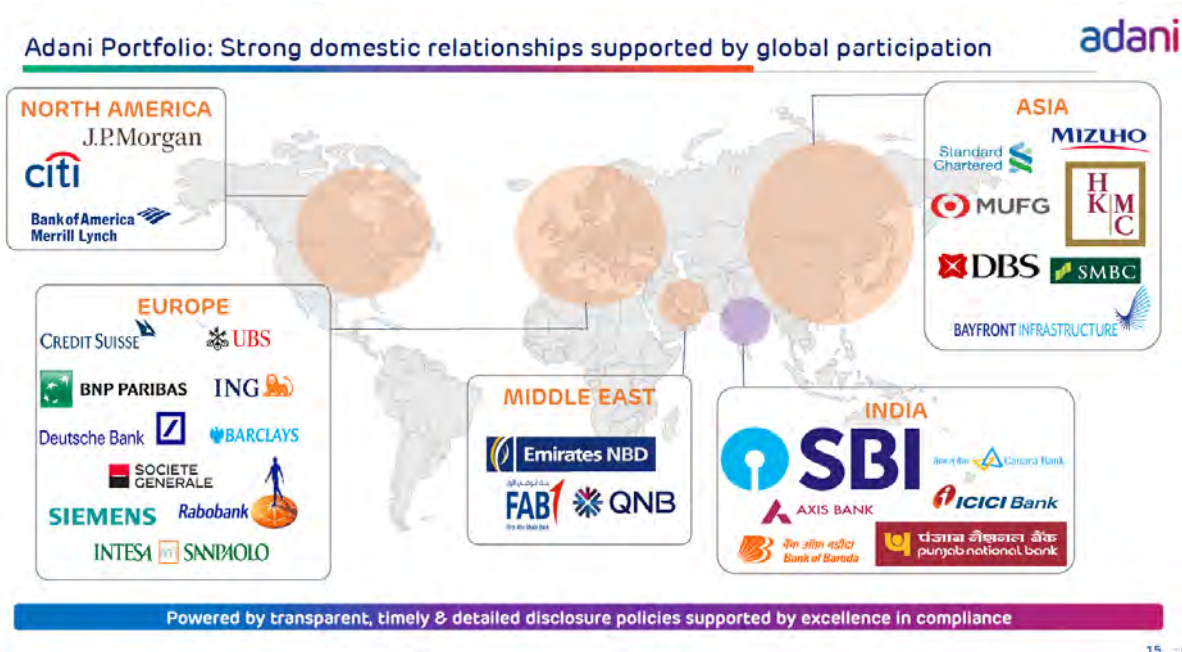
| Company | % Shares publicly held by Promoter Group | % Promoter Shares encumbered | % Public Shares encumbered |
|---------|--|------------------------------|----------------------------|
| ATL | 74.19% | 6.62% | -% |
| AEL | 72.63% | 2.66% | -% |
| APSEZ | 65.13% | 17.31% | -% |
| AWL | 87.94% | -% | -% |

Source: Bombay stock exchange (BSE), National stock exchange (NSE)

Note: AEL: Adani Enterprises Limited, AGEL: Adani Green Energy Limited, APSEZ: Adani Ports and Special Economic Zone Limited, APL: Adani Power Limited, ATGL: Adani Total Gas Limited, ATL: Adani Transmission Limited, ACL: Ambuja Cements Limited, ACCL: ACC Limited; AWL: Adani Wilmar Limited

D. Banking Relationships

The portfolio has developed deep domestic and international bank relationships, which is outlined below. This has strengthened access to diverse funding sources and structures.



Further, Adani Portfolio companies have demonstrated successful syndication of the banking transactions, resulting in de-risking of the banks in volatile markets. Case in point being Holcim's Indian cement business acquisition with international banks, and Navi Mumbai Airport and Kutch Copper refinery with domestic banks.

| 1 Navi Mumbai | | 2 Kutch Copper Refinery | | 3 Holcim Acquisition | |
|-------------------------------------|-------|------------------------------------|-------|--|--------|
| Underwriter SBI - INR 12,770 Cr. | | Underwriter SBI - INR 6,071 Cr. | | Underwriter Barclays, DB & SCB – INR 42,000 Cr. | |
| SBI Hold Portion | 5,000 | SBI Hold Portion | 1,846 | Underwriter Hold | 8,100 |
| PNB | 2,550 | PNB | 1,750 | DBS | 6,000 |
| UBI | 1,500 | UBI | 1,000 | MUFG | 4,800 |
| BOM | 1,300 | BOM | 500 | Intesa | 3,600 |
| Central | 1,000 | Central | 500 | SMBC | 2,800 |
| IIFCL | 1,000 | IIFCL | 250 | FAB | 2,800 |
| Others | 1,470 | Others | 225 | Mizuho & others | 13,900 |

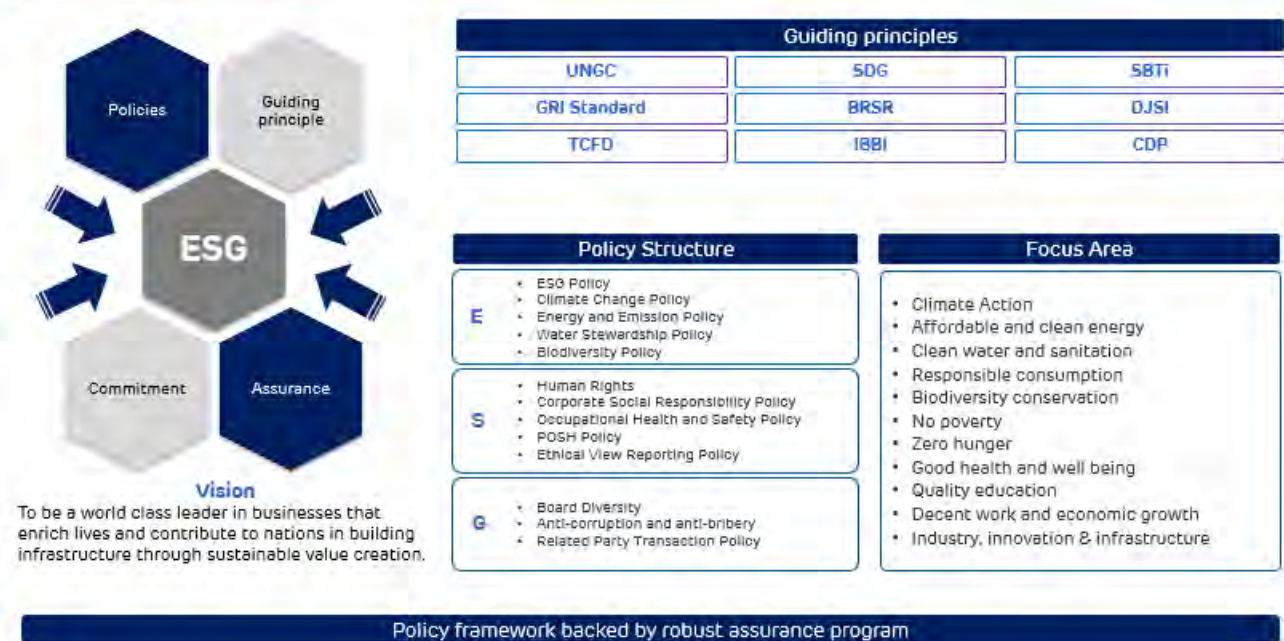
Low risk, high credit quality portfolio supported by global access driving institutional support

It may be noted that Adani Portfolio has issued 30Yr bonds (USPP - Adani Transmission Portfolio), 20 Yr Bonds (APSEZ 2041) and 20 Yr Amortiser Bonds (AGEL, RG2), which outlines deep access to international bond markets and infrastructure investors.

E. Environment, Social and Governance (ESG) Highlights

Adani Portfolio companies are fully committed to ESG aspects and have a robust ESG framework and glide path in place, which is focused on assurance framework.

Robust ESG assurance framework



We have identified key ESG risks and adopted multiple mitigation measures which are business specific for e.g. Mangrove Afforestation in Adani Ports and Increasing Renewable mix in power procurement from 3% in FY21 to 30% FY23 and 60% by FY27 in Adani Electricity Mumbai, part of Adani Transmission Limited.










The Adani portfolio companies have adopted best-in-class global disclosures and standards like TCFD, SBTi, CDP, SDGs. The portfolio companies are on track to achieve the following:

- Water neutrality
- Zero Waste to Landfill
- Single use plastic free sites
- Mangrove Afforestation
- Zero Biodiversity Net Loss
- Carbon Neutrality

Additionally, we have improved our Governance standards to align it with Global Best practices. We have already constituted a Corporate Responsibility Committee (consisting of 100% independent directors) in all of our portfolio companies which does the review of the ESG progress and framework alignment with progress of the same.

Most of the Board Committees in the portfolio companies have majority representation from independent directors. All committee's Terms of References (TOR) has to be reviewed by the board on periodic basis.

Below is a short summary of the ESG credentials and environmental commitments of Adani Portfolio companies:

| | | adani Ports and Logistics | adani Power | adani Transmission | adani Renewables | adani Gas | adani Enterprises | adani ACC | adani Ambuja Cement |
|---|-----------------------|------------------------------|------------------|-----------------------|---------------------|--------------------|----------------------|--------------------|------------------------|
|  TCFD | TCFD Supporter | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
|  SBTi | SBTi Commitment | ✓ | NC | ✓ | ✓ | NC | NC | ✓ | ✓ |
|  UNGC | UNGC Participant | ✓ | ✓ | In Progress | ✓ | In Progress | In Progress | NC | NC |
|  IBBI | IBBI Member | ✓ | ✓ | ✓ | ✓ | In Progress | In Progress | NC | NC |
|  S&P Dow Jones Indices | DJSI (2022 Score) | 68 | 59 | 63 | 66 | 54 | 51 | 73 | 80 |
|  CDP | CDP - CC (2022 Score) | B | B | D | C | C | B | A- | B |
|  CDP | CDP - WS (2022 Score) | B | B | -- | -- | -- | -- | B | B |
|  Sustainalytics | Sustainalytics | 12.4 (Low Risk) | 31.4 (High Risk) | 32.7 (High Risk) | 14.6 (Low Risk) | 24.6 (Medium Risk) | 36.4 (High Risk) | 29.7 (Medium Risk) | 24.0 (Medium Risk) |
|  MSCI | MSCI | CCC | CCC | BBB | A | BBB | CCC | B | B |

APSEZ: Adani Ports and Special Economic Zone Limited; ATL: Adani Transmission Limited; APL: Adani Power Limited; AGEL: Adani Green Energy Limited; ATGL: Adani Total Gas Ltd, JV with Total Energies; AEL: Adani Enterprises Ltd;

Key Environmental commitments of Adani Portfolio companies

| | adani Ports and Logistics | adani Power | adani Transmission | adani Renewables | adani Gas | adani Enterprises | adani ACC | adani Ambuja Cement |
|-----------------------------------|------------------------------|----------------|-----------------------|---------------------|--------------|----------------------|--------------|------------------------|
| Net Zero | ✓ | NC | ✓ | NC | ✓ | ✓* | ✓ | ✓ |
| Water Neutrality | ✓ | NC | ✓ | ✓ | NC | ✓ | ✓ | ✓ |
| Zero Waste to Landfill | ✓ | NC | ✓ | ✓ | NC | ✓ | NC | NC |
| SUP Free Sites | ✓ | ✓ | ✓ | ✓ | ✓ | NC | NC | NC |
| Mangrove / Afforestation | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Zero Biodiversity Net Loss (IBBI) | ✓ | ✓ | ✓ | ✓ | NC | ✓ | NC | NC |

NC No stated commitment

* Airports & Data Center : Operational Net Zero (Scope 1 & 2 emissions)

Note: TCFD: Task Force on Climate-Related Financial Disclosures, SBTi: Science Based Targets initiative, UNGC: United Nations Global Compact, DJSI: Dow Jones Sustainability Indices

Governance

At the heart of the Adani governance commitment is a one tier Board system with Board of Directors possessing a disciplined orientation and distinctive priorities. Our robust governance structure is based on well-structured policies and procedures that are the backbone of our governance philosophy. Our policies are formulated to ensure business continuity and to maintain a high quality throughout our operations. Board of Directors are the highest authority for the governance and the custodian who push our businesses in the right direction. They provide the overall strategic insights and guidance to our business operations. Our governance framework reflects our value system and is built to boost our governance mechanisms.

Ethics and integrity: The Boards of the Adani portfolio (“Boards”) are committed to the highest integrity standards. Directors commit to abide by the ‘Code of Conduct’, regulations and policies under oath, endeavouring to demonstrate intent and actions consistent with stated values.

Responsible conduct: The Boards emphasize the Adani portfolio’s role in contributing to neighbourhoods, terrains, communities and societies. In line with this, the Adani portfolio is accountable for its environment and societal impact, corresponded by compliance with laws and regulations. As a mark of responsibility, the Adani businesses extend beyond minimum requirements with the objective of emerging as a responsible corporate.

Accountability and transparency: The Boards engage in comprehensive financial and nonfinancial reporting, aligned to best practices relating to disclosures; it follows internal and/or external assurance and governance procedures

Structure of the board: All Adani portfolio entities’ Board represents an appropriate balance between executive, non-executive and independent directors to safeguard the interests of

stakeholders, including shareholders. The Board comprises of at least 50% Independent Directors and the businesses are headed by professional CEOs/ Executive directors.

To ensure the effectiveness of corporate governance and that all our operations are well-governed, the Board has established sub-committees that supervise various business functions. This enables the Board to remain updated on all developments in the Company, as the Committees provide in-depth scrutiny over all business aspects. All Committees conduct meetings with defined periodicity to ensure the smooth functions of the business functions they are responsible for. Committees to the Board have at least 50% members as Independent Directors.

Following is the summary of the Committees:

| Name of the Committee | Composition | Meeting Frequency |
|---|----------------------------|--------------------------|
| Audit Committee | 100% Independent Directors | Quarterly |
| Nomination and Remuneration Committee | 75% Independent Directors | At least twice in a year |
| Stakeholders' Relationship Committee | 50% Independent Directors | Quarterly |
| Corporate Social Responsibility Committee | 75% Independent Directors | Half Yearly |
| Risk Management Committee | 50% Independent Directors | Quarterly |
| Corporate Responsibility Committee | 100% Independent Directors | Quarterly |
| Information Technology & Data Security Committee (Sub-Committee to Risk Management Committee) | >50% Independent Directors | Half Yearly |
| Mergers & Acquisitions Committee (Sub-Committee to Risk Management Committee) | >50% Independent Directors | As and when applicable |
| Legal, Regulatory & Tax Committee (Sub-Committee to Risk Management Committee) | 100% Independent Directors | Half Yearly |
| Reputation Risk Committee (Sub-Committee to Risk Management Committee) | >50% Independent Directors | Half Yearly |

Detailed charters for the committees are available on the website of each of the Adani portfolio listed entities.

Board diversity: Our Boards diversity harnesses differences in knowledge, skills, regional exposure, industry experience, cultural backgrounds, ages, ethnicity, races and gender. Adani businesses developed a Board Diversity Policy, which is available on their respective websites.

Skills and experience: The Boards aggregate knowledge, perspective, professionalism, differentiated mindsets and experience. The Board members possess a rich understanding of different sectors, strategy, governance, risks, legal, technical, environmental, social, financial,

non-financial, risks, legal, different sectors, strategy, governance, risks, legal, technical, environmental, social, financial, non-financial, risks, legal and environment matters.

The Board members are periodically upskilled on emerging risks and trends, including ESG related risks and opportunities.

Board member credentials

The Board members are identified and selected based on their skillsets, capabilities, business requirement including compliance with the following:

- Embrace the shared organisational vision, mission and values
- Knowledge of the industrial/ sectors, policies, major risks and potential opportunities in which the relevant Adani portfolio operates
- Technical skills/experience in accounting/finance, governance or public policy, economy, human resource management, strategy development and implementation of capital planning
- Governance attributes such as compliance, leadership, risk management experience and a sound business judgment
- Unqualified independence, in case of independent directors
- Willingness to act in the best interest of stakeholders

Based on above criteria, the Nomination and Remuneration Committee (NRC) recommends the candidature of Board members to the respective Board, for its approval, subject to the consent of shareholders, within the defined timelines, as prescribed under the applicable laws.

The selection for second term is based on formal evaluation and recommended of NRC.

Board evaluation and compensation

The Boards are evaluated through a formal mechanism which comprises an evaluation of individual Board Members, committees, Chairperson(s) and the Board as a whole. The exercise is carried out through a structured process, covering the Board and committee composition as well as comprehensive functioning, experience and competencies, performance of specific duties and obligations, contribution at meetings and otherwise, independent judgment and governance issues, among others. The breadth of fiduciary responsibility of the Board critically attaches the Board evaluation mechanism to the overall performance.

With respect to evaluating effectiveness of the Board, Adani portfolio listed entities are engaging independent third parties for this annual evaluation.

The Board compensation is guided by the Remuneration Policy of Directors and is in accordance with law. The Independent Directors are provided fixed sitting fees, commission and the reimbursement of travel expenses.

The Independent Directors are not entitled for any stock options.

Policies to ensure Transparency and Accountability

The Adani Portfolio listed entities have adopted the following governance policies to enhance transparency and accountability across the organisation:

- 1) Related party transaction policy
- 2) Whistle-blower Policy
- 3) Code of conduct for each of the employees (with specific attention to for anti-corruption. Fraud reporting and bribery)
- 4) Code of conduct for the Board of Directors and senior management personnel
- 5) Code of ethics
- 6) Material events policy
- 7) Policy on Preservation of documents
- 8) Dividend Distribution policy
- 9) Anti-Corruption and Anti-Bribery policy
- 10) Cyber security & Data privacy Policy
- 11) Remuneration Policy
- 12) Policy on preservation of Unpublished Price Sensitive Information
- 13) Policy on preservation of documents
- 14) Policy on gender equality
- 15) Employee Grievance management policy
- 16) Supplier code of conduct
- 17) Bio Diversity Policy
- 18) Water Stewardship Policy
- 19) Human Rights Policy
- 20) Organisational Health & Safety
- 21) Prevention of Sexual Harassment
- 22) ESG / Sustainability Policies

Additionally, all Adani portfolio listed entities have published its first Business Responsibility and Sustainability Reporting for FY 2022 on voluntarily basis in order to provide detailed and transparent information to the stakeholders. These reports were also verified by independent third parties.

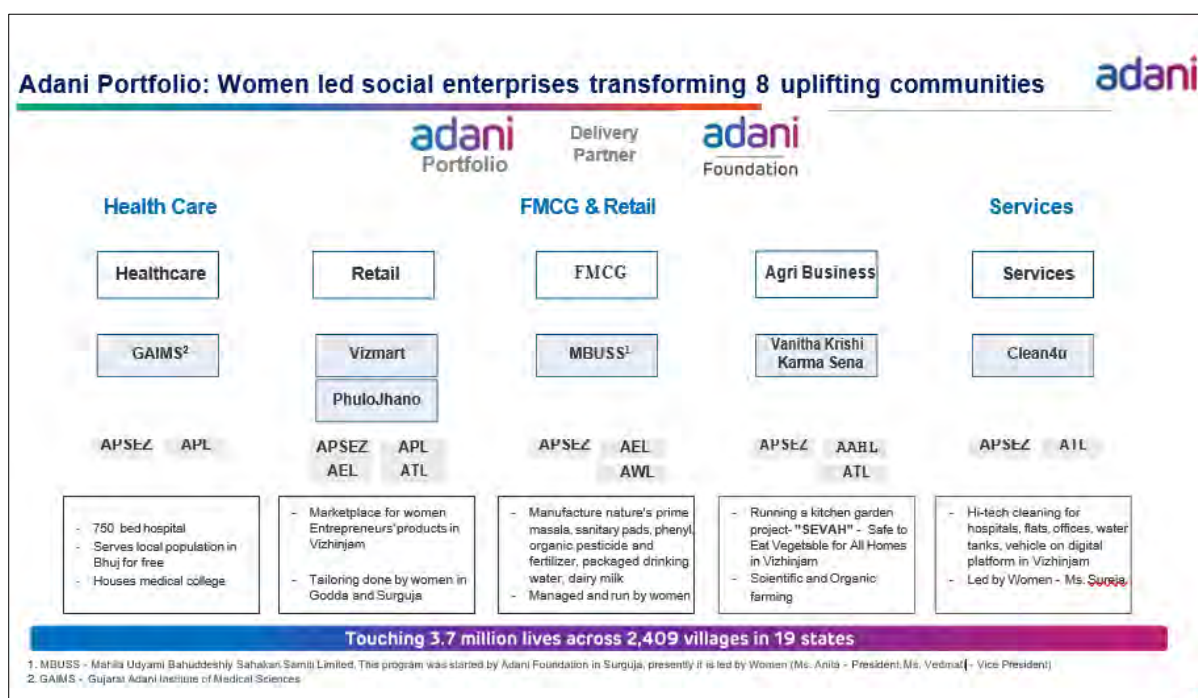
In order to put in place and continually raise the governance standards of Adani portfolio entities and to equip all directors and management with global perspective and ingrain industry best practices, we regularly invite leading sector experts to share their valuable inputs with directors and the management. For example, we have organized sessions with Grant Thornton for financial reporting, with Moody's for their valuable inputs on ratings and with Latham & Watkins on ESG.

F. Social Responsibility Initiatives - Adani Foundation

Growth with Goodness is imbibed in the culture of Adani Portfolio. It is about the real impact which we can create, touch the lives, nourish the communities and inspire for future endeavor. Focus is on creating viable livelihood for the people in general, and specifically towards upliftment of women by providing them platform for sustainable growth. Adani Foundation is the delivery partner for various Adani Portfolio companies to deliver the social enterprise.

We have created women led social enterprises in the interiors of the country (places like Godda, Bhuj, Mundra, Sarguja, Vizhinjam etc). Our platform is touching, transforming & uplifting 3.7 million lives across more than 2400 village communities in close to 20 States of India.

The platform created by Adani portfolio develops and nurtures the Entrepreneurship across various service functions which in turn cascades to various strata of the society.

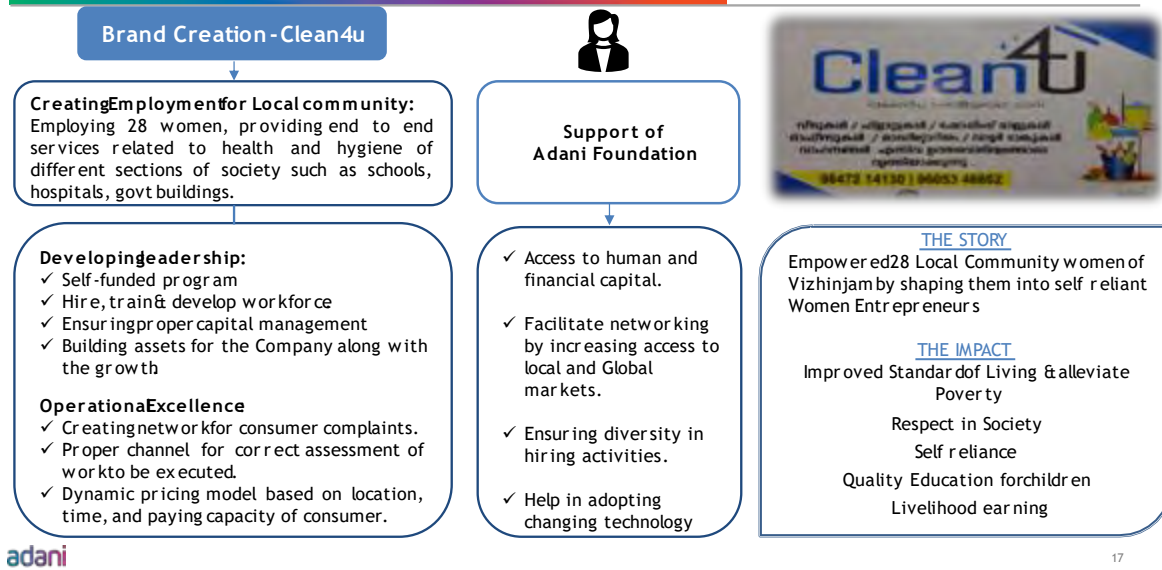


A few case studies of our impact stories is as below

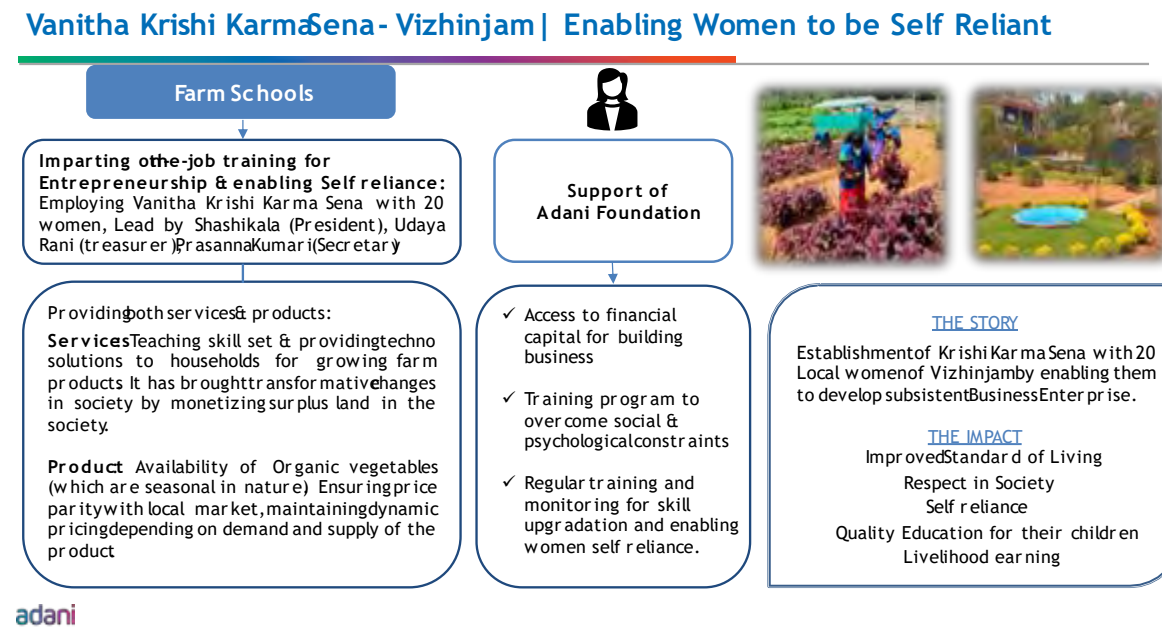
Case Study 1 - Vizhinjam - Clean4u - Creating Women Entrepreneurs

The Women Entrepreneurs have developed Clean 4 U brand with support from Adani and run it in the most professional way. Not only they provide excellent services to households and offices but employ the local women to get the job done

Vizhinjam- Clean4u | Creating Women Entrepreneurs



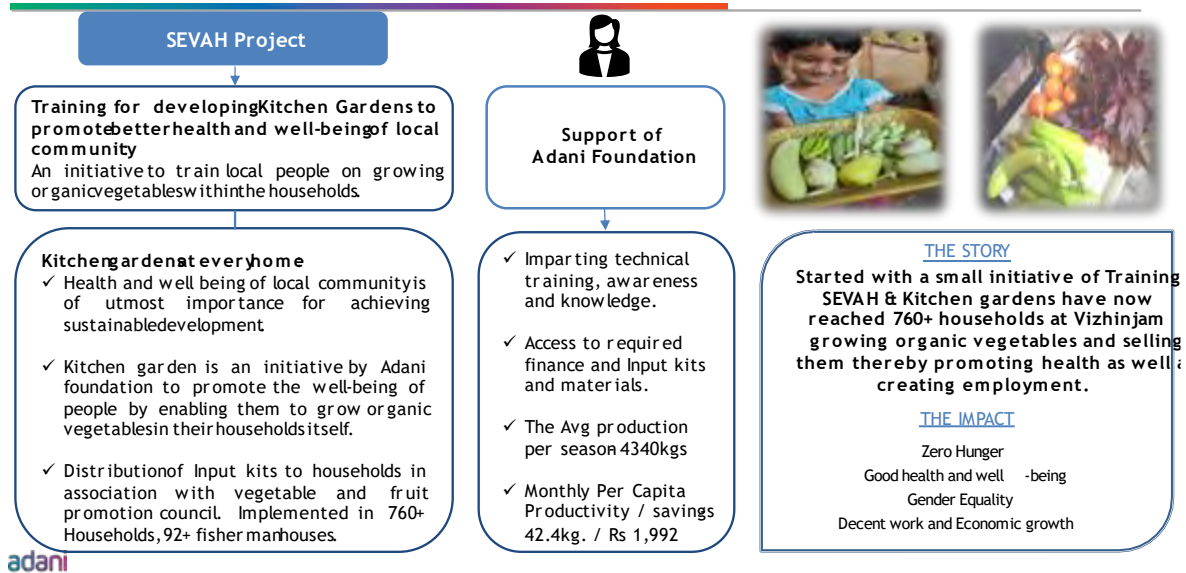
Case Study 2 - Vizhinjam - Vanitha Krishi Karma Sena - Enabling Women to be self reliant



Case Study 3 - SEVAH

Local Home grown Brands like SEVAH (Safe to Eat Vegetable for All Homes) focus on running kitchen Garden projects for the community through scientific and Organic farming.

SEVAH Vizhinjam | Safe to eat vegetables for households



G. Accounting Process

Internal Financial control process and governance mechanism is facilitated and monitored by the group based on five key pillars namely

- Centralized ERP Governance Mechanism and Reporting System,
- Periodic internal and external reviews of various processes
- Issuing Corporate guidelines and ensuring their adherence
- Appointment of competent and reputed statutory auditors for all verticals.
- Capacity building programs for facilitating the controls.

With these 5 pillars group ensures that highest standards of governance and reporting is being maintained by all businesses across all verticals.

Centralized ERP governance mechanism and Reporting system

Adani Business Excellence Team (ABEX) is a centralized team which handles accounting and financial controls of all companies across all verticals. All the processes are governed through Standard Operating Practices (SOPs) and the ABEX team ensures that all the financial control parameters are uniformly followed by all the verticals across the group. Also, it is ensured that all group companies follow the stringent financial control governance mechanism established through SAP. There is a well established and properly documented mechanism of maker and checker process established at ABEX. These processes have received various six sigma and ISO awards for maintaining highest degree of compliances and governance.

Periodic internal and external reviews of various processes

At portfolio level, various processes are being monitored and based on risk assessment different processes are selected for internal or external reviews. In FY22 we have appointed Deloitte and many other auditing firms for doing a health checkup exercise for all business across different verticals. Similarly various processes are being continuously monitored internally to increase our own operating standards. Key book hygiene parameters are also identified which are being monitored every month for all businesses.

Issuing Corporate guidelines and ensuring their adherence

In order to harmonize different accounting, recognition and disclosure practices followed in various business, the Group Financial & Management Control (GFMC) team issues corporate guidelines to all the verticals. In order to ensure the guidelines are being followed, compliance certificates are taken from CFOs of all the business across various verticals.

While issuing the group guidelines its always ensured that disclosure and accounting practices specified in guidelines are far more stringent and requires more disclosures compared the requirement of Ind AS (Indian Accounting Standards), guidance notes, opinions and other reference materials issued by ICAI (The Institute of Chartered Accountants of India).

Appointment of competent and reputed statutory auditors for all verticals.

All the listed companies of Adani Portfolio have a robust governance framework. The Audit Committee of each of the listed companies is composed of 100% of Independent Directors and chaired by Independent Director. The Statutory Auditors are appointed only upon recommendation by the Audit Committee to the Board of Directors.

Adani Portfolio company's follow a stated policy of having global big 6 or regional leaders as Statutory Auditors.

Adani Portfolio also has a policy to conduct an independent review of disclosure and notes by one of the big 6 across all group companies and the last review carried out for FY 20 and FY 21 was undertaken by Grant Thornton.

Capacity building programs for facilitating the controls.

The group gears up the team across all verticals by including them in training programs imparted by reputed Institutes and prominent subject experts. This is done a part of capability building across all verticals. The team works on set of principles, procedures to make sure that financial statements reflect true and fair view of the state of affairs of all the listed entities.

One example of major exercise undertaken in FY 22 across all verticals was preparing a comprehensive risk management (Hedging) policy, which is explained hereunder:

Hedging policy:

To enhance the risk management and mitigation of various identified risks, during the current financial year (FY23) the group has undertaken detailed exercise of preparing and implementing the hedge policy for different businesses with the help of external expert

The group identified different financial risk in the nature of interest rate risk, foreign exchange risk, asset liability maturity mismatches, commodity price risk, credit risk and various other risks for each business. After understanding of different risks in different value chains with plethora of discussion, the group implemented various tools and instruments to mitigate these risks.

It is important to note that this exercise ensured that the group is not exposed to any adverse movement in macro-economic parameters. This was very critical considering the fact that group is largest infrastructure group in India and very much vulnerable to any positive or negative movement in domestic and well as foreign macro-economic environment.

The group with its competent central treasury team uses different hedging instruments like forwards, options, POS, etc. for mitigating the risk. The risk management policy also ensure that wherever the risk is naturally hedged with business inflows and outflow just like Port business, such matching is properly documented and the same is considered while preparing and deciding for hedging strategy of these businesses.

Further, group also continuously looks for opportunities to ensure that its operational excellence and prudent capital allocation is not affected by any negative event in our external economic environment.

SHORT SELLER ALLEGATIONS - A BRIEF RESPONSE

A. Disclosed, discredited and disproven allegations

Disclosed, discredited and disproven allegations: Allegations no. 1, 2, 3, 27, 28, 29, 30, 31, 72, 73, 74, 75, 76, 77, 78, 79, 80 present no new findings and only dredge up allegations (in some cases from a decade ago) which have been judicially disproven and have also been disclosed by us to our investors and the regulators.

1/ (Allegation #1) **Gautam Adani's younger brother, Rajesh Adani, was accused by the Directorate of Revenue Intelligence (DRI) of playing a central role in a diamond trading import/export scheme around 2004-2005. He was subsequently arrested twice over allegations of customs tax evasion, forging import documentation and illegal coal imports. Given his history, why was he subsequently promoted to serve as Managing Director at the Adani Group?**

2/ (Allegation #72) Adani has been subject to numerous allegations of fraud by the DRI and other government agencies. In the 2004-2006 diamond scandal investigation, the government alleged that **Adani Exports Ltd (renamed Adani Enterprises) and related entities' exports were 3x the total exports of all the other 34 firms in the industry group put together. How does Adani explain that sudden surge in trading volume?**

3/ (Allegation #73) The diamond export investigation also demonstrated the role played by Vinod Adani and entities in the UAE, Singapore and Hong Kong that were used to facilitate the back-and-forth movement of money and product. How does Adani explain all the trading that took place with entities associated with Vinod Adani?

4/ (Allegation #2) **Gautam Adani's brother-in-law, Samir Vora, was accused by the DRI of being a ringleader of a diamond trading scam and of repeatedly making false statements to regulators. Given his history, why was he subsequently promoted to Executive Director of the critical Adani Australia division?**

Common Response -

Each of the above matters are closed and dismissed in our favour. Further, these have been disclosed by us in the public domain and all our stakeholders are aware of the same. These have been cited solely in an attempt to further the narrative of lies.

In this respect, please see the following:

- i. Prospectus issued by Adani Ports and Special Economic Zone Limited dated June 5, 2013 (page 181)
- ii. Offering circular dated July 28, 2016 for the USD 500 million Senior Secured Notes issued by Adani Transmission Limited (page 149)
- iii. Offering circular dated November 14, 2019 for the USD 500 million Senior Secured Notes issued by Adani Transmission Limited (page 179)
- iv. Offering circular dated January 26, 2021 for USD 500 million Senior Secured Notes issued by Adani Ports and Special Economic Zone Limited (page 214-215),
- v. Offering circular dated July 28, 2020 for USD 750 million Senior Secured Notes issued by Adani Ports and Special Economic Zone Limited (page 215),

- vi. Offering circular dated July 16, 2019 for USD 650 million Senior Secured Notes issued by Adani Ports and Special Economic Zone Limited (page 183),
- vii. Offering circular dated July 22, 2015 for USD 650 million issued by Adani Ports and Special Economic Zone Limited (page 172),
- viii. Offering circular dated June 22, 2017 for USD 500 million issued by Adani Ports and Special Economic Zone Limited (page 204),
- ix. Offering circular dated July 26, 2021 for USD 750 million issued by Adani Ports and Special Economic Zone Limited (page 222 - 223).

The relevant excerpts are annexed hereto as Annexure 2.

The order of Appellate Tribunal (CESTAT) of August 2015, setting aside all the allegations of DRI and confirming that all exports & imports transactions of diamond were valid & genuine is annexed as Annexure 3. The orders of the Supreme Court of India upholding the order of the Appellate Tribunal (CESTAT) are further annexed as Annexure 4 and Annexure 5.

The Hindenburg report clearly omits the fact that the above mentioned order of the Appellate Tribunal (CESTAT) was upheld on further appeal by Supreme Court of India.

Lastly, none of these disproven allegations have any relevance in relation to the promotion of Mr. Samir Vora.

5/ (Allegation #3) As part of the DRI investigation into over-invoicing of power imports, Adani **claimed that Vinod Adani was “not at all having any involvement in any Adani Group of companies”**, except as shareholder. Despite this claim, a pre-IPO prospectus for Adani Power from 2009 detailed **that Vinod was director of at least 6 Adani Group companies. Were Adani’s original statements about Vinod, made to regulators, false?**

There were two DRI investigations initiated against us in respect of over-invoicing of power imports. The first DRI investigation (initiated pursuant to show cause notice issued to Maharashtra Eastern Grid Power Transmission Company Limited & others) has been adjudicated before the courts and has been closed and dismissed in our favour and consequently it has been determined that there was no over-invoicing. The second DRI investigation (initiated pursuant to show cause notice issued to Adani Power Maharashtra Limited, Adani Power Rajasthan Ltd. & others) has been decided in our favour both in the lower court as well as in appeal before the CESTAT and consequently it has been determined that there was no over-invoicing. Whilst an appeal in this respect has been preferred and is pending, we strongly believe this will be decided in our favour in line with the decision of the lower court and CESTAT.

Each of these investigations are part of disclosures already made by us in the public domain, including the below and our stakeholders are aware of the same for many years.

- i. Offering circular dated February 5, 2020 for the U.S.\$1 bn Senior Secured Notes by Adani Electricity Mumbai Limited (page 34), and
- ii. Offering circular dated July 13, 2021 for the U.S.\$2 bn Global Medium Term Note Programme by Adani Electricity Mumbai Limited (page 53)
- iii. Offering circular dated July 28, 2016 for the U.S.\$500 mn Senior Secured Notes issued by Adani Transmission Limited (page 37 and 149)

iv. Offering circular dated November 14, 2019 for the U.S.\$500 mn Senior Secured Notes issued by Adani Transmission Limited (page 32 and 182)

The relevant excerpts from the above documents are annexed hereto in Annexure 2.

The relevant orders are appended in Annexure 6 and Annexure 8.

Further, the statement made by us in the pre-IPO prospectus in 2009 is absolutely correct. It may also be noted that the over-invoicing allegations for power imports pertains to the period between April 2010 till August 2014, during which period Mr. Vinod Adani was not even a director in any of the relevant Adani entities against whom such investigations were initiated and had no role in their day to day affairs.

6/ (Allegation #27) Our findings indicate that SEBI has investigated and prosecuted more than 70 entities and individuals, including Adani promoters, for manipulating Adani stock between 1999 to 2005. How does Adani respond?

There are no ongoing proceedings against the Adani promoters before SEBI in relation to this issue and all past cases before SEBI have been closed. These have also been duly disclosed by us and our stakeholders are already aware of the same. See for instance, p. 51 of the APSEZ Institutional Private Placement Prospectus dated June 2013, the relevant excerpt of which is annexed hereto as Annexure 2.

We are neither aware of, nor are we required to be, aware of any proceedings against these other “entities and **individuals**”, who are not Adani promoters.

7/ (Allegation #28) A SEBI ruling determined that Adani promoters aided and abetted Ketan Parekh in the manipulation of shares of Adani Exports (now Adani Enterprises), showing that 14 Adani private companies transferred shares to entities controlled by Parekh. How does Adani explain this coordinated, systematic stock **manipulation in its shares, together with one of India’s most notorious convicted stock fraudsters?**

8/ (Allegation #29) In its defense, Adani Group claimed it had dealt with Parekh and his stock manipulation efforts to finance operations at the Mundra port. Does Adani view extraction of capital through stock manipulation as a legitimate method of financing?

9/ (Allegation #30) Individuals close to Ketan Parekh have told us that he continues to work on transactions with his old clients, including Adani. What was and is the full extent of the relationship **between Parekh and the Adani Group, including either entity’s relationship with Vinod Adani?**

Common Response -

The allegation in relation to Ketan Parekh working with Adani companies are incorrect.

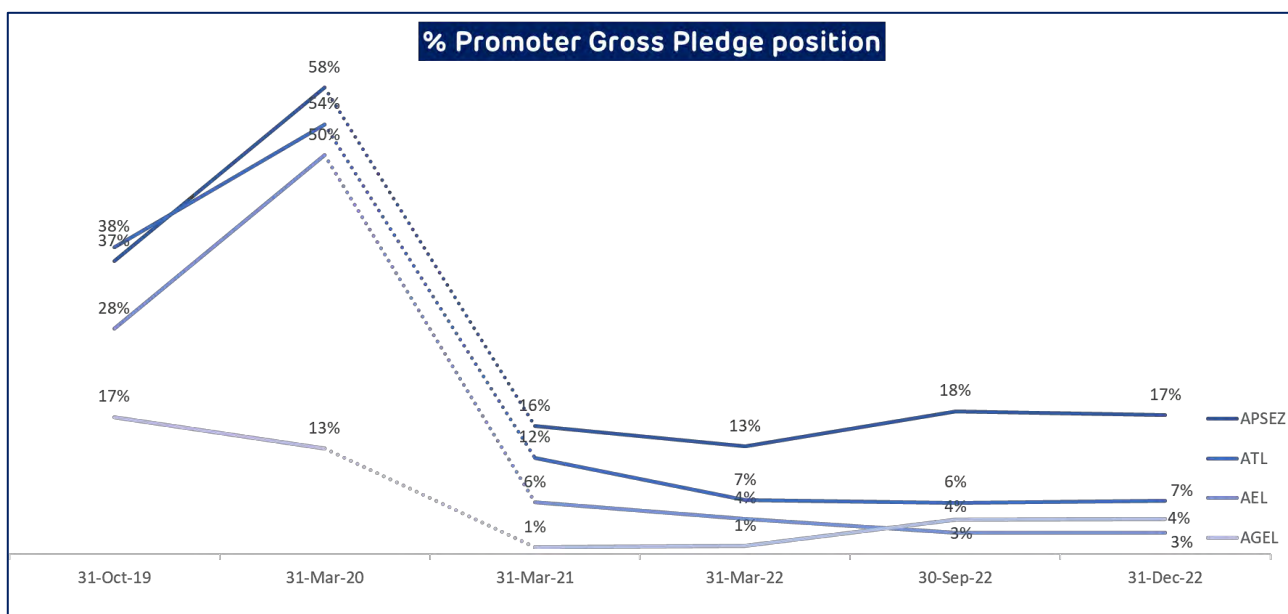
This matter has been disposed of by SEBI on 17th April 2008 and has also been duly disclosed by us in the public domain.

10/ (Allegation #31) Given that Adani Group promoters pledge shares as collateral for loans, **wouldn’t stock manipulation artificially inflate the collateral and borrowing base for such loans, posing a significant risk for the promoters’ counterparties and, by proxy, Adani shareholders who would suffer at the hands of a collateral call or deleveraging via equity sale?**

Raising financing against shares as collateral is a common practice globally. These loans are given by large reputed financial institutions and banks on the back of thorough credit analysis of the underlying assets in the listed company as well as detailed assessment of liquidity of the company stock pledged as collateral. Further, there is a robust disclosure system in place in India wherein listed companies need to disclose their overall pledge position of shares to stock exchanges from time to time. **Consequently, Hindenburg’s** narrative of alleged stock manipulation on account of pledge of shares has no basis and stems from ignorance of the securities laws in India.

Please refer chart below for promoter pledge position across Adani portfolio listed companies. This clearly shows a significant reduction in the pledge position across all the listed companies.

Promoter Gross Pledge position



Source: Bombay Stock Exchange (BSE) website.

11/ (Allegation #74) In 2011, the parliamentary Ombudsman for the Karnataka state issued a 466-page report describing Adani as the “anchor point” for a massive INR 600 billion (U.S. \$12 billion) scam involving the illegal importation of iron ore, alleging that Adani had bribed all levels of the government in facilitation of the scheme. What is Adani’s response to the investigation and the extensive evidence presented as part of these findings?

The proceeding has been closed in July 2017 in our favour. However, in the interest of governance and transparency to all of our stakeholders, the following are details of the matter.

The Special Investigation Team (SIT) formed by Karnataka Lokayukta had lodged an FIR against AEL and others. The same was publicly disclosed by AEL vide stock exchange disclosure dated July 30, 2011 (link: https://www.bseindia.com/xml-data/corpfiling/CorpAttachment/2011/7/Adani_Enterprises_Ltd_300711.pdf).

The SIT and after a detailed investigation, determined the allegations were false and filed a closure report stating that AEL was not involved in such alleged illegal gratification. This has been accepted by the designated Lokayukta court at Bangalore.

12/ (Allegation #75) In 2014, the DRI once again accused Adani of using intermediary UAE-based shell entities controlled by Vinod Adani to siphon funds, in this case through the over-invoicing of

power equipment. Did Adani invoice the power equipment purchases to UAE-based entities such as Electrogen Infra FZE? If so, why?

13/ (Allegation #76) Was there a markup from the original purchase price for the equipment? What services did the Vinod Adani-associated entities provide that would have justified a markup?

14/ (Allegation #77) **The same DRI investigation found that Vinod Adani's intermediary entity sent ~\$900 million to a privately owned Adani entity in Mauritius.** What is the explanation for these transactions?

15/ (Allegation #78) Where did the money from these transactions go after it was sent to a private Adani entity in Mauritius?

16/ (Allegation #79) The DRI investigation also documented many other transactions through the Vinod Adani intermediary entity, which were not probed further by investigators. **What is Adani's** explanation for these other transactions?

There were two DRI investigations initiated against us in respect of over-invoicing of power equipment. The first DRI investigation (initiated pursuant to show cause notice issued to Maharashtra Eastern Grid Power Transmission Company Limited & others) has been adjudicated before the courts and has been closed and dismissed in our favour. The second DRI investigation (initiated pursuant to show cause notice issued to Adani Power Maharashtra Limited, Adani Power Rajasthan Ltd. & others) has been decided in our favour both by the DRI (the same authority who issued the show cause notice) as well as in appeal before the CESTAT. It has been held by CESTAT that all the imports were genuine and being undertaken **at arm's length and concluded that the value declared is correct and the value is not required to be redetermined.** Whilst another appeal in this respect has been preferred in November 2022 and is pending, we strongly believe this will be decided in our favour in line with the decision of CESTAT.

Each of these investigations are part of disclosures already made by us in the public domain, including the below and our stakeholders are aware of the same for many years.

- i. Offering circular dated February 5, 2020 for the U.S.\$1 bn Senior Secured Notes by Adani Electricity Mumbai Limited (page 34), and
- ii. Offering circular dated July 13, 2021 for the U.S.\$2 bn Global Medium Term Note Programme by Adani Electricity Mumbai Limited (page 53)
- iii. Offering circular dated July 28, 2016 for the U.S.\$500 mn Senior Secured Notes issued by Adani Transmission Limited (page 37 and 149)
- iv. Offering circular dated November 14, 2019 for the U.S.\$500 mn Senior Secured Notes issued by Adani Transmission Limited (page 32 and 182)

The relevant excerpts from the above documents are annexed hereto in Annexure 2.

The relevant orders are appended in Annexure 6 and Annexure 8.

17/ (Allegation #80) In yet another scandal, Adani was accused of over-valuing coal imports through shell entities in Dubai, the UAE, Singapore, and the BVI. Did Adani transact with entities in these jurisdictions? If so, which ones and why?

DRI, Mumbai initiated an investigation against around 40 importers (40 Companies) of coal for import made during Oct. 2010 to Mar. 2016 and sought for various documents including Invoice of

Supplier, Country of Origin Certificate (Form A1), Bill of Entry, Bill of Lading etc. In compliance with the DRI directions, we have already submitted the necessary documents to the regulator. No show cause notice has been issued to us till date.

B. Baseless allegations around transactions which are in fact, compliant with law, fully disclosed and on proper commercial terms

Baseless allegations around transactions which are in fact, compliant with law, fully disclosed and on proper commercial terms: Allegation no. 9, 15, 19, 24, 25, 32, 33, 35, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57, 58, 59, 60, 61, 81, 82 & 83 are again a selective regurgitation of disclosures from the financial statements of Adani entities to paint a biased picture. These disclosures have already been approved by third parties who are qualified and competent to review these (rather than an unknown overseas shortseller) and are in line with applicable accounting standards and applicable law.

The Indian legislations (Companies Act, Listing Regulations, Accounting Standards etc) have one of the most robust and well-**defined framework to identify and determine “related parties”**. **Adani Group’s Indian entities follow and comply with these legislations at all times**. Further, all **related party transactions are at arm’s length, properly disclosed** and reviewed/audited by statutory independent auditors, of relevant entities periodically. In a similar manner, overseas entities, follow the law of land, of their respective jurisdiction. The assumption that the entities, as stated in the Report, are related to Adani listed entities, is imaginary, vague and unsubstantiated and flows only from a lack of understanding by Hindenburg of the Indian laws, regulations and accounting standards.

The Audit Committee of each of the listed companies that reviews and approves these related party transactions is composed of 100% of Independent Directors and chaired by Independent Director. The Statutory Auditors are appointed only upon recommendation by the Audit Committee to the Board of Directors. Adani Portfolio companies follow a stated policy of having global Big 6 or regional leaders as Statutory Auditors. Further Adani Portfolio also has a policy to conduct an independent review of disclosure and notes by one of the Big 6 across all portfolio companies and the last review carried out for FY 20 and FY 21 was undertaken by Grant Thornton. Indian regulations have high standards of corporate governance which we have consistently complied with.

Hindenburg Research does not appear to have any understanding on matters of Indian law or accounting **standards and yet makes claims of entities being undisclosed “related parties” with no understanding of what constitutes a related party**. In several instances, the report makes **unsubstantiated statements of “close relationships” and “conflicts of interest” as “related party”**. Any mere close or business relationship of any promoter entity or their relatives does not make a transaction a related party transaction.

18/ (Allegation #35) We found at least 38 Mauritius-based entities associated with Vinod Adani and Subir Mitra (the head of the Adani private family office). We also found Vinod Adani associated entities in other tax haven jurisdictions like Cyprus, the UAE, Singapore, and various Caribbean islands. Several of these entities have transacted with Adani entities without disclosing the related party nature of the dealings, seemingly in violation of the law, as evidenced throughout our report. What is the explanation for this?

All transactions entered into by us with entities who qualify as ‘related parties’ under Indian laws and accounting standards have been duly disclosed by us. Further these have been carried out on arm’s length terms in accordance with applicable laws. Further, these are also disclosed by us, are publicly available to all regulators and our stakeholders, and have been duly verified and audited by independent third parties who are competent and have the required expertise in this respect. As stated above, Adani Portfolio companies follow a stated policy of having global big 6 or regional leaders as Statutory Auditors.

19/ (Allegation #44) We have identified a series of transactions from 2013-2015 whereby assets were transferred from a subsidiary of listed Adani Enterprises to a private Singaporean entity controlled by Vinod Adani, without disclosure of the related party nature of these deals. What is the explanation for these transactions and the lack of disclosure?

20/ (Allegation #45) The private Singaporean entity controlled by Vinod Adani almost immediately wrote down the value of the transferred assets. Were those still held on the books of Adani Enterprises, it likely would have resulted in an impairment and significant decline in reported net income. What is the explanation for why these assets were transferred to a private undisclosed related party before being written down?

Common Response -

The transactions relate to transfer of the cost to the specific project entity which was incorporated for rail businesses (Carmichael Rail Network Trust incorporated on 17th September 2014). These transactions have been carried out in compliance with applicable law and on arm’s length terms.

The amounts transferred included:

- (i) Exploration and Evaluation Assets (i.e. Capital works in progress (‘CWIP’)); and
- (ii) Amounts already expensed to profit and loss account and an arms length management fee charged by Adani Mining Pty Ltd (a step-down subsidiary of Adani Enterprises)

These transactions were fully disclosed in the financial statements Adani Mining Pty Ltd. (AMPL), as below.

Source: Page 14 of the Financial Statement of AMPL for FY15 showing the part-transfer of Exploration and Evaluation Assets.

| 7. EXPLORATION AND EVALUATION ASSETS | | |
|--|--------------|-------------|
| Capitalised exploration and evaluation of EPC 1690 and EPC1080 | 910,111,917 | 898,453,848 |
| (a) Consistent with note 1(g), no amortisation is charged during the exploration and evaluation phase as the asset is not available for use. | | |
| (b) Reconciliation of carrying amounts from the beginning and end of the period: | | |
| At the beginning of the year | 898,453,848 | 782,727,832 |
| - Net amounts paid and payable in respect of the on-going exploration and evaluation of EPC 1690 and EPC 1080 | 73,716,887 | 75,181,102 |
| - Capitalised interest | 30,869,722 | 40,544,914 |
| - Transfer to Carmichael Rail Network Trust | (92,928,540) | - |
| At the end of the year | 910,111,917 | 898,453,848 |

Source: Page 13 of the Financial Statement of AMPL for FY15 showing the reversal of cost which was expensed in P&L account in earlier years and other income on account of management fee

**ADANI MINING PTY LTD
NOTES TO THE FINANCIAL STATEMENTS
YEAR ENDED 31 MARCH 2015**

| | Year Ended 31 March 2015 \$ | Year Ended 31 March 2014 \$ |
|---|-----------------------------------|-----------------------------------|
| 2. OTHER INCOME | | |
| Recovery of cost from Carmichael Rail Network Trust | 5,737,915 | - |
| Management Fee from Carmichael Rail Network Trust | 9,160,854 | - |
| Other Income | 355,564 | 312,759 |
| | <u>15,254,333</u> | <u>312,759</u> |

Treatment of these amounts in the acquiring entity

The transaction represented a transfer of project specific amounts from CWIP & P&L, and to keep the treatment of the amount consistent with how it was originally treated in the financials of AMPL. The amount of A\$92,928,540 (which represented the transfer of Exploration and Evaluation Assets) was recorded as CWIP and the balance amount taken to the P&L account through an expense of A\$23,255,069 as general and administration expenses.

The amount of A\$23,255,069 presented as day one write off of CWIP were already part of the expenses of AMPL in the previous years and current year in which the transfer occurred and hence it was not an immediate write off of acquired assets but an accounting transfer of an amount from CWIP to P&L account as required and consistent with accounting principles.

Source: Page 13 of the Financial Statement of Carmichael rail network trust for FY15

**CARMICHAEL RAIL NETWORK TRUST
NOTES TO THE FINANCIAL STATEMENTS
PERIOD ENDED 31 MARCH 2015**

| | 31 Mar 2015 \$ |
|---|-------------------|
| 2. OTHER INCOME | |
| Interest income | 49,970 |
| | <u>49,970</u> |
| 3. GENERAL AND ADMINISTRATION EXPENSES | |
| Reimbursement of expenses to Adani Mining Pty Ltd | 23,255,069 |
| Audit fee | 5,000 |
| Others | 7,500 |
| | <u>23,267,569</u> |

21/ (Allegation #40) A Vinod Adani-controlled Mauritius entity now called Krunal Trade & Investment lent INR 11.71 billion (U.S. ~\$253 million) to a private Adani entity without disclosure of it being a related party loan. How does Adani explain this?

22/ (Allegation #42) A Vinod Adani-controlled Cyprus entity called Vakoder Investments has no signs of employees, no substantive online presence, and no clear operations. It had an investment of U.S. ~\$85 million in an Adani private entity without disclosure that it was a related party. How does Adani explain this?

23/ (Allegation #43) What was the source of the Vakoder funds?

24/ (Allegation #46) **We found that a “silver bar” merchant based at a residence with no website** and no obvious signs of operations, run by a current and former Adani director, lent INR 15 billion (U.S. \$202 million) to private Adani Infra with no disclosure of it being a related party transaction. What is the explanation for the lack of required disclosure?

25/ (Allegation #48) Gardenia Trade and Investments is a Mauritius-based entity with no website, no employees on LinkedIn, no social media presence, and no apparent web presence. One of its directors is Subir Mittra, the head of the Adani private family office. The entity lent INR 51.4 billion (U.S. \$692.5 million) to private Adani Infra with no disclosure of it being a related party loan. What is the explanation for the lack of required disclosure?

26/ (Allegation #47) What was the purpose of the loan, and what was the original source of the **“silver bar” merchant’s funds?**

27/ (Allegation #49) What was the purpose of the loan, and what was the original source of the Gardenia Trade and Investments funds?

28/ (Allegation #50) Milestone Tradelinks, another claimed silver and gold merchant also run by a longstanding employee of the Adani Group and a former director of Adani companies, invested INR 7.5 billion (U.S. \$101 million) into Adani Infra. Once again there was no disclosure of it being a related party loan. What is the explanation for the lack of required disclosure?

29/ (Allegation #51) What was the purpose of the loan, and what was the original source of the Milestone Tradelinks funds?

Common Response -

The above cited transactions with Krunal Trade & Investment, Vakoder, Rehvar Infrastructure, Milestone Tradelink, Gardenia Trade and Investment and the ‘private Adani entities’ are not ‘related party transactions’ under laws of Indian or accounting standards. Consequently, we are neither aware nor required to be aware of their ‘source of funds’.

All transactions cited above between the Adani listed entities and the “private Adani entities”, i.e., Adani Estates Private Limited, Sunbourne Developers Private Limited are related party transactions, which have been undertaken on arm’s length terms and in compliance with applicable Indian laws and standard, and have also been fully disclosed as related party transactions.

30/ (Allegation #41) A Vinod Adani-controlled UAE entity called Emerging Market Investment DMCC lists no employees on LinkedIn, has no substantive online presence, has announced no clients or

deals, and is based out of an apartment in the UAE. It lent U.S. \$1 billion to an Adani Power subsidiary. What was the source of the Emerging Market Investment DMCC funds?

This allegation is clearly incorrect and is due to a lack of understanding of the Indian debt restructuring regulations.

As part of the debt resolution plan of Mahan Energen Limited (earlier named as Essar Mahan Limited), duly approved by the NCLT under the Indian Bankruptcy Code, Emerging Market Investment DMCC (an affiliate of Adani Power Limited, the successful bidder for this asset) acquired the unsustainable debt from the erstwhile lenders of Mahan Energen Limited for a consideration of USD 100. **Emerging Market Investment DMCC has not 'lent' U.S. \$1 billion to Mahan Energen, but has acquired this debt by paying USD 100 as part of the NCLT approved resolution plan.**

The order of the National Company Law Tribunal is annexed as Annexure 7.

In any event, there is no restriction on Adani listed entities/ their subsidiaries to avail loans from promoter entities from time to time for their business purposes. All such loans are availed in compliance with relevant laws and are suitably disclosed as required under the laws and accounting standard.

31/(Allegation #58) In FY20, AdiCorp Enterprises only generated INR 6.9 million (U.S. \$97,000) in net profit. That same year, 4 Adani Group companies entities lent it U.S. ~\$87.4 million, or more than 900 years of AdiCorp net income. These loans seemed to make little financial sense. What was the underwriting process and business rationale that went into making these loans?

32/ (Allegation #59) AdiCorp almost immediately re-lent 98% of those loans to listed Adani Power. Was AdiCorp simply used as a conduit to surreptitiously move funds into Adani Power from other Adani Group entities and side-step related party norms?

Common Response -

AdiCorp is not a related party, and transactions with AdiCorp **are not 'related party transactions'** under laws of Indian or accounting standards and these have been undertaken in compliance with applicable law.

33/ (Allegation #61) Listed company Adani Enterprises paid U.S. \$100 million to a company, ultimately held by private trust of the Adani family in the British Virgin Islands (BVI), a notorious Caribbean tax haven, with the claimed rationale being to pay a security deposit to use an Australian **coal terminal. Why did the listed company need to pay such lucrative fees to Adani's private interests?**

Hindenburg seems to suggest, that simply because two parties are related, transactions between **them cannot be for arm's length consideration.**

It has clearly been disclosed by us that North Queensland Export Terminal Pty Ltd (formerly known as **Adani Abbot Point Terminal Pty Ltd**) ("**NQXT**") is a **related party of Adani Mining Pty Ltd** (a stepdown subsidiary of Adani Enterprises Limited), and transactions between them are related party transactions.

Hindenburg has also conveniently failed to mention that NQXT is a multi-user terminal and Adani Mining Pty Ltd is one of more than nine major long-term customers of NQXT. As part of any long term take or pay contract for accessing the port infrastructure such as NQXT, users typically provide credit support in order to secure their obligations. In this case, as fully disclosed, **Adani Mining Pty Ltd paid NQXT a 'security deposit' to secure its obligations** under the long term take or pay contract. **The amount was neither 'charged' nor was a 'fee' as incorrectly alleged in the report.**

Instead, Hindenburg seems to suggest, in flagrant violation of standard governance requirements for related party transactions, that simply because two parties are related, NQXT (which is a separate corporate entity and subject to the regulations of Australian Securities & Investment Commission) should have provided long term access to the terminal for no security deposit or charges **at all rather than a contract on arm's length basis.**

34/ (Allegation #60) **Why have listed Adani companies paid private Adani entity “Adani Infrastructure Management Services” INR 21.1 billion (U.S. \$260 million) over the past 5 years, given that the listed companies’ business is also managing infrastructure?**

This allegation stems from a complete lack of understanding the manner in which businesses are carried out by large companies in these sectors, with suggestions that merely because they manage infrastructure business, they cannot outsource parts work or enter into contracts for obtaining these services from other related parties who specialize in providing such services. It further flows from a complete lack of understanding of these complex businesses which require specialized services and management which cannot at all times be housed in the same corporate entity.

Adani Infrastructure Management Services Limited (AIMSL) is such a specialized service provider for the Adani companies. AIMSL **is a pioneer in operation and maintenance of key assets in India’s power sector** with all required manpower and qualifications to be able to provide such services to the **Adani companies on arms’ length terms.** Currently, AIMSL is operating AGEL, ATL & APL assets spread across multiple states such as Rajasthan, Karnataka, Maharashtra, Gujarat, M.P, Haryana etc. and is being managed by experienced resources.

Annexure 11 sets out further details about AIMSL and their credentials.

35/ (Allegation #9) **What is the extent of the Adani Group Companies, and any Vinod Adani related entities’ dealings with Jatin Mehta?**

There are no business relationships or business dealings with Mr. Jatin Mehta.

36/ (Allegation #15) Adani has worked extensively with international incorporation firm Amicorp, which has established at least 7 of its promoter entities, at least 17 offshore shells and entities associated with Vinod Adani, and at least 3 Mauritius-based offshore shareholders of Adani stock. Amicorp played a key role in the 1MDB international fraud scandal, according to the book Billion Dollar Whale and U.S. legal case files, along with files from the Malaysian anti-corruption commission. Why has Adani continued to work closely with Amicorp despite its proximity to a major international fraud and money laundering scandal?

Amicorp is a recognized firm that provides secretarial services to various entities and corporate groups from across the globe and not just the Adani portfolio entities. More details for Amicorp and its portfolio are available at: <https://www.amicorp.com/>.

We are not concerned with these completely unrelated “scandals” that you refer to in a blatant attempt to build a false narrative around our group. Hindenburg can write to Amicorp to seek their response if it so wishes about any scandal they believe Amicorp is involved in.

37/ (Allegation #19) **Trustlink’s CEO touts its close relationship with Adani. The same Trustlink CEO was previously alleged by the DRI to have been involved in a fraud using shell companies with Adani.**

What are the full details of Trustlink’s CEO’s dealings with the Adani Group, including those detailed in the DRI investigative records?

Trustlink is also a firm providing secretarial services to various entities and not just the Adani portfolio, including for incorporating companies in Mauritius and in the course of such services also acts as director in the Mauritius entities. The Trustlink CEO is not a director in any of the entities in the Adani Portfolio.

We have already responded on the DRI investigations in detail above.

Unfortunately **Hindenburg’s report seems to include characterization of what is a history of individual’s job listings on LinkedIn as “touts” of a “close relationship”**, which stems from a lack of understanding of laws in relevant jurisdictions and of the existence and work done by independent firms providing secretarial services in these jurisdictions.

38/ (Allegation #24) Adani chose Monarch Network Capital to run the OFS offerings. **An Adani private company has a small ownership stake in Monarch, and Gautam Adani’s brother-in-law** had previously purchased an airline together with the firm. This close relationship seems to pose an obvious conflict of interest. How does Adani respond?

39/ (Allegation #25) Why did Adani choose Monarch Network Capital, a small firm previously suspended and sanctioned by SEBI over allegations of market manipulation, to run the offerings, rather than a large, well-respected broker?

Common response -

Monarch Network Capital Limited (MNCL) was selected (as fully disclosed in the public domain) for their credentials and ability to tap into the retail market. More details around Monarch are available at <https://www.mnclgroup.com/>

Monarch’s “suspension” that has been alluded to, was a 1 month suspension more than a decade ago in 2011 and has no further relevance to their appointment for the OFS. It may be noted that several other banks (including international banks) have been subjected to similar or lengthier suspensions in the Indian market. This fact has been deliberately omitted by Hindenburg.

With nearly 3 decades of experience in retail broking, Institutional Equities, Investment Banking, fund management, global access and wealth and third-party product distribution, they are an award **wining brokerage house with accreditations as the “Best regional retail broker by NSE in 2018”**. **The company was also awarded as the “Top performing member in the cash market for 2015-16” by NSE** (National Stock Exchange).

40/ (Allegation #32) In 2007, an Economic Times article described a deal whereby a brokerage controlled by Dharmesh Doshi, a fugitive associated with Ketan Parekh, bought shares in a pharmaceutical company for a BVI entity where Vinod Adani served as shareholder and director. What was and is the full extent of the relationship between Dharmesh Doshi and the Adani Group, including with Vinod Adani?

41/ (Allegation #33) What is the explanation for a Vinod Adani entity receiving an alleged U.S. \$1 million as part of a transaction with Jermyn Capital, the brokerage entity previously run by Dharmesh Doshi, at the time a fugitive and wanted market manipulator?

Common response -

As already stated, all business transactions by the entities in the Adani portfolio are in ordinary course of our business, in compliance with all applicable laws and have been fully disclosed as required.

42/ (Allegation #54) Listed Adani companies have paid INR 63 billion to private contractor PMC Projects over the past 12 years to help construct major projects. A 2014 DRI investigation called **PMC Projects a “dummy firm” for Adani Group. Given that constructing major projects is Adani’s business, is PMC Projects in fact just a “dummy firm”?**

43/ (Allegation #55) PMC Projects has no current website. Historical captures for its website show that it shared an address and phone number with an Adani company. Numerous employee LinkedIn profiles show that they work concurrently at both. Several expressed confusion at whether there **was any difference. Is PMC Projects a mere “dummy firm” for Adani?**

44/ (Allegation #56) Newly revealed ownership records show that PMC Projects is owned by the son of Chang Chung-Ling, the close associate of Vinod Adani mentioned above. Taiwanese media **reports that the son is “Adani Group’s Taiwan representative”. We found pictures of him literally holding an Adani sign at an official government event, where he represented Adani. Once again, is PMC projects a mere “dummy firm” for Adani, as earlier alleged by the government?**

45/ (Allegation #57) **If so, why hasn’t either company reported its extensive dealings as being related party transactions, as required?**

46/ (Allegation #53) **What is the nature of Chang Chung-Ling’s relationship with the Adani Group, including his relationship with Vinod Adani?**

Common Response -

In August 2017, the Adjudicating authority of DRI i.e. which was the same authority who issued the show cause notice to Maharashtra Eastern Grid Power Transmission Limited (MEGPTCL) and PMC Projects, dealt with this issue in detail and concluded that the allegations were false, holding that **all the imports were genuine and being undertaken at arm’s length. The Authority further concluded that the value declared is correct and is not required to be re-determined.**

Even the Appellate Tribunal (CESTAT) in appeal has upheld the order of the adjudicating authority and rejected the challenge from the Customs Department. These findings are also concurred by Indian Income Tax authorities.

It can be clearly concluded that the allegation that PMC was managed and controlled by Adani portfolio through its entity MEGPTCL is unsustainable for the reason that the price was arrived at arm's length. The question of MEGPTCL influencing or controlling PMC is far-fetched as both MEGPTCL and PMC are not related. This can be referenced in sub para (ii) of Para 26 at page 22 of the order of the Appellate Tribunal appended in Annexure 8. This is an independent judicial process and has withstood scrutiny of challenge and any allegations to the contrary are baseless.

We have already responded above in details on the DRI investigations.

47/ (Allegation #81) In 2019, the Singaporean entity Pan Asia Coal Trading won a coal supply tender floated by Adani Group. **Pan Asia Coal Trading’s website provides no details on its coal trading**

experience, nor does it name a single individual associated with the company. Why did Adani Group select such a small firm for coal supply? What was the due-diligence process that went into its selection?

The transaction with Pan Asia has been clearly disclosed in the financials and hence the attempts to suggest that these transactions need to be brought to light are absurd when all relevant stakeholders have had access to this information for almost 4 years.

In any event, the tenders floated by Adani portfolio entities have well laid out technical and financial qualification criteria for all prospective bidders and any prospective bidder who meets the aforementioned conditions is eligible to participate in the tenders.

48/ (Allegation #82) Corporate records show that a former Adani Group company director was a **director and shareholder of Pan Asia. Why didn't Adani Group disclose the potential conflict of interest** in the transaction?

This allegation stems from a complete misunderstanding by Hindenburg of the facts and what amounts to conflict of interest in bid documents. Hence to clarify, no Adani company director was a director or a shareholder in Pan Asia at the time of, or even close to the time of, when the said bidding process was carried out.

Hence, there was no conflict of interest, potential or otherwise, while dealing with Pan Asia for this tender.

49/ (Allegation #83) In the same year as winning the coal deal in 2019, Pan Asia Coal Trading lent U.S. \$30 million to a private entity of Adani Group, per Singaporean corporate records. Why did a private company of the Adani family take money from a small single shareholder entity in Singapore at the same time its listed company was awarding a coal supply deal to it?

This loan transaction has no link to the tender. We have been informed that the loan transaction has been carried out in compliance with applicable laws by the relevant parties.

C. **Misleading claims around offshore entities being allegedly “related parties”** without regard for applicable law and standards

Misleading claims around offshore entities being allegedly “related parties” without regard for applicable law and standards: Allegation no. 4, 36, 37, 38, and 39 from the report are in reference to offshore entities. The queries make reckless statements without any evidence whatsoever and purely on unsubstantiated speculations without any understanding of the Indian laws around related parties and related party transactions.

50/ (Allegation #4) **What has been the full extent of Vinod Adani’s role in the Adani Group** to date, including all roles on deals and entities that have transacted with the Adani Group?

51/ (Allegation #36) How many entities is Vinod Adani associated with as either director, shareholder, or beneficial owner? What are the names and jurisdictions of these entities?

52/ (Allegation #37) What are the full details of the Vinod Adani-**associated entities’ dealings with private and listed entities in the Adani empire?**

53/ (Allegation #38) We found websites for 13 Vinod Adani entities that seem like rudimentary efforts to demonstrate that the entities have operations. Many websites were formed on the exact **same day and listed the same set of nonsensical services such as “consumption abroad” and “commercial presence”**. **What business or operations do** each of these entities actually engage in?

54/ (Allegation #39) One of the websites for a Vinod Adani-**associated entity claimed “we trade in Services** such as sale and delivery of an intangible product, like a Service, between a producer and **consumer.” What** does that even mean?

Common Responses -

Vinod Adani does not hold any managerial position in any Adani listed entities or their subsidiaries and has no role in their day to day affairs. As such, these questions have no relevance to the entities in the Adani portfolio and we are not in a position to comment on your allegations on the business dealings and transactions of Mr. Vinod Adani.

We reiterate that any transactions by the Adani portfolio companies with any related party have been duly identified and disclosed as related party transactions in compliance with Indian laws and **standard and have been carried out on arm’s length terms.**

D. False suggestions based on malicious misrepresentation of the governance practices in Adani portfolio

False suggestions based on malicious misrepresentation of the governance practices in Adani portfolio : Allegation no. 34, 62, 63, 64, 65, 66, 67, 68, 69, 70, and 71 use selective information to make insinuations, when in fact, the Adani portfolio has instituted various corporate governance policies and committees including our Corporate Responsibility Committee consisting solely of independent directors tasked with keeping the Board of Directors informed about the ESG performance of businesses. Our ESG approach is based on well-thought out goals, commitments and targets which are independently verified through an assurance process.

55/ (Allegation #34) Investors generally prefer clean and simple corporate structures to avoid the conflicts of interest and accounting discrepancies that can lurk in sprawling, convoluted structures. **Adani’s 7 key listed entities collectively have 578 subsidiaries and have** engaged in a total of 6,025 separate related-party transactions in fiscal year 2022 alone, per BSE disclosures. Why has Adani chosen such a convoluted, interlinked corporate structure?

This allegation again emanates from a complete lack of understanding by Hindenburg of the business structures and requirements of infrastructure companies. For infrastructure business in India and many other jurisdictions, companies typically have to operate with a ring fenced project finance structure wherein each project is housed in a separate company and financing is raised against the specific project assets. This structure is also preferred by banks and financial institutions as it provides bankruptcy remoteness. In some cases, regulatory considerations also require projects to be set up in separate companies. For example - Transmission projects in India are awarded under tariff based competitive bidding, in such bidding the successful bidder has to acquire the SPV which is undertaking the project. Hence, it is a regulatory requirement as part of the Electricity Act, 2003 and the regulations and bid documents approved by the Central Electricity Regulatory Commission to execute projects in different special purpose companies.

56/ (Allegation #62) Adani Enterprises has had 5 chief financial officers over the course of 8 years, a key red flag suggesting potential accounting irregularities. Why has Adani Enterprises had such a difficult time retaining someone for its top financial position?

57/ (Allegation #63) What were the reasons for the resignations or terminations each of these prior CFOs?

58/ (Allegation #64) Adani Green Energy, Adani Ports and Adani Power have each had 3 CFOs over 5 years, while Adani Gas and Adani Transmission have both had CFO turnover within the past 4 years. Why have Adani entities struggled to retain individuals at its top financial positions?

59/ (Allegation #65) What were the reasons for the resignations or terminations each of these prior CFOs?

Common Response -

Here again Hindenburg has tried to color the facts to suit their narrative and have completely misrepresented the truth in respect of our CFOs.

The truth is that several of the CFOs that Hindenburg claims have left, are in fact still part of the organization in various other capacities, including taking on larger or key roles as part of our growth stories.

Mr. Devang Desai (the CFO of Adani Enterprises Limited who resigned in May-2014), Mr. Ashok Jagetiya, Mr. Kaushal Shah (the CFOs of Adani Green Energy Limited who resigned in Aug-2017, Nov-2022), Mr. Suresh Chandra Jain (the CFO of Adani Power Limited who resigned in July-2020), and Mr. Rajiv Rustagi, Mr. Kaushal Shah (the CFOs of Adani Transmission Limited, who resigned in Oct-2015, Feb-2021), still continue to be part of the organization and play vital roles in the organization.

The organisation allows and encourages development of individuals, including them taking on significantly larger roles from time to time. For example, Mr. Jugeshinder Singh, the current CFO of Adani Enterprises Limited, was appointed as CFO in May 2019, but has been with the organization since May-2012, where he played the role as advisor in Strategic Finance.

The other CFOs mentioned in the report have left to pursue individual ambitions including their journey as entrepreneur, which we as an organization are happy to support. For example, Mr. Ameet Desai resigned as CFO of Adani Enterprises Limited to begin his journey as an entrepreneur; Mr. B. Ravi resigned as CFO of Adani Ports & SEZ Ltd for similar entrepreneurial journey.

The Hindenburg report conveniently fails to mention that none of the resignation have ever been made pursuant to any alleged concerns against any of the underlying companies. Further, each of the cited resignations and changes in CFOs have been duly disclosed from time to time as per regulatory requirements and this information is already available in the public domain.

60/ (Allegation #66) The independent auditor for Adani Enterprises and Adani Gas is a tiny firm called Shah Dhandharia. Historical archives of its website show that it had only 4 partners and 11 employees. It seems to have no current website. Records show it pays INR 32,000 (U.S. \$435 in 2021) in monthly office rent. The only other listed entity we found that it audits has a market capitalization of about INR 640 million (U.S. \$7.8 million). Given the complexity of Adani's listed

companies, with hundreds of subsidiaries and thousands of interrelated dealings, why did Adani choose this tiny and virtually unknown firm instead of larger, more credible auditors?

61/ (Allegation #67) **The audit partner at Shah Dhandharia who signed off on Adani Gas’ annual audits was 23 years old when he began approving the audits. He had just finished university. Is that individual really in a position to scrutinize and hold to account the financials of a firm controlled by one of the world’s most powerful individuals?**

62/ (Allegation #68) The audit partner at Shah Dhandharia who signed off on Adani Enterprises annual audits was as young as 24 years old when he began approving the audits. Is that individual really in a position to scrutinize and hold to account the financials of a firm controlled by one of **the world’s most powerful individuals?**

63/ (Allegation #69) The audit partners signing off on Adani Gas and Adani Enterprises annual audits are now both 28 years old. Again, are they in a position to credibly scrutinize and hold to **account the financials of firms controlled by one of the world’s most powerful individuals?**

Common Response -

All these auditors who have been engaged by us have been duly certified and qualified by the relevant statutory bodies who are responsible to determine these benchmarks. All our auditors have been appointed in compliance with applicable laws.

The financials and public documents of the Adani portfolio entities clearly disclose Shah Dhandharia & Co as our auditor to all regulators and stakeholders and hence, it is unclear what new findings are being brought to light by Hindenburg.

In fact, and rather disturbingly, Hindenburg in furthering their agenda and profit have displayed a brazen disregard of personal privacy and safety in publishing private and personal information including pictures of government IDs without any consent or attempt to safeguard the identities of the people in question and making personal allegations and attacks around competence. The claims **of seeking “transparency” and fairness ring hollow** when taken in this context.

In any case, all companies of Adani Portfolio have a robust governance framework. The Audit Committee of each of the listed companies is composed of 100% of Independent Directors and chaired by Independent Director. The Statutory Auditors are appointed only upon recommendation by the Audit Committee to the Board of Directors.

Adani Portfolio company’s follow a stated policy of having global big 6 or regional leaders as Statutory Auditors and this can be seen from the table below.

Adani Enterprises Limited: AEL acts as an incubator and has businesses in various sectors and subsidiaries and associates spread over eight jurisdictions. There are more than 35 Statutory Audit firms which audit the various entities within Adani Enterprises which include a mix of Big 6 Statutory Auditors as well as statutory auditors who are highly reputed in their respective jurisdictions.

Shah Dhandharia & Co. does the statutory audit of AEL entity. Shah Dhandharia & Co is also a peer reviewed Chartered Accountancy firm registered with the Institute of Chartered Accountants of India since year 1999 with experience of more than 20 years. Below is a summary of the auditors in AEL’s subsidiaries

| Big 6 | Audit Firms | Entities |
|---------|-------------|----------|
| Airport | 3 | 4 |

| | | |
|-----------------------------|---|----|
| Road, Metro, Rail and Water | - | - |
| Australia | 1 | 16 |
| Defence | 1 | 1 |
| Others | 2 | 2 |
| Total | 7 | 23 |

| Regulatory Panel ¹ | Audit Firms | Entities |
|-------------------------------|-------------|----------|
| Airport | 3 | 7 |
| Road, Metro, Rail and Water | 4 | 13 |
| Australia | - | - |
| Defence | - | - |
| Others | - | - |
| Total | 7 | 20 |

| Others | Audit Firms | Entities |
|-----------------------------|-------------|----------|
| Airport | 3 | 11 |
| Road, Metro, Rail and Water | 3 | 12 |
| Australia | - | - |
| Defence | 5 | 12 |
| Others | 19 | 103 |
| Total | 30 | 138 |

1. Regulatory panel includes auditors that are selected from the panel appointed by regulatory authorities (this is in line with the respective concession agreements)

| Listed Entity | Statutory Auditor | Remarks |
|-------------------------|---|---|
| Adani Ports & SEZ | Deloitte Haskins & Sells | The Statutory Auditor before the rotation was SRBC & Co. (EY) |
| Adani Power | SRBC & Co. (EY) | The Statutory Auditor before the rotation was Deloitte Haskins & Sells |
| Adani Transmission | Deloitte Haskins & Sells | The Statutory Auditor before the rotation was Dharmesh Parikh & Co. |
| Adani Green Energy | SRBC & Co. (EY) & Dharmesh Parikh & Co. (Joint Auditors) | The Statutory Auditor before the rotation was BSR & Co. (KPMG) |
| Adani Enterprises (AEL) | Shah Dhandharia & Co. & includes 27 other Statutory Audit Firms like Ernst & Young, PKF, Walker Chandio & Co. & K S Rao & Co., etc. | AEL acts as an incubator and has businesses in various sectors and subsidiaries and associates spread over eight jurisdictions. There are more than 27 Statutory Audit firms which audit the various entities within Adani Enterprises which include a mix of big four Statutory Auditors as well as statutory auditors who are highly reputed in their respective jurisdictions. |

| Listed Entity | Statutory Auditor | Remarks |
|-----------------|--|---|
| | | Shah Dhandharia & Co. does the statutory audit of AEL standalone entity which is into the business of trading and mining services only. Shah Dhandharia & Co is also a peer reviewed chartered accountancy firm registered with the Institute of Chartered Accountants of India in year 1999 with experience of more than 20 years. |
| Adani Total Gas | Shah Dhandharia & Co. | |
| Adani Wilmar | SRBC & Co. (EY) & Dharmesh Parikh & Co. (Joint Auditors) | SRBC & Co. have been recently appointed as joint statutory auditor |

Adani Portfolio also has a policy to conduct an independent review of disclosure and notes by one of the big 6 across all group companies and the last review carried out for FY 20 and FY 21 was undertaken by Grant Thornton.

64/ (Allegation #70) **The auditor for Adani Power, an Ernst & Young affiliate, gave a “qualified” opinion in its audit, saying that it had no way to support the value of INR 56.75 billion (U.S. ~700 million) in investments and loans held by Adani Power. What is Adani Power’s full explanation for the valuation of these investments and loans?**

65/ (Allegation #71) **Which parts of the valuation of Adani Power’s investments and loans did the auditor disagree with?**

Common Response -

The ‘qualifications’ referred to above have been done by the auditor in compliance with law and taking into account various factors which affect the business from time to time. This matter is also fully disclosed in our financial statements and all our stakeholders are clearly aware of the same.

E. Manipulated narrative around unrelated third party entities

Manipulated narrative around unrelated third party entities: Allegation no. 5, 6, 7, 8, 10, 11, 12, 13, 14, 16, 17, 18, 20, 21, 22, 23, 26 and 52 from the report seek information on our public shareholders. Shares of listed companies on Indian stock exchanges are traded on a regular basis. The listed entity does not have control over who buys / sells / owns the publicly traded shares in the company. A listed company does not have nor is it required to have information on its public shareholders and investors.

66/ (Allegation #6) **Recent right-to-information requests confirm that SEBI is investigating Adani’s foreign fund stock ownership. Can Adani confirm that this investigation is ongoing and provide details on the status of that investigation?**

67/ (Allegation #7) What information has been provided thus far as part of any investigations, and to which regulators?

Common Responses -

The relevant entities have already responded to the stock exchanges through the disclosure dated 14th June 2021 as set out below:

14th June, 2021

BSE Limited

P J Towers,
Dalal Street,
Mumbai - 400001.

National Stock Exchange of India Limited

Exchange plaza,
Bandra-Kurla Complex,
Bandra (E), Mumbai - 400051.

Scrip Code: 512599

Scrip Code: ADANIENT

**Sub: Clarification on news article published in economic times-A/c's of 3 FPI's
Owning Adani Shares Frozen.**

Dear Sir / Madam,

We bring to your kind attention, the news headlines published in ET that NSDL has frozen the accounts of 3 foreign funds- Albula Investment Fund, Cresta Fund and APMS Investment Fund holding shares in Adani Group Companies. We regret to mention that these reports are blatantly erroneous and is done to deliberately mislead the investing community. This is causing irreparable loss of economic value to the investors at large and reputation of the group.

Given the seriousness of the article and its consequential adverse impact on minority investors, we requested Registrar and Transfer Agent, with respect to the status of the Demat Account of the aforesaid funds and have their written confirmation vide its e-mail dated 14th June, 2021, clarifying that the Demat Account in which the aforesaid funds hold the shares of the Company are not frozen.

We are issuing this letter in the larger public interest and for the protection of minority investors interest.

We request you to kindly take the same on records.

Thanking you,

68/ (Allegation #5) Mauritius-based entities like APMS Investment Fund, Cresta Fund, LTS Investment Fund, Elara India Opportunities Fund, and Opal Investments collectively and almost exclusively hold shares in Adani-listed companies, totaling almost U.S. \$8 billion. Given that these entities are key public shareholders in Adani, what is the original source of funds for their investments in Adani companies?

69/ (Allegation #8) Entities associated with Monterosa Investment Holdings collectively own at least U.S. \$4.5 billion in concentrated holdings of Adani Stock. Monterosa's CEO served as director

in 3 companies alongside fugitive diamond merchant Jatin Mehta, whose son is married to Vinod **Adani's daughter. What is the full extent of the relationship between Monterosa, its funds, and the Adani family?**

70/ (Allegation #10) A once-related party entity of Adani called Gudami International, headed by close Adani associate Chang Chung-Ling, invested heavily in one of the Monterosa funds that allocated to Adani Enterprises and Adani Power. Monterosa entities continue as key Mauritius shareholders in Adani companies. **What is Adani's explanation for this large, concentrated investment into Adani listed companies by a related-party entity?**

71/ (Allegation #11) What was the original source of funds for each of the Monterosa funds and their investments in Adani?

72/ (Allegation #16) New Leaina is a Cyprus-based investment firm, which held ~95% of its holdings in shares of Adani listed companies, consisting of over U.S. \$420 million. The entity is operated by Amicorp. What was the original source of funds for New Leaina and its investments in Adani?

73/ (Allegation #17) Opal Investment Private Ltd. is the largest claimed independent holder of shares of Adani Power, with 4.69% of the company (representing ~19% of the float). It was formed on the same day, in the same jurisdiction (Mauritius) by the same small incorporation firm (Trustlink) as an entity associated with Vinod Adani. How does Adani explain this?

74/ (Allegation #18) What was the original source of funds for Opal and its investments in Adani?

75/ (Allegation #12) A former trader for Elara, a firm with almost \$3 billion in concentrated holdings of Adani shares, including a fund that is 99% concentrated in shares of Adani, told us that it is obvious that Adani controls the shares. He added that the structure of the funds is intentionally designed to conceal their beneficial ownership. How does Adani respond?

76/ (Allegation #13) Leaked emails show that the CEO of Elara had dealings with notorious stock manipulator Dharmesh Doshi, partner of Ketan Parekh, even after Doshi became a fugitive for his alleged manipulation activity. How does Adani respond to this relationship, given that Elara is one **of the largest "public" holders of shares of Adani?**

77/ (Allegation #14) What was the original source of funds for the Elara funds and their investments in Adani?

78/ (Allegation #20) The above-named offshore entities holding concentrated positions in Adani stock accounted for up to 30%-47% of the yearly delivery volume in Adani stocks, a massive irregularity, according to our analysis of data from Indian exchanges and disclosed trading volume per Adani filings. How does Adani explain the extreme trading volume from this concentrated group of opaque offshore funds?

79/ (Allegation #21) The nature of this trading suggests that these entities are involved in manipulative wash trading or other forms of manipulative trading. How does Adani respond?

Common Responses -

Each of the entities referenced in queries above are public shareholders in the listed companies in the Adani Portfolio. Innuendoes that they are in any manner related parties of the promoters are incorrect.

A listed entity does not have control over who buys / sells / owns the publicly traded shares or how much volume is traded, or the source of funds for such public shareholders nor is it required to

have such information for its public shareholders under laws of India. Hence we cannot comment on trading pattern or behavior of public shareholders.

80/ (Allegation #22) In 2019, Adani Green Energy completed two offerings for sale (OFS) that were critical for ensuring that its public shareholders were above the 25% listing threshold requirement. What portion of these OFS deals were sold to offshore entities, including Mauritius and Cypriot entities named in our report?

81/ (Allegation #23) Indian listed corporates receive a weekly shareholding update, not disclosed to the public, which would detail the shareholding changes around the deals. Will Adani detail the full list of offshore entities that participated in the OFS deals?

82/ (Allegation #26) Mr. Robbie Singh, Group CFO at the time the shareholding issue erupted in public forums in 2021, claimed in an NDTV interview on June 16th 2021 that funds like the Mauritius shareholders had not made fresh investments and had come to own shares of other Adani stocks through vertical demergers. Our analysis shows that it was almost certain that the Mauritius shareholders made further investments in Adani Green. This coincides with the time when the promoters were required to bring their shareholding down to meet public shareholding norms. How does Adani Group respond to this new evidence?

Common Responses -

These allegations again emanate from a lack of understanding by Hindenburg of Indian laws.

Under Indian laws, all listed entities are required to have a public shareholding of a minimum of 25%. Since the shares of AGEL got listed after the demerger from AEL in June 2018, AGEL was required to comply with the requirements of regulation 38 within 12 months from the date of listing thereof.

The process for OFS is a regulated process implemented through an automated order book matching process on the platform of the stock exchange. This is not a process which is controlled by any entity and the purchasers are not visible to anyone on the platform.

This process is not controlled by the seller or the buyer and are implemented through an automated order book matching process on the platform of the stock exchange. Even the purchaser of securities is not visible to the seller on the stock exchange platform.

The shareholding pattern of AGEL, both pre and post completion of offerings for sale are already disclosed on the website of Stock Exchanges with total holdings amongst the different Foreign Portfolio Investors.

Below table shows the Adani Green Energy Public Shareholding as on 31-Mar-2019 (pre-OFS),

Source: <https://www.nseindia.com/companies-listing/corporate-filings-shareholding-pattern?symbol=ADANIGREEN&tabIndex=equity>

| CATEGORY | CATEGORY OF SHAREHOLDER | NO. OF SHAREHOLDERS | TOTAL NOS. SHARES HELD | SHAREHOLDING AS A % OF TOTAL NO. OF SHARES |
|----------|---|---------------------|------------------------|--|
| 1 | Institutions | - | - | - |
| a | Mutual Funds/ | 1 | 96 | - |
| b | Venture Capital Funds | - | - | - |
| c | Alternate Investment Funds | - | - | - |
| d | Foreign Venture Capital Investors | - | - | - |
| e | Foreign Portfolio Investors | 60 | 16,04,35,854 | 10.26 |
| | Elara India Opportunities Fund Limited | 1 | 4,68,40,786 | 2.99 |
| | Cresta Fund Ltd | 1 | 2,52,93,035 | 1.62 |
| | Albula Investment Fund Ltd | 1 | 2,20,78,233 | 1.41 |
| | Asia Investment Corporation (Mauritius) Ltd | 1 | 1,69,27,128 | 1.08 |
| f | Financial Institutions/ Banks | 5 | 38,03,794 | 0.24 |
| g | Insurance Companies | - | - | - |
| h | Provident Funds/ Pension Funds | - | - | - |
| i | Any Other (specify) | - | - | - |
| | Sub-Total (B)(1) | 66 | 16,42,39,744 | 10.50 |
| 2 | Central Government/ State Government(s)/ President of India | - | - | - |
| | Sub-Total (B)(2) | - | - | - |
| 3 | Non-institutions | - | - | - |
| a | Individuals - | 79,989 | 3,63,94,375 | 2.33 |
| i | Individual shareholders holding nominal share capital up to Rs. 2 lakhs. | 79,805 | 2,49,75,678 | 1.60 |
| ii | Individual shareholders holding nominal share capital in excess of Rs. 2 lakhs. | 184 | 1,14,18,697 | 0.73 |
| b | NBFCs registered with RBI | 2 | 13,397 | - |
| c | Employee Trusts | - | - | - |
| d | Overseas Depositories (holding DRs) (balancing figure) | - | - | - |
| e | Any Other (specify) | 3,485 | 1,05,71,754 | 0.68 |
| | Bodies Corporate | 382 | 50,33,283 | 0.32 |
| | Clearing Members | 198 | 16,50,657 | 0.11 |
| | Foreign Nationals | 1 | 7,610 | - |
| | HUF | 1,662 | 26,11,815 | 0.17 |
| | IEPF | 1 | 33,858 | - |
| | Non-Resident Indian (NRI) | 1,237 | 12,10,245 | 0.08 |
| | Trusts | 4 | 24,286 | - |
| | Sub-Total (B)(3) | 83,476 | 4,69,79,526 | 3.00 |
| | Total Public Shareholding (B)= (B)(1)+(B)(2)+(B)(3) | 83,542 | 21,12,19,270 | 13.50 |

Below table is the Adani Green Energy Public Shareholding as on 30-Jun-2019 (post-OFS),

Source: <https://www.nseindia.com/companies-listing/corporate-filings-shareholding-pattern?symbol=ADANIGREEN&tabIndex=equity>

| CATEGORY | CATEGORY OF SHAREHOLDER | NO. OF SHAREHOLDERS | TOTAL NOS. SHARES HELD | SHAREHOLDING AS A % OF TOTAL NO. OF SHARES |
|----------|---|---------------------|------------------------|--|
| 1 | Institutions | - | - | - |
| a | Mutual Funds/ | 1 | 336 | - |
| b | Venture Capital Funds | - | - | - |
| c | Alternate Investment Funds | - | - | - |
| d | Foreign Venture Capital Investors | - | - | - |
| e | Foreign Portfolio Investors | 51 | 31,81,91,988 | 20.34 |
| | Elara India Opportunities Fund Limited | 1 | 6,11,40,786 | 3.91 |
| | Cresta Fund Ltd | 1 | 3,59,50,082 | 2.30 |
| | Albula Investment Fund Ltd | 1 | 3,80,78,233 | 2.43 |
| | Asia Investment Corporation (Mauritius) Ltd | 1 | 3,62,27,128 | 2.32 |
| | Aoms Investment Fund Ltd | 1 | 3,52,79,568 | 2.26 |
| | Vespera Fund Limited | 1 | 2,63,56,892 | 1.69 |
| | Lts Investment Fund Ltd | 1 | 2,40,30,943 | 1.54 |
| | Marshal Global Capital Fund Ltd | 1 | 2,13,36,150 | 1.36 |
| | Polus Global Fund | 1 | 1,70,65,870 | 1.09 |
| f | Financial Institutions/ Banks | 6 | 42,83,723 | 0.27 |
| g | Insurance Companies | - | - | - |
| h | Provident Funds/ Pension Funds | - | - | - |
| i | Any Other (specify) | - | - | - |
| | Sub-Total (B)(1) | 58 | 32,24,76,047 | 20.62 |
| 2 | Central Government/ State Government(s)/ President of India | - | - | - |
| | Sub-Total (B)(2) | - | - | - |
| 3 | Non-institutions | - | - | - |
| a | Individuals - | 80,679 | 3,76,90,827 | 2.41 |
| i | Individual shareholders holding nominal share capital up to Rs. 2 lakhs. | 80,486 | 2,60,18,626 | 1.66 |
| ii | Individual shareholders holding nominal share capital in excess of Rs. 2 lakhs. | 193 | 1,16,72,201 | 0.75 |
| b | NBFCs registered with RBI | 2 | 1,397 | - |
| c | Employee Trusts | - | - | - |
| d | Overseas Depositories (holding DRs) (balancing figure) | - | - | - |
| e | Any Other (specify) | 3,592 | 3,21,35,299 | 2.05 |
| | Bodies Corporate | 396 | 2,65,87,143 | 1.70 |
| | Clearing Members | 244 | 18,31,700 | 0.12 |
| | Foreign Nationals | 1 | 7,610 | - |
| | HUF | 1,685 | 23,70,070 | 0.15 |
| | IEPF | 1 | 33,858 | - |
| | Non-Resident Indian (NRI) | 1,261 | 12,80,632 | 0.08 |
| | Trusts | 4 | 24,286 | - |
| | Sub-Total (B)(3) | 84,273 | 6,98,27,523 | 4.46 |
| | Total Public Shareholding (B)= (B)(1)+(B)(2)+(B)(3) | 84,331 | 39,23,03,570 | 25.08 |

83/ (Allegation #52) Another secretive Mauritius entity called Growmore Trade and Investment netted an overnight U.S. ~\$423 million gain through a stock merger with Adani Power. According to court records, Growmore is controlled by Chang Chung-Ling, an individual who shared a residential address with Vinod Adani and had been named in DRI fraud allegations as director of a key intermediary entity used to siphon funds out of Adani Enterprises. What is the explanation for this windfall gain to an opaque private entity controlled by a close associate of the Adani family?

The stock merger referred to in the allegation was undertaken after following due process as per Companies Act and all applicable regulations including SEBI regulations. The valuation for the stock merger was supported by an independent third party reputed valuers. Ernst & Young provided the valuation report supported by a fairness opinion from ICICI Securities. The scheme of amalgamation including exchange ratio and the allotment of shares were considered and approved by majority shareholders of both companies, various regulatory authorities including stock exchanges, Regional director of Central Government and the High court of Gujarat. The order of the High Court in annexed in Annexure 9. Hence innuendoes of overnight gain are incorrect and baseless.

We have already addressed above all allegations in respect of DRI investigations, which as detailed above have been closed and dismissed in our favour.

F. Biased and unsubstantiated rhetoric

Biased and unsubstantiated rhetoric: Allegation no. 84, 85, 86, 87, and 88 from the report are inherently biased statements around our openness to address criticism with a window-dressing to garb them as questions. Criticism does not include the right to make false and defamatory statement which could damage the interests of our stakeholders. We continue to have the right to seek judicial remedy before Indian courts when such interests are threatened, and in all cases, we have exercised these rights in due compliance with law and the judicial process.

84/ (Allegation #84) In interviews, **Gautam Adani has said “I have a very open mind toward criticism.” Given this, why did Adani seek to have critical journalist Paranjoy Guha Thakutra jailed** following his articles on allegations of Adani tax evasion?

85/ (Allegation #87) If Adani Group has nothing to hide, why does it feel the need to pursue legal action against even the smallest of its critics?

Common Response -

Being open to criticism does not mean we have given up our legal right to defend ourselves against defamatory and false statements. We have exercised our rights in due compliance with law and through judicial processes in this respect.

86/ (Allegation #85) **In the same interview, Gautam Adani said “Every criticism gives me an opportunity to improve myself.” Given this, in 2021, why did Adani seek a court gag order on a YouTuber that made critical videos of Adani?**

As above, action has been taken by us under law to defend ourselves not because these videos are **“critical” but are patently false** and defamatory. This was also examined by the court which after proper determination and hearing the parties, issued the order asking the YouTuber to take down the video.

This YouTuber has a history of making such patently false and defamatory videos, and in a separate and unrelated incident he had an order passed against him by the Ministry of Information and Technology. A copy of this order is annexed hereto as Annexure 10.

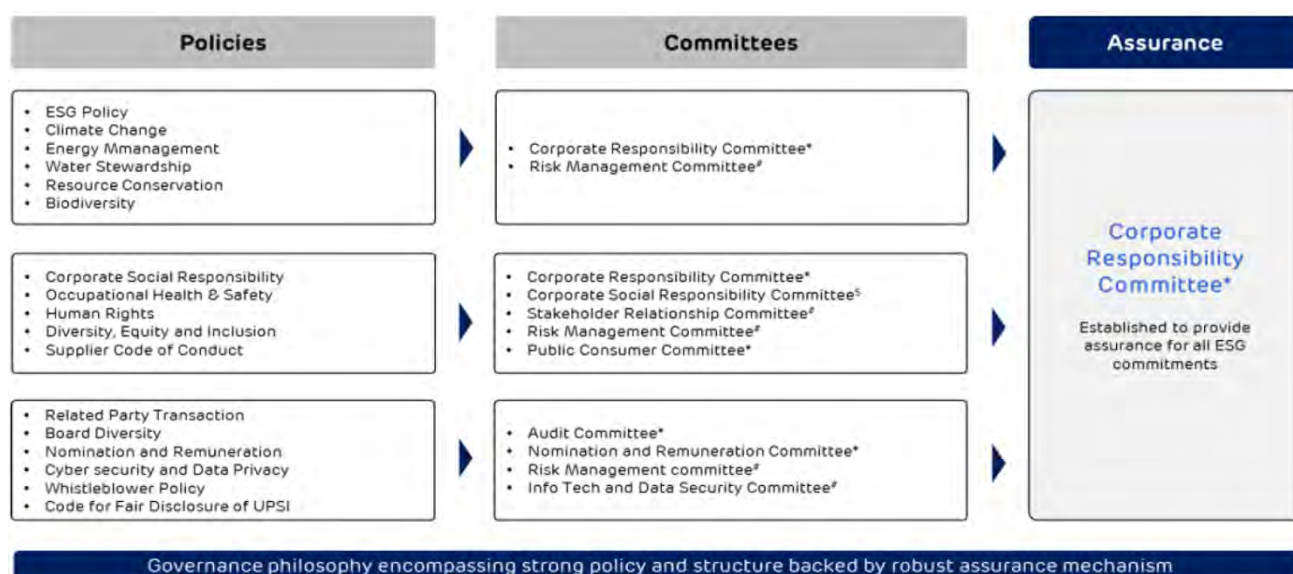
87/ (Allegation #86) **In the same interview, Gautam Adani said “I always introspect and try to understand the others’ point of view.” Given this, why has Adani Group filed legal suits against journalists and activists, which have been condemned by media watchdogs? Why did it have an activist in Australia followed by private investigators?**

Being open to introspection or understanding others point of view does not mean we have given up our legal right to defend ourselves, our businesses and other employees through proper legal channels. We have exercised our rights in this matter in due compliance with law and through proper judicial processes in this respect.

88/ (Allegation #88) Does Adani Group truly view itself as an organization with sound corporate governance that embodies its slogan, “Growth With Goodness?”

Yes. Adani companies follow high standards of corporate governance in line with global best practices. In the last 10 years, Adani portfolios of companies have emerged as epitome in terms of governance. Adani portfolio companies have instituted various corporate governance policies and committees including our Corporate Responsibility Committee (“CRC”) consisting solely of independent directors tasked with keeping the Board of Directors informed about the ESG performance of businesses.










Our ESG approach is based on well-thought out goals, commitments and targets which are independently verified through an assurance process. The image below provides an overview of our governance framework.



* 100% Independence; \$ At least 75% Independence; and # At least 50% Independence

As a result of these initiatives, Adani Enterprises Limited (AEL) is one the only company in India, in its sector to be included in the Dow Jones Sustainability Index ("DJSI") Emerging Market index and were ranked seventh in our global peer group (135 companies selected by S&P Global). AEL scored 51/100 against the industry average of 21 / 100, achieving a 96th percentile position in 2022 by S&P Global.

Similarly, below is the ESG credentials of Adani Portfolio companies,

| | adani Ports and Logistics | adani Power | adani Transmission | adani Renewables | adani Gas | adani Enterprises | adani ACC | adani Ambuja Cement |
|--|---------------------------------|---------------------|-----------------------|---------------------|-----------------------|----------------------|-----------------------|------------------------|
|  TCFD Supporter | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
|  SBTi Commitment | ✓ | NC | ✓ | ✓ | NC | NC | ✓ | ✓ |
|  UNGC Participant | ✓ | ✓ | In Progress | ✓ | In Progress | In Progress | NC | NC |
|  IBBI Member | ✓ | ✓ | ✓ | ✓ | In Progress | In Progress | NC | NC |
|  DJSI (2022 Score) | 68 | 59 | 63 | 66 | 54 | 51 | 73 | 80 |
|  CDP - CC (2022 Score) | B | B | D | C | C | B | A- | B |
|  CDP - WS (2022 Score) | B | B | -- | -- | -- | -- | B | B |
|  Sustainalytics | 12.4 (Low Risk) | 31.4 (High Risk) | 32.7 (High Risk) | 14.6 (Low Risk) | 24.6 (Medium Risk) | 36.4 (High Risk) | 29.7 (Medium Risk) | 24.0 (Medium Risk) |
|  MSCI | CCC | CCC | BBB | A | BBB | CCC | B | B |

Below are select awards and recognition for Adani portfolio companies in relation to ESG

Adani Transmission Limited (ATL):

- ATL recognized with the Climate Action Program (CAP) 2.0° “Oriented Award” by Confederation of Indian Industry (CII) in the Energy, Mining and Heavy Manufacturing category.
- ATL has also won ‘The Global Sustainability Leadership Award’ in ‘Best Sustainable Strategies - Power Industry’ category from World Sustainability recently in Mauritius.

Adani Green Energy Limited (AGEL):

- AGEL won Sustainability 4.0 Award Conferred Jointly by Frost and Sullivan and TERI.
- AGEL conferred with the ‘Leaders Award’ and ‘Sustainability Front Runner’ under the ‘Mega large business’ category

Adani Enterprises Limited (AEL):

- Awarded from Federation of Indian Mineral Industries (FIMI) for Sustainable Mining for Parsa East & Kente Basin Coal Mine.
- Adani Solar have won ‘Golden Peacock Eco-Innovation Award’ for the year 2022 for using ETP waste chemical sludge as raw material in other organizations.
- Guwahati Airport awarded the Greentech Award 2022 for outstanding performance in environment and sustainability category.

Adani Total Gas Limited (ATGL):

- The Economic Times Biggest Initiative on the Gas Sector, ET Energyworld Annual Gas Conclave, facilitated Adani Total Gas Limited for the Category “ESG initiative of the year” for Greenmosphere - Low Carbon society.

Adani Ports and SEZ Limited (APSEZ):

- APSEZ Mundra port received two OSH India Awards; One is Safety & Excellence Award - for saving lives of the truck drivers and second is on Environment Management - for various environmental initiatives

ANNEXURES

Annexure 1: Page references for Table 1 from Annual Reports of the listed businesses

EBITDA - FY22

| | AEL | AGEL | APSEZ | APL | ATGL | ATL |
|---|------------------|--------|--------|--------|------|-------|
| Reference page number from FY22 Annual Report [PAT, Tax, Deferred Tax, Depreciation, Finance Cost, Exception items] | 347 | 375 | 512 | 275 | 309 | 395 |
| Reference page number - FY22 Annual Report [Unrealised FX Loss / (Gain)] | 407 (Note 38) | - | 512 | - | - | - |
| PAT | 4.75 | 4.89 | 47.95 | 49.12 | 5.05 | 12.64 |
| [+] Tax | 3.91 | (0.04) | 7.46 | 7.68 | 1.47 | 2.44 |
| [+] Deferred Tax | 0.85 | 0.68 | - | 9.76 | 0.27 | 1.92 |
| [+] Depreciation | 12.48 | 8.49 | 27.40 | 31.18 | 0.83 | 14.27 |
| [+] Finance Cost | 25.26 | 26.17 | 25.41 | 40.95 | 0.53 | 23.65 |
| [+] Unrealised FX Loss / (Gain) | 2.75 | - | 8.72 | - | - | - |
| [+] Exceptional item | - | (0.64) | 4.05 | - | - | - |
| EBIDTA | 50.00 | 39.55 | 120.99 | 138.69 | 8.15 | 54.93 |

Cash and cash equivalents - As on 31 Mar 22

AEL

| Particulars | INR bn | AEL FY22 Annual Report reference |
|-------------------------|--------|----------------------------------|
| Cash & Cash Equivalents | 9.12 | Page 346 |
| [+] Bank Balances | 30.04 | Page 346 |
| Total | 39.16 | |

AGEL

| Particulars | INR bn | AGEL FY22 Annual Report reference |
|--|--------|-----------------------------------|
| Cash & Cash Equivalents | 5.67 | Page 374 |
| [+] Bank Balances | 10.26 | Page 374 |
| [+] Fixed Deposits with Original Maturity more than 12 months | 0.01 | Page 426, Note 8 |
| [+] Balances held as Margin Money or security against borrowings | 17.72 | Page 426, Note 8 |
| [+] Financial Assets: Investments | 5.01 | Page 425, Note 6 |
| Total | 38.67 | |

ATL

| Particulars | INR bn | ATL FY22 Annual Report reference |
|--|--------|----------------------------------|
| Cash & Cash Equivalents | 1.89 | Page 394 |
| [+] Bank Balances | 13.04 | Page 394 |
| [+] Investments | 2.97 | Page 394 |
| [+] Balances held as Margin Money or security against borrowings | 5.08 | Page 431 Note 8 |
| [+] Fixed Deposits with maturity over 12 months | 5.24 | Page 430 Note 8 |
| [+] Aggregate market value of Quoted Investments | 2.46 | Page 430 Note 6 |
| Total | 30.67 | |

APSEZ

| Particulars | INR bn | APSEZ FY22 Annual Report reference |
|--|---------------|------------------------------------|
| Cash & Cash Equivalents | 85.97 | Page 511 |
| [+] Bank Balances | 18.95 | Page 511 |
| [+] Investments | 4.78 | Page 511 |
| [+] Bank Deposits having maturity over twelve months | 19.54 | Page 511 |
| Total | 129.24 | |

APL

| Particulars | INR bn | APL FY22 Annual Report reference |
|---|--------------|----------------------------------|
| Cash & Cash Equivalents | 7.82 | Page 274 |
| [+] Bank Balances | 15.82 | Page 274 |
| [+] Bank balances held as Margin money (security against borrowings and others) | 4.24 | Page 306 Note 6 |
| Total | 27.89 | |

ATGL

| Particulars | INR bn | ATGL FY22 Annual Report reference |
|---|-------------|-----------------------------------|
| Cash & Cash Equivalents | 0.31 | Page 308 |
| [+] Bank Balances | 0.03 | Page 308 |
| [+] Balances held as Margin Money or security against Credit facilities | 3.15 | Page 328 Note 6 |
| [+] Fixed Deposits with Original Maturity more than 12 months | 0.40 | Page 328 Note 6 |
| Total | 3.89 | |

Debt - As on 31 Mar 22

AGEL

| Particulars | INR bn | AGEL FY22 Annual Report reference |
|-----------------------|---------------|-----------------------------------|
| Non Current Debt | 427.17 | Page 435, Note 19A |
| Shareholders sub debt | (70.78) | Page 435, Note 19A |
| Net Long term Debt | 356.39 | |
| Current Debt | 34.63 | Page 446, Note 19B |
| Shareholders sub debt | (7.20) | Page 446, Note 19B |
| Trade Credit | 60.08 | Page 446, Note 19B |
| Short term Debt | 87.51 | |
| Total | 443.90 | |

ATGL

| Particulars | INR bn | ATGL FY22 Annual Report reference |
|------------------|-------------|-----------------------------------|
| Non Current Debt | 3.52 | Page 333, Note 18 |
| Current Debt | 4.64 | Page 335, Note 23 |
| Trade Credit | 1.79 | Page 335, Note 23 |
| Short term Debt | 6.43 | |
| Total | 9.95 | |

APL

| Particulars | INR bn | APL FY22 Annual Report reference |
|-----------------------|---------|----------------------------------|
| Non Current Debt | 378.71 | Page 312, Note 20 |
| Shareholders sub debt | (68.28) | Page 312, Note 20 |
| Net Long term Debt | 310.43 | |
| Current Debt | 78.73 | Page 318, Note 26 |
| Shareholders sub debt | (5.49) | Page 318, Note 26 |
| Trade Credit | 30.51 | Page 318, Note 26 |
| Short term Debt | 103.75 | |
| Total | 414.18 | |

ATL

| Particulars | INR bn | ATL FY22 Annual Report reference |
|-----------------------|---------|----------------------------------|
| Non Current Debt | 277.74 | Page 439, Note 22 |
| Shareholders sub debt | (23.24) | Page 439, Note 22 |
| Net Long term Debt | 254.51 | |
| Current Debt | 20.41 | Page 445, Note 29 |
| Short term Debt | 20.41 | |
| Total | 274.91 | |

AEL

| Particulars | INR bn | AEL FY22 Annual Report reference |
|-----------------------|---------|----------------------------------|
| Non Current Debt | 208.03 | Page 397, Note 22 |
| Shareholders sub debt | (61.62) | Page 419, Note 42 |
| Net Long term Debt | 146.41 | |
| Current Debt | 202.20 | Page 402, Note 27 |
| Shareholders sub debt | (63.79) | Page 419, Note 42 |
| Short term Debt | 138.41 | |
| Total | 284.83 | |

APSEZ

| Particulars | INR bn | APSEZ FY22 Annual Report reference |
|-----------------------|--------|------------------------------------|
| Non Current Debt | 396.91 | Page 563, Note 14 |
| Shareholders sub debt | (1.15) | Page 563, Note 14 |
| Net Long term Debt | 395.76 | |
| Current Debt | 51.61 | Page 570, Note 18 |
| Trade Credit | 9.00 | Page 570, Note 18 |
| Short term Debt | 60.61 | |
| Total | 456.37 | |

Annexure 2: Disclosures in public documents

- (I) Offering circular dated July 28, 2016 for U.S.\$500,000,000 Senior Secured Notes issued by Adani Transmission Limited

- (A) Risk Factor in relation to the DRI Show Cause Notice

There are claims of alleged customs violations against us, which if adversely determined, could have a material adverse effect on our business

In 2014, the Directorate of Revenue Intelligence in India (the “DRI”) issued a show cause notice against MEGPTCL. The notice alleges that MEGPTCL, in relation to the procurement of equipment and machinery from outside India, inflated invoices above the actual value of the goods, in violation of the Customs Act, 1962. Notwithstanding certain media allegations regarding relationships between us and Electrogen Infra FZE, a subcontractor for the equipment and machinery that is the subject of the DRI notice, we believe our procurement of the equipment and machinery that is the subject of the DRI notice was conducted on an **arm’s length basis in accordance with all applicable laws. This matter is still pending with the DRI.** If the DRI were to issue an adverse order against us, we could appeal to the courts, up to the Supreme Court of India. However, we cannot assure you that the DRI or any other regulator or any court will accept our position. The alleged amount of overvaluation represented approximately 13% of our consolidated assets as of March 31, 2016. Any order or judgment against MEGPTCL could result in significant monetary fines and confiscation of equipment and machinery and other adverse consequences, including penalties under Indian law, including without limitation the FEMA. Our management’s time may be diverted in relation to such proceedings, and we may also be required to utilize financial resources for our defense. Any potential violation of any Indian laws and regulations, if adversely determined, could have a material adverse effect on our business, prospects, financial condition, results of operations and reputation. See also “*Legal Proceedings—Litigation Relating to Subsidiaries—MEGPTCL*”.

- (B) Risk factor in relation to material related party transactions

We have material related party transactions and may continue to do so.

We have entered into transactions with other Adani Group Companies in the ordinary course of our business. While we believe that all such transactions (which have included (unsecured) inter-corporate deposits and guarantees given on behalf of our subsidiaries and **joint ventures**) have been conducted on an arm’s length basis, we might have achieved more favorable terms had such transactions not been entered into with related parties. Furthermore, we may enter into additional related party transactions in the ordinary course of our business in accordance with the provisions of the Common Terms Deed. Such transactions, individually or in the aggregate, could have a material adverse effect on our business, prospects, financial condition and results of operations. See “*Management’s Discussion and Analysis of Financial Condition and Results of Operations – Related Party Transactions*”.

- (C) Risk factor in relation to claims against directors and/or other Adani Group Companies or Promoters

There are claims made against us, our directors and/or other Adani Group Companies or Promoters from time to time that can result in litigation or regulatory proceedings which could result in liability or harm our reputation.

From time to time, we and/or our directors and management are involved in litigation, claims and other proceedings relating to the conduct of our business, including environmental claims, non-compliance with provisions of our various licenses, tax disputes and proceedings involving the securities dealings of our directors. Any claims could result in litigation against us and could also result in regulatory proceedings being brought against us by various government and state agencies that regulate our business. Often these cases raise complex factual and legal issues, which are subject to risks and uncertainties and which could require significant time from our directors and/or our management, Promoters or Adani Group Companies. Litigation and other claims and regulatory proceedings against us or our management could result in unexpected expenses and liabilities and could also materially adversely affect our business, prospects, financial condition and results of operations.

Currently, there are outstanding legal proceedings against us that are incidental to our business and operations, including certain criminal proceedings against our Company, certain of our Directors, Promoters and our subsidiaries. These proceedings are pending at different levels of adjudication before various courts, tribunals, enquiry officers and appellate tribunals. Such proceedings could divert management time and attention, and consume financial resources in their defense. Further, an adverse judgment in some of these proceedings could have a material adverse effect on our business, prospects, financial condition and results of operations. For further details, see “*Legal Proceedings*”.

In addition, other Adani Group Companies from time to time are involved in litigation, claims and other proceedings relating to the conduct of their businesses, including environmental claims, proceedings relating to abuse of market position, tax disputes and proceedings involving securities dealings by other Adani Group Companies and/or their directors. Any such claims could result in litigation and/or regulatory proceedings against the Adani Group, which could harm our reputation as a member of the Adani Group and materially adversely affect our business, prospects, financial condition and results of operations.

(D) Disclosure of legal proceedings in relation to Customs Act and DRI Show Cause Notice

Litigation Relating to Directors

There are three outstanding legal proceedings involving Mr. Gautam S. Adani. These relate to: (i) a civil dispute filed by Container Corporation of India Limited seeking to restrain the defendants named therein, including AEL and Mr. Gautam Adani, from proceeding with a cold chain project; (ii) the alleged violation of certain provisions of the Customs Act, 1962 **(the “Customs Act”) relating to the alleged misuse** of an advance license granted to a third party for the import of metallurgical coke and the evasion of customs duty in relation thereto; and (iii) the alleged violation of certain provisions of the Customs Act relating to the import and misuse of an aircraft. These proceedings are pending at various stages of adjudication.

There are certain outstanding legal proceedings involving Mr. Rajesh S. Adani in relation to alleged violations of the Customs Act, the Foreign Exchange Regulations Act, 1973 and FEMA. Such proceedings relate to alleged violations stemming from the import and export of various items by AEL, investment in a wholly-owned subsidiary without prior approval from the RBI and remittance of overseas agency commission. These proceedings are pending at various stages of adjudication.

Litigation related to Subsidiaries

MEGPTCL

In 2014, the DRI issued a show cause notice to MEGPTCL. The notice alleges that MEGPTCL, in relation to the procurement of equipment and machinery from outside India, inflated invoices above the actual value of the goods in violation of the Customs Act, 1962.

Notwithstanding certain media allegations regarding relationships between us and Electrogen Infra FZE, a subcontractor for the equipment and machinery that is the subject of the DRI notice, we believe our procurement of the equipment and machinery that is the **subject of the DRI notice was conducted on an arm's length basis in accordance with all applicable laws**. This matter is still pending with the DRI. If the DRI were to issue an adverse order against us, we could appeal to the courts, up to the Supreme Court of India. However, there can be no assurance that the DRI or any other regulator or any court will accept our position. The alleged amount of overvaluation represented approximately 13% of our consolidated assets as of March 31, 2016. Any order or judgment against MEGPTCL could result in significant monetary fines and confiscation of equipment and machinery, and there could be other adverse consequences, including penalties under Indian law, including **without limitation the FEMA. See "Risk Factors—Risks Related to Our Operational Projects—**There are claims of alleged customs violations against us, which if adversely determined, could have a material adverse **effect on our business"**.

(II) Offering circular dated November 14, 2019 for U.S. \$500,000,000 Senior Secured Notes issued by Adani Transmission Limited

(A) Risk Factor in relation to the DRI Show Cause Notice

There are claims of alleged customs violations against us, which if adversely determined, could have a material adverse effect on our business. In 2014, the Directorate of Revenue **Intelligence in India (the "DRI") issued a show cause notice against MEGPTCL. The notice** alleged that MEGPTCL, in relation to the procurement of equipment and machinery from outside India, inflated invoices above the actual value of the goods, in violation of the Customs Act, 1962. 32 Notwithstanding certain media allegations regarding relationships between us and Electrogen Infra FZE, a subcontractor for the equipment and machinery that is the subject of the DRI notice, we believe our procurement of the equipment and **machinery that is the subject of the DRI notice was conducted on an arm's length basis in accordance with all applicable laws**. The alleged amount of overvaluation represented approximately 13% of our consolidated assets as of March 31, 2016. In October 2017, the Additional Director General (Adjudication), the adjudicating authority of the DRI (the "Adjudicating Authority"), **set aside all the allegations and dropped the show cause notice**. It has been held by the Adjudicating Authority that all the imports between the Adani group **entities in India and Electrogen Infra FZE were genuine and being undertaken at arm's length** and concluded that the value declared is correct and the value is not required to be re-determined. In February 2018, the Indian Customs Department filed an appeal against the DRI order before the Appellate Tribunal, Mumbai. However, no stay has been granted against the DRI order. The matter is currently pending and no hearing date has been fixed as of the date of this Offering Circular. Any order or judgment against MEGPTCL could result in significant monetary fines and confiscation of equipment and machinery and other adverse consequences, including penalties under Indian law, including without limitation the FEMA. **Our management's time may be diverted in relation to such proceedings, and we may also** be required to utilize financial resources for our defense. Any potential violation of any Indian laws and regulations, if adversely determined, could have a material adverse effect

on our business, prospects, financial condition, results of operations and reputation. See also “*Legal Proceedings – Litigation Relating to Subsidiaries – MEGPTCL*”.

(B) Risk factor in relation to material related party transactions

We have material related party transactions and may continue to do so.

We have entered into transactions with other Adani Group Companies in the ordinary course of our business. While we believe that all such transactions (which have included (unsecured) inter-corporate deposits and guarantees given on behalf of our subsidiaries and joint ventures) **have been conducted on an arm’s length basis, we might have achieved more favorable terms had such transactions not been entered into with related parties.** Furthermore, we may enter into additional related party transactions in the ordinary course of our business in accordance with the provisions of the Common Terms Deed. Such transactions, individually or in the aggregate, could have a material adverse effect on our **business, prospects, financial condition and results of operations.** See “*Management’s Discussion and Analysis of Financial Condition and Results of Operations – Related Party Transactions*”.

(C) Risk factor in relation to claims against directors and /or other Adani Group Companies or Promoters

There are claims made against us, our directors and/or other Adani Group Companies or Promoters from time to time that can result in litigation or regulatory proceedings which could result in liability or harm our reputation.

From time to time, we and/or our directors and management are involved in litigation, claims and other proceedings relating to the conduct of our business, including environmental claims, non-compliance with provisions of our various licenses, tax disputes and proceedings involving the securities dealings of our directors. Any claims could result in litigation against us and could also result in regulatory proceedings being brought against us by various government and state agencies that regulate our business, including the Ministry of Environment, Forest and Climate Change (“MoFF”), **the CERC, the MERC and SEBI.** Often these cases raise complex factual and legal issues, which are subject to risks and uncertainties and which could require significant time from our directors and/or our management, Promoters or Adani Group Companies. Litigation and other claims and regulatory proceedings against us or our management could result in unexpected expenses and liabilities and could also materially adversely affect our business, prospects, financial condition and results of operations. Currently, there are outstanding legal proceedings against us that are incidental to our business and operations, including certain criminal proceedings against our Company, certain of our Directors, Promoters and our subsidiaries. These proceedings are pending at different levels of adjudication before various courts, tribunals, enquiry officers and appellate tribunals. For example, on December 10, 2018, the MERC constituted a factfinding committee to investigate an increase in power bills issued by AEML from September to November 2018. The fact finding committee concluded that the electricity bills were raised on the basis of tariffs approved by the MERC. We believe that the increase in power bills was due to an increase in power consumption brought on inter alia, by high temperatures and increased humidity during the period investigated by the **MERC, and due to the worker’s strike organized in the period from August 28 to September 1, 2018,** due to which a large number of electricity meters could not be read. The committee inter alia, recommended that since adverse weather conditions are likely to arise at least twice a year, AEML should switch to smart meters in a phased and time bound manner and that consumers should have the option of viewing their consumption on a real time basis. Following this incident, we have taken several remedial measures such as increasing our use

of smart meters to more accurately measure power consumption and enhance the efficiency and accuracy of our meter reading and bill distribution process. Any similar investigations or other proceedings in the future could divert management time and attention, and consume financial resources in their defense. Further, an adverse judgment in some of these proceedings could have a material adverse effect on our business, prospects, reputation, **financial condition and results of operations. For further details, see “Legal Proceedings”.** In addition, other Adani Group Companies from time to time are involved in litigation, claims and other proceedings relating to the conduct of their businesses, including environmental claims, proceedings relating to abuse of market position, tax disputes and proceedings involving securities dealings by other Adani Group Companies and/or their directors. Any such claims could result in litigation and/or regulatory proceedings against the Adani Group, which could harm our reputation as a member of the Adani Group and materially adversely affect our business, prospects, financial condition and results of operations.

(D) Disclosure of legal proceedings in relation to Customs Act and DRI Show Cause Notice

Litigation Relating to Directors

There are three outstanding legal proceedings involving Mr. Gautam S. Adani. These relate to: (i) a civil dispute filed by Container Corporation of India Limited seeking to restrain the defendants named therein, including AEL and Mr. Gautam Adani, from proceeding with a cold chain project; (ii) alleged violation of certain provisions of the Customs Act, 1962 (the **“Customs Act”**) relating to the alleged misuse of an advance license granted to a third party for the import of metallurgical coke and the evasion of customs duty in relation thereto, which matter is presently pending on appeal before the Supreme Court; and (iii) alleged violation of certain provisions of the Customs Act relating to the import and misuse of an aircraft, which is pending before the Customs, Excises and Service Tax Appellate Tribunal (**“Appellate Tribunal”**). **Matters relating to similar violations are pending before the Supreme Court of India.** The Appellate Tribunal has kept the matter before it pending, with liberty to be mentioned, once the Supreme Court has resolved the matters pending before it. These proceedings are pending at various stages of adjudication. There are certain outstanding legal proceedings involving Mr. Rajesh S. Adani in relation to alleged violations of the Customs Act, the Foreign Exchange Regulations Act, 1973 and FEMA. Such proceedings relate to alleged violations in relation to the import and export of various items by AEL and investment in a wholly-owned subsidiary without prior approval from the RBI. These proceedings are pending at various stages of adjudication.

Litigations involving MEGPTCL

Civil Cases

The Directorate of Revenue Intelligence (**“DRI”**) issued a show cause notice dated May 15, 2014 (the **“Notice”**) to MEGPTCL and others. The notice alleges that MEGPTCL, in relation to the procurement of equipment and machinery from outside India, inflated invoices above the actual value of the goods in violation of the Customs Act, 1962. Through an order dated **October 17, 2017 (the “Order”)**, the **Additional Director General, DRI (Adjudication)** who issued the show cause notice, after dealing with the issue in detail, set aside the allegations levelled in the Notice, holding that the import of equipment and machinery by MEGPTCL **was undertaken on an arm’s length basis. The Customs Department has filed an appeal** against the Order before the Customs, Excise and Service Tax Appellate Tribunal at Mumbai. No stay has presently been granted against the Order. This matter is currently pending.

(III) Offering circular dated February 5, 2020 for U.S.\$1,000,000,000 Senior Secured Notes by Adani Electricity Mumbai Limited

(A) Disclosure in relation to the DRI Show Cause Notice

Certain Adani Group Companies are involved in various legal, regulatory and other proceedings which could have a material adverse effect on our business and reputation.

Certain Adani Group Companies from time to time are involved in litigation, claims and other proceedings relating to the conduct of their businesses, including environmental claims, proceedings relating to abuse of market position, tax disputes and proceedings involving securities dealings by other Adani Group Companies and/or their directors. Any such claims could result in litigation, including regulatory proceedings by Government and other agencies including the MERC, the MOEF, the Maharashtra Pollution Control Board, the Ministry of Home Affairs, the Central Bureau of Investigation and SEBI against the relevant Adani Group Company, which could harm our reputation and materially adversely affect our business, prospects, financial condition and results of operations.

Notwithstanding certain media allegations regarding relationships of the relevant Adani Group Company with Electrogen Infra FZE, a subcontractor for the equipment and machinery **that is the subject of the DRI notice, we believe that the relevant Adani Group Company's** procurement of the equipment and machinery, that is the subject of the DRI notice, was **conducted on an arm's length basis in accordance with all applicable laws. In October 2017**, the Additional Director General (Adjudication), the adjudicating authority of the DRI (the "Adjudicating Authority"), **set aside** all the allegations and dropped the show cause notice. It has been held by the Adjudicating Authority that all the imports between the Adani group **entities in India and Electrogen Infra FZE were genuine and being undertaken at arm's length** and concluded that the value declared is correct and the value is not required to be re-determined.

In February 2018, the Indian Customs Department filed an appeal against the DRI order before the Appellate Tribunal, Mumbai. However, no stay has been granted against the DRI order. The matter is currently pending and no hearing date has been fixed as of the date of this Offering Circular. Any order or judgment in this matter could result in significant monetary fines and confiscation of equipment and machinery and other adverse consequences, including penalties under Indian law, including without limitation the FEMA. **The management's time may be diverted in relation to such proceedings, and Adani Group Companies may also be required to utilize financial resources towards these matters.** Any potential violation of any Indian laws and regulations, if adversely determined, could have **a material adverse effect on the Adani Group's business, prospects, financial condition, results of operations and reputation.**

(B) Disclosure in relation to the related party transactions

We have material related party transactions and will continue to do so in the future. We have entered into transactions with other entities owned by the Adani Group, including ATL, in the ordinary course of our business. While we believe that all such transactions (which **have included supply of services and inter entity loans**) **have been conducted on an arm's length basis**, we might have achieved more favorable terms had such transactions not been entered into with related parties. Furthermore, we may enter into additional related party transactions, in the ordinary course of our business in the future. Such transactions, individually or in the aggregate, could have a material adverse effect on our business, prospects, **financial condition, results of operations and cash flows. See "Management's Discussion and Analysis of Financial Condition and Results of Operations – Related Party Transactions" for further details.**

(IV) Offering circular dated July 13, 2021 for U.S.\$2,000,000,000 Global Medium Term Note Programme by Adani Electricity Mumbai Limited

(A) Disclosure in relation to the DRI Show Cause Notice

Certain Adani Group Companies are involved in various legal, regulatory and other proceedings which could have a material adverse effect on our business and reputation.

Certain Adani Group Companies from time to time are involved in litigation, claims and other proceedings relating to the conduct of their businesses, including environmental claims, proceedings relating to abuse of market position, tax disputes and proceedings involving securities dealings by other Adani Group Companies and/or their directors. Any such claims could result in litigation, including regulatory proceedings by the Gol and other agencies including MERC, the Ministry of Environment, Forest and Climate Change (the “MoEF”), **the Maharashtra Pollution Control Board, the Ministry of Home Affairs**, the Central Bureau of Investigation and SEBI against the relevant Adani Group Company, which could harm our reputation and materially adversely affect our business, prospects, financial condition and results of operations.

In February 2018, the Indian Customs Department filed an appeal against the Directorate of **Revenue Intelligence, Gol (“DRI”) order before the Appellate Tribunal, Mumbai. However**, no stay has been granted against the DRI order. The matter is currently pending, and no hearing date has been fixed as of the date of this Offering Circular. Any order or judgment in this matter could result in significant monetary fines and confiscation of equipment and machinery and other adverse consequences, including penalties under Indian law, including, **without limitation, the FEMA. The management’s time may be diverted in relation to such proceedings**, and Adani Group Companies may also be required to utilize financial resources towards these matters. Any potential violation of any Indian laws and regulations, if **adversely determined, could have a material adverse effect on the Adani Group’s business**, prospects, financial condition, results of operations and reputation.

(B) Disclosure in relation to the related party transactions

We have material related party transactions and will continue to do so in the future.

We have entered into transactions with other entities owned by the Adani Group, including ATL, in the ordinary course of our business. While we believe that all such transactions (which have included supply of services and inter entity loans) have been conducted on an **arm’s length basis, we might have achieved more favorable terms had such transactions not** been entered into with related parties. Furthermore, we may enter into additional related party transactions, in the ordinary course of our business in the future. Such transactions, individually or in the aggregate, could have a material adverse effect on our business, prospects, financial condition, results of operations **and cash flows. See “Management’s Discussion and Analysis of Financial Condition and Results of Operations – Related Party Transactions” for further details.**

(V) Offering circular dated July 26, 2021 for USD 750 Million issued by ASPEZ

(A) DRI Disclosure

Certain Adani Group Companies are involved in various legal, regulatory and other proceedings which could have a material adverse effect on our business and reputation.

Certain Adani Group Companies from time to time are involved in litigation, claims and other proceedings relating to the conduct of their businesses, including environmental claims and proceedings, tax disputes and other regulatory proceedings. Any such claims could result in litigation, including regulatory proceedings by the GoI and other agencies including DRI and SEBI against the relevant Adani Group Company, which could materially adversely affect our business, prospects, financial condition and results of operations. Adani Group Companies may also be required to utilize financial resources towards these matters. Any potential violation of any Indian laws and regulations, if adversely determined, could **have a material adverse effect on the Adani Group's business, prospects, financial condition, results of operations and reputation.**

Claims made against us, our directors and/or other Adani Group companies from time to time can result in litigation or regulatory proceedings which could result in liability or harm our reputation.

From time to time, we and/or our directors and management are involved in litigation, claims and other proceedings relating to the conduct of our business, including environmental claims, non-compliance with provisions of our various licenses, tax disputes, and proceedings involving the securities dealings of our directors. Any claims could result in litigation against us and could also result in regulatory proceedings being brought against us by various Government and state agencies that regulate our business, including the MoEF, the respective state pollution control boards, the Ministry of Commerce, Directorate of Revenue Intelligence, the Serious Fraud Investigation Office, the Ministry of Home Affairs and SEBI. Often these cases raise complex factual and legal issues, which are subject to risks and uncertainties and which could require significant time from our directors and/or our management. Litigation and other claims and regulatory proceedings against us or our management could result in unexpected expenses and liability and could also materially **adversely affect our operations and our reputation. For further details, see "Legal Proceedings"**.

Adani Group companies from time to time are involved in litigation, claims and other proceedings relating to the conduct of their businesses, including environmental claims, proceedings relating to abuse of market position, tax disputes and proceedings involving securities dealings by other Adani Group companies and/or their directors. Any claims could result in litigation and/or regulatory proceedings against the Adani Group, which could harm our reputation as a member of the Adani Group and ultimately materially adversely affect our operations.

(B) Disclosure referring SEBI and Indian securities market

There may be less information available in the Indian securities markets than in more developed securities markets in other countries.

There is a difference between the level of regulation and monitoring of the Indian securities markets and that of the activities of investors, brokers and other participants in securities

markets in more developed economies. SEBI is responsible for monitoring disclosure and other regulatory standards for the Indian securities market. SEBI has issued regulations and guidelines on disclosure requirements, insider trading and other matters. There may be, however, less publicly available information about Indian companies than is regularly made available by public companies in more developed countries, which could adversely affect the market for the Notes. As a result, investors may have access to less information about our business, financial condition, cash flows and results of operations, on an ongoing basis, than investors in companies subject to the reporting requirements of other more developed countries.

(C) Representation referring SEBI in Section - Board of Directors and Senior Management)

Prohibition by SEBI or Other Governmental Authorities

None of the Directors or the companies with which they are or were associated as promoters, directors or persons in control are currently debarred from accessing the capital markets under any order or direction passed by SEBI, stock exchanges in India or court/tribunal.

(D) Disclosure of legal proceedings in relation to violations of the Customs Act, 1962 and FEMA stemming from import and export of items by AEL

Litigation Relating to Directors

There are certain outstanding legal proceedings involving Mr. Rajesh S. Adani. These relate to (i) alleged violations of the Customs Act, 1962, Foreign Exchange Regulations Act, 1973 and FEMA, which relate to violations stemming from the import and export of various items by AEL investment in a wholly-owned subsidiary without prior approval from the RBI; (ii) a criminal complaint under Sections 420 and 120B of the Indian Penal Code, 1860 was filed by **the Serious Fraud Investigation Office (“SFIO”) before the learned magistrate, Ballard Pier, Mumbai** against Mr. Rajesh S. Adani and others on the allegation that he conspired with the other accused in relation to share prices of AEL. The learned magistrate, Ballard Pier, Mumbai discharged Mr. Rajesh S. Adani on the grounds that no prima facie case was made out by the SFIO against him. However, the SFIO challenged that order before the Court of **the Sessions for Greater Mumbai (“Sessions Court”) by way of a criminal revision application**. Further, the Sessions Court has allowed the criminal revision application and directed the parties to appear before the Additional Chief Metropolitan Magistrate for hearing (the **“Impugned Order”**). **Subsequently, Rajesh S. Adani and Gautam S. Adani have filed a writ petition before the High Court of Judicature at Bombay (“High Court”) challenging the Impugned Order**. Currently, the High Court has stayed the Impugned Order until the next hearing; (iii) the alleged violation of certain provisions of the Customs Act, 1962 relating to the import and misuse of an aircraft; and (iv) certain complaints were filed in relation to products of Adani Wilmar Limited before various forums under the Prevention of Food Adulteration Act, 1954 against Adani Wilmar Limited, its nominees, Mr. Rajesh S. Adani (in his capacity as the director of Adani Wilmar Limited) and others. The matters are currently pending.

[Note: Please note that a similar disclosure on proceedings pertaining to import and export of items by AEL was also included in the Offering Circular dated January 26, 2021 for notes of USD 500 million issued by APSEZ, Offering Circular dated July 28, 2020 for notes of USD 750 million issued by APSEZ, Offering Circular dated July 16, 2019 for notes of USD 650

million issued by APSEZ, Offering Circular dated July 22, 2015 for notes of USD 650 million issued by APSEZ.]

(E) Disclosure of legal proceedings in relation to stock manipulation

Litigation Relating to Directors

There are certain outstanding legal proceedings involving Mr. Gautam S. Adani. These relate to (i) a civil dispute filed by Container Corporation of India Limited seeking to restrain defendants named therein, including Adani Logistics and Mr. Gautam Adani from proceeding with a cold chain project; (ii) a criminal complaint under Sections 420 and 120B of the Indian **Penal Code, 1860 was filed by the Serious Fraud Investigation Office (“SFIO”) before the learned magistrate, Ballard Pier, Mumbai against Mr. Gautam S. Adani and others on the allegation that he conspired with the other accused in relation to share prices of AEL. The learned magistrate, Ballard Pier, Mumbai discharged Mr. Gautam S. Adani on the grounds that no prima facie case was made out by the SFIO against him. However, the SFIO challenged that order before the Court of the Sessions for Greater Mumbai (“Sessions Court”) by way of a criminal revision application. Further, the Sessions Court has allowed the criminal revision application and directed the parties to appear before the Additional Chief Metropolitan Magistrate for hearing (the “Impugned Order”). Subsequently, Rajesh S. Adani and Gautam S. Adani have filed a writ petition before the High Court of Judicature at Bombay (“High Court”) challenging the Impugned Order. Currently, the High Court has stayed the Impugned Order until the next hearing;** (iii) the alleged violation of certain provisions of the Customs Act, 1962 relating to the import and misuse of an aircraft; and (iv) certain complaints were filed in relation to products of Adani Wilmar Limited before various forums under the Prevention of Food Adulteration Act, 1954 against Adani Wilmar Limited, its nominees, Mr. Gautam S. Adani (in his capacity as the director of Adani Wilmar Limited) and others. The matters are currently pending. [Note: Please note that similar disclosures in relation to the SFIO complaint were included in the offering circulars for Offering Circular dated January 26, 2021 for notes of USD 500 million issued by APSEZ, Offering Circular dated July 28, 2020 for notes of USD 750 million issued by APSEZ, Offering Circular dated July 16, 2019 for notes of USD 650 million issued by APSEZ.]

(F) Disclosure on reason for resignation of Chief Financial Officer

Mr. Deepak Maheshwari, Chief Financial Officer, has resigned due to personal reasons with effect from May 5, 2021.

(VI) APSEZ Institutional Private Placement Prospectus dated June 5, 2013

Our Promoters and certain Promoter Group entities have in the past been subject to criminal litigations initiated by SEBI which were compounded pursuant to consent applications.

SEBI had filed a criminal complaint against Adani Enterprises Limited, Rajeshbhai S. Adani Family Trust (represented by its trustees Rajesh S. Adani and Ms. Shilin R. Adani) and certain **other Promoter Group entities (collectively the “Promoter Group Entities”) in the Court of Additional Chief Metropolitan Magistrate, Mumbai in relation to violation of various**

provisions of the SCRA and certain notifications issued by SEBI. In accordance with the SEBI Circular no. EFD/ED/Cir-I/2007 dated April 20, 2007 (the “Circular”), the Promoter Group Entities had filed consent applications dated January 16, 2008 (the “Consent Applications I”). Pursuant to the Consent Applications I, the criminal case was compounded by the Court of Additional Chief Metropolitan Magistrate Court, Mumbai through order dated August 30, 2008 upon payment of ₹ 3.00 million. SEBI had issued a show cause notice to certain entities **forming part of the Promoter Group (“Prohibited Entities”) in relation to aiding and abetting** entities associated with Ketan Parekh in manipulating the price of the equity shares of Adani Enterprises Limited. Further, by an order dated May 25, 2007, SEBI prohibited the Prohibited Entities from accessing the securities market directly or indirectly and also prohibited them from buying, selling or otherwise dealing in securities, in any manner whatsoever, for a **period of two years. An appeal was filed with Securities Appellate Tribunal (“SAT”) against** the above mentioned SEBI order. In accordance with the Circular the Prohibited Entities had filed consent applications dated November 28, 2007. SEBI vide its letter dated April 17, 2008 agreed to settle the case upon payment of certain amounts by the Prohibited Entities. The terms of the settlement were approved by SAT by its order dated April 24, 2008.

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SEBI had filed a criminal complaint against Adani Enterprises Limited, Rajeshbhai S. Adani Family Trust (represented by its trustees Rajesh S. Adani and Ms. Shilin R. Adani) and certain **other Promoter Group entities (collectively the “Promoter Group Entities”) in the Court of** Additional Chief Metropolitan Magistrate, Mumbai in relation to violation of various provisions of the SCRA and certain notifications issued by SEBI. In accordance with the SEBI Circular no. EFD/ED/Cir-I/2007 dated April 20, 2007 (the “Circular”), the Promoter Group Entities had filed consent applications dated January 16, 2008 (the “Consent Applications I”). Pursuant to the Consent Applications I, the criminal case was compounded by the Court of Additional Chief Metropolitan Magistrate Court, Mumbai through order dated August 30, 2008 upon payment of ₹ 3.00 million. SEBI had issued a show cause notice to certain entities **forming part of the Promoter Group (“Prohibited Entities”) in relation to aiding and abetting** entities associated with Ketan Parekh in manipulating the price of the equity shares of Adani Enterprises Limited. Further, by an order dated May 25, 2007, SEBI prohibited the Prohibited Entities from accessing the securities market directly or indirectly and also prohibited them from buying, selling or otherwise dealing in securities, in any manner whatsoever, for a period of two years. An appeal was filed with Securities Appellate Tribunal **(“SAT”) against the above mentioned SEBI order. In accordance with the Circular the** Prohibited Entities had filed consent applications dated November 28, 2007. SEBI vide its letter dated April 17, 2008 agreed to settle the case upon payment of certain amounts by the Prohibited Entities. The terms of the settlement were approved by SAT by its order dated April 24, 2008.

Litigation against Directors

There are two outstanding legal proceedings involving Mr. Gautam S. Adani. These relate to (i) a civil dispute seeking to restrain defendants named therein from proceeding with a cold chain project, and (ii) alleged violation of certain provisions of the Customs Act, 1962 emanating from alleged misuse of advance licence granted to a third party for import of metallurgical coke and evasion of customs duty in relation thereof. These proceedings are pending at various stages of adjudication. There are certain outstanding legal proceedings

involving Mr. Rajesh S. Adani in relation to alleged violations of the Customs Act, 1962, Foreign Exchange Regulations Act, 1973 and Foreign Exchange Management Act, 1999. Such proceedings relate to violations stemming from import and export of various items, investment in a wholly owned subsidiary without prior approval from RBI and remittance of overseas agency commission. These proceedings are pending at various stages of adjudication.

Annexure 3: Order of Customs, Excise & Service Tax Appellate Tribunal (CESTAT)
dated 26th August 2015

Tel. : 2375 4933 (Hunting Line)
Fax. : 2375 4910 / 2371 6439

Email : cestatmumbai@gmail.com
Web Site : www.cestat.gov.in
BY HAND DELIVERY/ REGD A.D./SPEED POST

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH**

3rd, 4th, & 5th Floor, Jai Centre, 34, P. D'Mello Road,
Poona Street, Masjid Bunder (East), Mumbai - 400 009.

Dated : 26-08-2015

From : The Assistant Registrar, CESTAT, MUMBAI.

To,

CC (II) -
(AIRPORT
SPECIAL CARGO),
MUMBAI

COMMISSIONER OF CUSTOMS (II) - (AIRPORT
SPECIAL CARGO), 6TH FLOOR, AVAS CORPORATE
POINT, MAKWANA LANE
ANDHERI-KURLA ROAD, BEHIND S.M. CENTRE
ANDHERI EAST, MUMBAI
MUMBAI-400059

2660

In the matter of CC (II) - (AIRPORT SPECIAL CARGO), MUMBAI

Appellant / Applicant

V/S

SHRI SAMIR VORA,

Respondent

I am directed to transmit herewith a certified copy of order passed by the Tribunal under Section 35(1) of the central Excise Act, 1944, Section 129(B) of the Customs Act, 1962 and Finance Act, 1994 as mentioned below.

| Appeal No. | Application No. | Order No. | Date | Pronouncement Date |
|----------------|-----------------|-------------------|------------|--------------------|
| C/86660/13-MUM | | A/2733-2744/15/CB | 09/04/2015 | 26-08-2015 |

Copy to :

1. Respondent

SHRI SAMIR VORA,

HINDUJA EXPORT PVT LTD,
ADANI HOUSE, SHRIMALI SOCIETY,
NAVRANGPURA,

INDORE-452 001

2. Advocate / Consultant

K.M.Mondal

509, Rex Chambers
Walchand Hirachand Marg
Balard Estate
Mumbai-400038

3. Authority

OINA : ----

Advocate / Consultant

J.H. Motwani

PDS Legal, 20th Floor,
Express Towers, Nariman
Point,
Mumbai - 400 021

V.S. Nankani

Atul Nanda, Sr. Adv.

Hameeza Hakeem

Nehal Parekh

Rohit Nanchani

V. K. Singh, Spl. Counsel

1. Commissioner (A.R.) for CESTAT, Mumbai

2. CESTAT Bar Association, New Delhi.

3. CESTAT Bar Association, Mumbai.

4. Master File.

5. M/s Centax publications Pvt. Ltd., New Delhi.

6. Taxmann Allied Services Pvt. Ltd., New Delhi.

7. Company Law Institute of India Pvt. Ltd. Chennai.

8. Taxindiaonline.com Pvt. Ltd., New Delhi.

9. M/s. Mark Professional Services Pvt. Ltd.

10. Easy Service Tax Online Dot Com Pvt. Ltd.,
Ahmedabad.

11. Lawcruz Advisors Pvt. Ltd., Faridabad
(Haryana).

Prepared by

Checked by

Deputy / Asst. Registrar

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO. II**

| APPEAL No. | APPELLANT | RESPONDENT |
|----------------------|---|---|
| C/86660/13 | CC (II) Airport Special Cargo, Mumbai | Shri Samir Vora |
| | | Shri Shah, Director Aditya Corpex Pvt. Ltd. |
| | | Formerly M/s Adani Enterprises Ltd. M/s Adani Exports Ltd. |
| | | M/s Hinduja Exports Pvt. Ltd. |
| | | M/s Aditya Corpex Pvt. Ltd. |
| | | M/s Bagadiya Brothers Pvt. Ltd. |
| | | M/s Jayant Agro Organics Pvt. Ltd. |
| | | M/s Midex Overseas Ltd. |
| | | Shri Rajesh Adani Group Manageing Director |
| | | Shri Deven Mehta |
| | | Shri OMI Bagadiya |
| | | Shri Vithaldas Gokaldas Udeshi |
| Shri Narottam Somani | | |
| C/85401/13 | Formerly M/s Adani Enterprises Ltd. M/s Adani Exports Ltd. | CC (II) Airport Special Cargo, Mumbai |
| C/85402/13 | Shri Rajesh Adani | Do |
| C/85403/13 | M/s Jayant Agro Organics Ltd. | Do |
| C/85404/13 | Shri Saurin Shah | Do |
| C/85405/13 | Shri Samir Vora | Do |
| C/85396/13 | M/s Milestone Tradelinks Pvt. Ltd. | Do |
| C/85423/13 | Shri Vithaldas Gokaldas Udeshi | Do |
| C/85521/13 | M/s Bagadiya Brothers Pvt. Ltd. | Do |
| C/85533/13 | Shri Narottam Somani | Do |
| C/85549/13 | Shri OMI Bagadiya | Do |
| C/85599/13 | Shri Deven Mehta | Do |

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(Arising out of Order-in-Original No. COMMR/PMS/ADJN/13/2012-13 dated 14.01.2013 passed by the Commissioner of Customs, CSI Airport, Mumbai.).

For approval and signature:

Hon'ble Shri Anil Choudhary, Member (Judicial)

Hon'ble Shri P.S. Pruthi, Member (Technical)

- =====
1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : No
 2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : Yes
 3. Whether their Lordships wish to see the fair copy of the order? : Seen
 4. Whether order is to be circulated to the Departmental authorities? : Yes
- =====

Appearance:

Shri V.S. Nankani, Sr. Advocate
 Shri Atul Nanda, Sr. Advocate
 Shri J.H. Motwani, Advocate
 Ms. Hameeza Hakeem, Advocate
 Ms. Nehal Parekh, Advocate
 Shri Roshil Nichani, Advocate

For Exporter/Assessees

Shri V.K. Singh, Special. Counsel

For Revenue

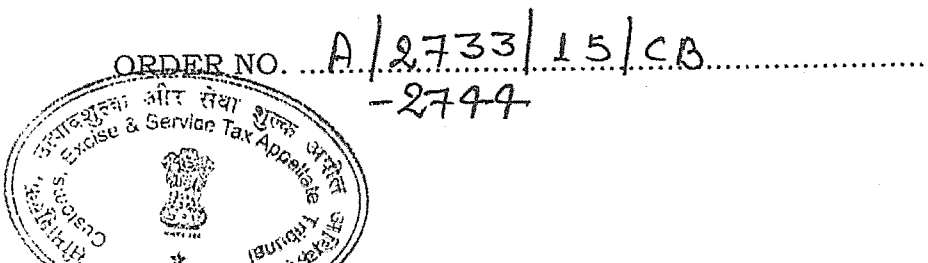
CORAM:

SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)

SHRI P.S. PRUTHI, MEMBER (TECHNICAL)

Date of Hearing: 09.04.2015

Date of Decision: 26-08-2015



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Per: Anil Choudhary:

Both the Revenue and the assessee are in appeal against Order-in-Original No. COMMR/PMS/ADJN/13/2012-13 dated 14.01.2013 passed by the Commissioner of Customs, CSI Airport, Mumbai. By the impugned order the FOB price declared for export of cut and polished diamonds have been rejected which were exported by the appellant exporters and the value was redetermined at the CIF value of the diamonds imported for the export after processing under Bond. Further penalties under Section 114 of the Customs Act, 1962 (the Act) ranging from Rs.25 Crores to Rs.25 Lacs has been imposed on the different Companies and individuals associated therewith. The learned Commissioner has held that the FOB value of Cut and Polished Diamonds (CPD for short) of assorted variety, exported by 6 Indian companies referred to herein, during the periods 2004-05 and 2005-06, not to be correct, rendering the goods liable to confiscation under Section 113(i) of the Act. However, as the goods are not available for confiscation, no redemption fine has been imposed. There is also no demand of duty in this case.

2. The appellant Adani Enterprises Ltd. (formerly known as Adani Exports Ltd.) has been in the business of foreign trade, that is export and import for more than 20 years. The appellant had been exporting and importing CPD during the financial years 19 94-95. The said activity of import and export of CPD was restarted in 2001 - 02 when the appellant also renewed the membership of Gem and Jewellery export promotion council, with a view to further grow its business. The appellant also obtained private bonded warehouse licence under Section 58 of the

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Customs Act in July, 2003 in order to carry on import and export of CPD as permissible under the Export and Import Policy 2002-07.

3. That with a view to expand the diamond business the appellant set up a 100% subsidiary in Mauritius known as Adani Global Limited which in turn set up to step down subsidiary in UAE namely Adani Global FZE (hereinafter referred to as AG FZE) and in Singapore namely Adani Global Pvt. Ltd. (hereinafter referred to as AGPL). With a view to grow its business appellant AEL and AG-FZE entered into a tripartite agreement with M/s. Daboul trading LLC, Dubai and M/s. Gudami International Pvt. Ltd.


4. The appellant's imported consignment of CPD and filed bills of entry for warehousing. The consignments were examined and bills of entry duly assessed, where after the consignment very allowed to be removed to the warehouse. In the bonded warehouse, the appellant carried out process like boiling, seiving and sorting, which are permissible to be carried in the bonded warehouse, in terms of Circular No. 40/99 issued by the CBEC. After carrying of these processes the appellants exported the CPD's having value addition. Each shipping bill was duly assessed after examination of the consignment by the proper officer of Customs. The examination was carried out as per the prescribed procedure in terms of Public Notice No. 11/98 issued by the Commissioner of Customs, airport, Mumbai, where after the let export order was given.

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5. The case of the department, as seen from the allegations contained in the show-cause notice, is as under:


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The Central Government announced 'Target Plus Scheme' (TPS) with a view to promote exports by granting Scrips with duty credit against incremental exports in the year 2004-05 as compared to the previous year. This Scheme was announced in August, 2004 but was effective from 1.4.2004. TPS continued in the following year, i.e., 2005-06 and was discontinued with effect from 1.4.2006. It is alleged that with a view to take advantage of TPS, M/s. Adani Enterprises Ltd. (AEL) which was already in the business of import and export of CPD, acquired 5 other Indian entities or signed MOUs with them to undertake the same business of import and export of cut and polished diamonds. These 5 Companies are M/s. Hinduja Exports Pvt. Ltd. (HEPL), M/s. Aditya Corpex Pvt. Ltd. (ACPL), M/s. Bagadiya Brothers Pvt. Ltd. (BBPL), M/s. Jayant Agro Organics Ltd. (JAOL) and M/s. Midex Overseas Ltd. (MOL). It is further alleged that in addition to the 5 Indian Companies mentioned above, AEL also managed and controlled 45 legal entities overseas. The list of 45 overseas entities is given on pages 40 and 41 of the show-cause notice (SCN). It is alleged that the 5 Indian entities and the 45 overseas entities were all managed and controlled by AEL. It is further alleged that AEL indulged in circular trading of diamonds by importing into India and exporting the same either after no processing or after insignificant processes. It is alleged that the diamonds were imported into private bonded warehouses, for which all the 6 Indian Companies including AEL had obtained bonded warehouse licences. It is alleged that after import, the goods were taken into private bonded warehouse and without processing the same were removed for export within 3-4 hours or the next day as the case may be. It was therefore, alleged that the claim of AEL, that processes such as boiling, sieving, sorting and packing was done as



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claimed by AEL and other appellants was bogus and that the same diamonds, without processing, were exported out of India. Reliance is placed heavily on the statements of Mr. Lumesb Sanghavi dated 30.01.2006, 07.02.2006, 28.02.2006 and 30.01.2007, who was at the relevant time Manager of AEL. Statements of Rajesh Adani, Managing Director, Samir Vora, Saurin Shah, Bhavik Shah, Kamraj Bodal, Vipul Desai, Kaushal Pandya, Mehul Shah and C.E. Mahadevan were recorded which allegedly support the allegations in the show-cause notice. It is therefore alleged that there was no processing undertaken by the Indian Companies inside the bonded warehouse and hence, there was no value addition, meaning thereby, that the FOB value declared was inflated in respect of same set of diamonds which were imported into and exported from bonded warehouse, only to be re-imported and re-exported, in the name of different Indian entities to establish and artificially increase export turnover to obtain undue benefits under TPS. The show-cause notice refers to officers and executives of AEL like Samir Vora and Saurin Shah being the Directors on board of HEPL and ACPL respectively. Samir Vora has also admitted in his statement dated 2.2.2006 that he used to coordinate and look after imports and exports of cut and polished diamonds for AEL, ACPL, JAOL, MOL and BBPL. In relation to overseas entities, the show-cause notice sets out a chain of e-mails mainly sent by one Ms. Mary of Singapore to all the individuals within AEL located in either India or Singapore or Dubai. These e-mails have been set out at pages 59 and 60 of the show-cause notice as well as pages from 65 to 79 of the show-cause notice. It is alleged that AEL through Ms. Mary knew the bank account numbers of all the overseas entities and was reporting transfer of funds from one account to the other. The show-cause notice



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also refers to flow charts at pages 86 to 89 allegedly retrieved from the Laptop which was in the possession of Vipul Desai. The show-cause notice also refers to instances of circular movement of lots of diamonds which have been tabulated at pages 90 to 93, set out in detail in Annexure-H and Annexure-I to the show-cause notice. The details of the lots of diamonds which have been allegedly circularly traded according to the investigations are given on pages 81 to 83 of the show-cause notice which allegedly claims that 45 lots were rotated in 2004-05 and 90 lots were rotated in 2005-06. The table on these pages also gives size, quantity, number of instances of circular trading and the period during which these lots were imported/exported. Investigations were also conducted to show abnormal and unusual payment of high commissions amounts for exports to overseas parties some of whom were also buyers from Indian Companies, for which purpose although MOUs were entered into with the overseas entities for payment of commission, no disclosure thereof was made in the shipping bills by the Indian Companies at the time of export. It was alleged that the MOUs also show that part of the Commission was payable upon receipt of benefit under TPS. Investigation further revealed, as set out in the table at Page 138 of the show-cause notice that AEL also controlled the flow of funds between Indian companies and overseas entities by resorting to L/C discount and buyers credit which was an abnormal trend indicating circular trading.

6. On the basis of the above allegations, show-cause notice dated 30.03.2007 was issued alleging that the Indian entities have:

(i) Mis-declared the FOB value of export goods in contravention of the provisions of Section 14 and Section 50 of the Act read with Section 11 of

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the Foreign Trade (Development & Regulation) Act, 1992 and Rule 11 & Rule 14 of the Foreign Trade (Regulation) Rules, 1993;

(ii) Resorted to mis-declaration of value of export goods in the corresponding export documents before the designated authority which falls within the ambit of "illegal exports" as defined in Section 11H (a) of the Act and modus on the part of consortium amounts to "smuggling" as defined in Section 2(39) of the Act. As the goods have been exported resorting to mis-declaration in terms of quality and value rendering the goods liable for confiscation under Section 113(i) of the Act;

(iii) Have rendered themselves liable for penal action under Section 114 of the Act;

(iv) Through its Directors entered into conspiracy with certain parties/peoples based in Singapore, Dubai, Hongkong to cause dubious imports and exports of cut and polished diamonds to take undue benefits of TPS and through its Director Shri Rajesh Adani indulged in mis-declaration while filing Bills of Entry, Shipping Bills and other documents before Customs and DGFT with an intent to obtain DFCE/TPS under FTP from the office of Jt. DGFT, Mumbai, made, signed and/or used declarations, statements by suppressing/mis-representing facts to the said authority for obtaining DFCE/TPS;

(v) Entered into MOU through group companies, like MOU between ACPL and MOL or the MOU between HEPL and BBPL or between HEPL and JAOL for passing on the incremental exports and the ultimate beneficiary thereof would be Adani group of Companies.

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(vi) Mis-declared the value addition of 5% in as much as the activities of assortment, boiling, sieving and repacking without any manufacturing/processing or change in the form of cut and polished diamonds by any stretch of imagination contributes to such value addition and further these processes too were not carried out on all the cut and polished diamonds imported and re-exported in the same form which has led to inflation and mis-declaration of FOB value of exports which in the light of the evidences in the show-cause notice, would be the value of the cut and polished diamonds at the time of imports.

(vii) Resorted to circular trading activity in the import and export of cut and polished diamonds by reimporting the same lot on more than one occasion to artificially boost the export turnover;

(viii) Have failed to declare the details of the Commission payable in the shipping bills

7. AEL filed a detailed reply dated 26.10.2007 to the show-cause notice and on 27.02.2012 filed further written submissions. The gist of the submissions made by AEL and others before the lower authority is as under:

a) 'Contemporaneous exports' show that the FOB value declared by them was correct;

b) All the shipping bills were duly assessed and goods examined by the Proper officer as provided for in Public Notice No.11/1998 dated 4.8.1998 issued by the Commissioner of Customs, Airport, Mumbai;

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c) All the consignments of imported diamonds underwent the process of sieving, cleaning, boiling and sorting in the bonded warehouse which was a permissible activity also recognised by the Central Board of Excise and Customs in Circular No. 40/1999 dated 28.06.1999;

d) The Gem and Jewellery Export Promotion Council in its letter dated 23.10.2006 addressed to the then Union Minister of Commerce and Industry had accepted that the processing activity of the nature carried out by them in the bonded warehouse resulted in value addition of 5% or more;

e) There was no circular trading and that as demonstrated by the number of examples in Annexure-H & I to the show-cause notice, the charge of circular trading was not sustainable as set out in Exhibit-D to the reply;

f) All exports and imports of diamond consignments were legal and proper and in accordance with the provisions of Para 4A.18 of the then prevailing Foreign Trade Policy (FTP);

g) All the transactions were conducted at arms length between the parties and that neither the Indian Companies nor the overseas entities are related persons nor are they managed and controlled by the appellant – AEL, and all the transactions were based on commercial consideration as reflected by the terms contained in Memorandum of Understanding dated 19.03.2003 between M/s. Daboul Trading Co. (Daboul), M/s. Adani Global FZE, M/s. Gudami International Pvt. Ltd. (Gudami);

h) As per Circular No.12 dated 9.9.2000 issued by RBI, declaration of Commission in the shipping bill was not mandatory, but optional. All the Commission remitted so far had been done with the approval of the

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Authorised dealer (Banks) in accordance with Foreign Exchange Management Act, 1999;

i) Lumesh Sanghavi retracted his statements vide affidavit dated 1.3.2006 and 4.1.2007 and requested for summoning him for cross-examination;

j) A request for cross-examination of forensic experts who gave the report on the data retrieved from the Company's computers, Kamaraj Bodal and officers who assessed the shipping bills and allowed exports was also made in the reply;

k) Diamonds were removed from TPS vide Notification No. 48 dated 20.02.2006 issued by the DGFT and therefore, exports thereof in the year 2005-06 were not eligible for benefit under TPS;

l) The application for issue of Duty credit scrip under TPS for the year 2004-05 made by the Company was pending before Jt. DGFT and till date, no benefit was received by the Company nor was there any loss of revenue.

8. Before the commissioner, cross-examination of Lumesh Sanghavi and Kamraj Bodal was conducted on 25.03.2008 while that of Kaushal Pandya was conducted on 7.4.2008. On 3.8.2011 and 1.12.2011, a total of 5 Customs officers who had assessed the shipping bills and allowed export were also cross-examined. The Officer of investigating agency - DRI was also present on each occasion during cross-examination, who questioned the witness in re-examination. DRI also filed written comments on the reply of AEL to the show cause notice. These comments have been reproduced by the Commissioner from para 14.0 to 14.8.2 of the impugned

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order. AEL filed its rebuttal to the DRI comments, which also have been reproduced by the Commissioner in para 15.0 to 15.7.6 of the impugned order.

9. By the impugned order, the Commissioner relied upon the statements of Lumesh Sanghavi and Kamaraj Bodal. He rejected the claim that retraction affidavits were sent to DRI and further also rejected the evidence recorded during cross-examination as an afterthought. On this basis, the Commissioner held as under:

"It is therefore clear that no processing was carried out by any of the six Noticees to achieve value addition of 5 % or 10 % as the case may be. Even if it is taken that processes of boiling, sieving and assortment were carried out, the Noticees have not shown how these simple process can result in value addition of 5% or 10 % in the two respective years".

10. The Commissioner, therefore, concluded that *"Thus, the FOB value declared in the shipping bills by simply adding 5% or 10% of the CIF value is artificial and hence, the export value which is not a correct value has to be rejected under Section 14 of the Customs Act, 1962"*. Accordingly, the Commissioner held that-

"..... mis-declaration of value declared in the shipping bills is firmly established. The goods cannot escape the mischief of confiscation for the mis-declaration of the value of export goods. The artificial value addition has also contributed to the mis-declaration of value of the export goods. No processing was undertaken to achieve the value addition and FOB value declared was incorrect. The simple process of boiling, sieving, and sorting do not automatically lead to value addition of 5% or 10% which was mechanically fixed by Shri Samir Vora and Shri Saurin Shah which is also confirmed by Shri Lumesh Sanghavi. It was possible for M/s.AEL to show incremental growth of exports through higher turnover and hence the difference between the FOB value of export goods and CIF value of import goods is not actual or real."

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11. On the question of circular trading, the Commissioner, However, held as under:

"The number of times each lot of diamonds was involved in circular trading is illustrated in para 9.1 and 9.2 of the Show Cause Notice. At the same time the illustrations given by the Noticees to show that circular trading is not possible also appears to be plausible. The contention of the Noticees is that conducting legal business operations to take the benefit of Government Scheme such as TPS is perfectly legitimate. While they conducted their business operations under perfectly legal and valid MOU and Tripartite agreements, they vehemently denied any Circular Trading. The flow chart do suggest the circular movement but Shri Vipul Desai from whose computer the same was recovered in his statement dated 19.2.07 stated that these charts were not prepared by him but by Shri Sudhakar Nair, Junior Assistant (Banking) who had left the Company subsequently. No statement of Shri Sudhakar Nair has been recorded."(emphasis supplied)

12. In view of his findings, the Commissioner imposed following penalties under Section 114 of the Act:

| Name of the Noticee | Amount of Penalty |
|---|-------------------|
| AEL | Rs.25 Crores |
| HEPL/ ACPL/BBPL/JAOL/MOL | Rs.2 Crores each |
| Rajesh Adani | Rs.1 Crore |
| Samir Vora / Saurin Shah | Rs.75 Lakhs each |
| Deven Mehta/ Omi Bagadiya/ Vithaldas Gokaldas Udeshi/ NarottamSomani | Rs.25 Lakhs each |

13. All the above Companies and individuals penalised by the Commissioner are in appeal. The department have also filed appeals in all cases on two grounds, the first being challenging the finding of the Commissioner with regard to Circular trading and second being for enhancement of penalties. All appeals were heard together. AEL and the department have also filed written submissions after the hearing.

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14. We have heard M/s Vikram Nankani and Atul Nanda, Senior Advocates for the parties and V.K. Singh, Special Counsel for the department. We acknowledge the assistance rendered by both sides to us in painstakingly taking us through the complex facts and the voluminous record of documents. A brief record of the submissions made before us at the time of hearing is set out.

15. On behalf of the parties, it was urged that in diamond industry, labour intensive work at low cost, yields high value and therefore, processes like sieving, boiling and assorting could result in value addition even higher than 5% or 10%. While reiterating that Lumesh Sanghavi had retracted his statements, the Ld. Advocates sought to explain his statements and submitted that the Commissioner have not correctly appreciated the same. It was further submitted that the charge of circular trading was sustainable neither in law nor on facts and examples of the same were given with the help of Exhibit-D to the reply and from the statement of Lumesh Sanghavi and his evidence in cross-examination. Our attention was also drawn to pages 42 to 44 of the show-cause notice to show that the inquiries made through the High Commission of India, at Singapore did not reveal either common shareholding or common Directors, except in respect of Adani Global Pvt. Ltd., which admittedly is a subsidiary of AEL. The same is the outcome also of the inquiry made by with Consulate General of India, at Dubai, which shows that except for the wholly owned subsidiary Adani Global FZE, there are no other related parties. After referring to the parts of reply to the show-cause notice wherein the authenticity and genuineness of e-mails and its contents were challenged, the Ld. Advocates submitted that there is nothing sinister in

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the e-mails sent by Ms. Mary and that normal commercial information which is obtained in the usual course of business between the parties has been misunderstood as evidence of circular trading and control by AEL over the various overseas entities, neither of which is true. The payment of commission as well as arranging for buyers credit are legally permissible and in the absence of any allegation that these actions on the part of the Indian Companies was not in accordance with law, no charges in respect thereof can be made against the Indian companies. It was finally submitted that there is no loss to the revenue and assuming that the Indian companies did intend to take advantage of TPS, they had genuinely exported as per the scheme which required an exporter to achieve incremental exports, but were yet to be granted the 'duty credit scrips' which is within the domain of the licensing authority. It was pointed out that AEL had exported cut and polished diamonds in the past, prior to TPS and continued to export between April and August, 2004 when the TPS had not been announced and so also continued to export in 2005-06 even after the removal of diamonds from the benefit of TPS on 20.02.2006, meaning thereby, all such transactions of diamonds were undertaken genuinely and in the ordinary course of business and not with the intention^a of artificially inflating the export turnover as alleged in the show cause notice. The Ld. Senior Advocates also submitted that once foreign exchange have been realised in relation to the exports made from India within the time stipulated under Foreign Exchange Management Act (FEMA), the FOB value declared under shipping bill cannot be doubted. It was submitted that burden to prove over valuation is on the department and the investigations have not revealed any contemporaneous exports at lower prices or valuation based on market inquiry before discarding the FOB



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value. It was therefore submitted that neither the goods are liable for confiscation nor any penalty warranted against the Indian companies and the Individuals associated thereto.

16. Shri V.K. Singh, Ld. Special Counsel stated that the appellant Adani Enterprises Ltd. formed a consortium with 5 other companies namely Aditya Corpex Private Ltd., Hinduja Exports Private Ltd., Midex Overseas, Jayant Agro Organics and Bagadia Brothers and obtained permission for setting up of Private bonded warehouses for import/export of CPD's. The activities covered under private bonded warehouses were - to import polished diamonds, to sieve the diamonds, to assort, to do boiling of the cut and polished diamonds, to pack the cut and polished diamonds, to re-export. It is further alleged that during the financial year 2002-03 the export turnover of AEL was 20.31 crores which increased to Rs. 1465.27 crores in year 200-04, which further increased to Rs. 5626.67 crores in the year 2004-05 and during the year 2005-06 the same was at Rs. 11,193.64 crore. It is further stated that the other 5 appellant companies had admittedly no turnover of CPD during 2002-03 but had turnover during the financial year 2003-04, 2004-05 and 2005-06. It is further stated that AEL was controlling export of other 5 companies under the understanding that the benefit of 'Target Plus Scheme' was to be availed by AEL.


16.1 That it is further urged that ACPL which was a partnership firm before being taken over by Milestone's Trade Link Pvt. Ltd., in which Mr. RK Sharma brother-in-law of Mr. Rajesh Adani (Director of AEL) and Mr. Saurin Shah-Executive of AEL were made directors. In Hinduja Exports Pvt. Ltd. which was earlier a partnership firm, was taken order by

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Ambitious Trade Link Private Ltd., group company of AEL. Hinduja Exports entered into MOU with Jayant Agro and Bagadia Brothers, whereas Aditya Corpex entered into MOU with Midex overseas. As per the MOU entire operations of export of CPD, to achieve the desired growth in the export turnover to enable them to claim the benefit of the Target Plus Scheme. Further the benefit of Target Plus Scheme was to accrue to HEPL and ACPL, and the firms/companies on passing of the benefit would be entitled to commission at the rate of 2% to 2.5% of FOB value.

16.2 That the import export of CPD's of all the 6 companies was being guided by brother-in-law of Mr. Gautam Adani, namely Mr. Samir Vora. Further the operations at ground level were looked after by Mr. Lumesh Sanghvi, an employee of AEL. The said fact stands and admitted in the statements of various persons recorded during investigation.

16.3 That with respect to the profile of the companies based at Hong Kong and Singapore, as the received from the High Commission of India, it is evident that out of total export of the CPD was 1643.02 million US dollars by the appellant companies in the year 2004-05, exports worth 1314.19 million USD was only to 8 companies out of the 45 overseas companies. Similarly during the financial year 2005-06 out of the total export of CPD worth US\$ 1448.99, exports worth 1347.99 million USD was only to 7 companies. That during the year 2004-05 out of total imports worth 1304.13 million USD were effected from only 7 companies. Similarly is the position in the financial year 2005-06.




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16.4 It is further urged that on perusal of the details of the 7-8 companies and report of High Commission of India, it was observed – two Hong Kong-based companies namely 'Kwality Diamonds' and 'Seven Stars', and four UAE - based companies namely 'Excel Global', 'Jewel Trade', 'Crown Diamonds' and 'KVK Diamonds' has acted as supplier as well as buyer of the CPD's for the appellant companies. Eight of the overseas companies were all incorporated after September 2004, which was after the introduction of the 'Target ^{Plus} ~~present~~ scheme'. Out of these, 5 companies stopped their business activities during the year 2005. Three of the overseas companies were functioning from the same premises at Hong Kong. One Global Enterprises is a supplier of the CPD to the Indian companies whereas the other 2 companies namely 'Kamsun Development International' and 'Wingate Trading' were importing CPD from the Indian companies and that too at a price which is higher by 5% to 10%. The registered office of one 'Planica Exports' have changed, at which address and other company Gracious export is already located. The said address is also the address of one Chew Bee Choo, one of the directors of Planica Exports and Gracious Exports. The registered address of Adani Global Pvt. Limited is also the residential address of Mr. Chang Chung Lind, Director of Gudami International Private Ltd. Most of the companies at Singapore have some common directors. Miss Mary Joseph, the employee of Adani Global Private Ltd. Singapore, is the Director of Gudami International. All the contracts of Gudami International, Singapore have been signed by Miss Mary in the capacity of director.

16.5 The learned special ^{counsel} ~~concern~~ took us through each and every head of the charges framed in the show-cause notice, starting with abnormal and

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sudden increase in export of cut and polished diamonds from India, creation of consortium of Indian companies, the inter relationship between overseas entities and AEL, leading to circular trading of same set of diamonds between Indian companies and overseas entities, which was also supported by the investigations to show that no manufacturing or process was carried out in the bonded warehouse. As can be seen from the statements of Lumesh Sanghavi and others, who have *inter alia* admitted that the goods were re-exported after 3-4 hours or next day at values which were communicated to the team in Mumbai by Samir Vora or Saurin Shah from Ahmedabad and that there was no actual value addition but a mechanical determination by adding 5% or 10% on the CIF value. The Special Counsel also drew our attention to the fact that for the same activity, value addition has increased from 5% to 10% with effect from 1.4.2005, only because of the change in the policy and therefore, the so called value addition was only on paper and not linked to the processing activity claimed to have been allegedly carried out in the bonded warehouse. Shri Singh, therefore, supported impugned order of the Commissioner. Arguing on the appeals filed by the department, Shri Singh submitted that the Commissioner, however, was wrong in not upholding the charge of circular trading in view of the clear and cogent evidence of inter relationship between the buyer and the seller, elaborately set out in para 8.1 to para 8.22 from Pages 39 to 80 of the show-cause notice which he took us through in detail, which according to him was duly corroborated by the instances of circular trading set out in detail in paragraphs 9.1 to 9.13 of the show-cause notice. Lastly, Shri Singh submitted that but for these investigations, these Indian Companies would have made whopping windfall on the artificially inflated export turnover and therefore, while the



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Commissioner was justified in invoking Section 113(i) of the Act, and discarding the declared FOB value, he was wrong in taking lenient view on penalties imposed by him. Shri Singh, therefore, submitted that the penalties should be suitably enhanced.

17. We have considered the lengthy arguments made by both sides and gone through the detailed written submissions filed by them. We have also perused the record and find that essentially the issues raised are questions of fact which we need to decide based on voluminous documents which each side has taken us through. We therefore first frame the issues for our decision. The issues framed are as under:

I] Whether FOB value declared in the shipping bills for export of cut and polished diamonds by appellant companies is liable to be rejected on the ground that no processing activity to achieve value addition of 5% or 10%, was undertaken by the Indian companies in the bonded warehouses?

II] Whether the Indian companies artificially inflated the export turnover to take benefit under the Target Plus Scheme (TPS) by resorting to circular trading/movement of the same set of diamonds between Indian companies and overseas entities which are allegedly inter related?

III] What is the effect of the Commissions paid by the Indian entities for exports and the arrangement of buyers credit by the Indian entities on either the FOB value declared in the shipping bills or on the charge of circular trading referred to above?

IV] Whether the export goods can be held liable for confiscation under Section 113 (i) of the Act and consequently whether the amounts of penalties imposed by the Commissioner are justified or are the same to be increased?

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18. We shall now deal with each of the above issues -

Issue No. I

A. There are two parts to this issue. We have to see whether, firstly, any processing activity at all was carried out by the Indian companies in the bonded warehouse, and if so, to what extent and secondly, the relationship between such processing activity and the value addition, on one hand, and the relationship between the FOB value and the value addition, on the other hand.

B. The Commissioner finds that no processing was carried out by any of the six Indian companies to achieve value addition of 5% or 10%. He finds, the fact that no processing was undertaken is evident from the fact that invariably all exports took place within 3-4 days of their imports and sometimes, on the 2nd or 3rd day itself. The fact that some processing activity was carried out in the bonded warehouse cannot be denied as even Lumesh Sanghavi, whose statements have been heavily relied upon by the department, has also admitted to the processing activity being conducted in the bonded warehouse. It would be useful to reproduce the portions from the statements of Lumesh Sanghavi. In his statement dated 07.02.2006, Lumesh Sanghavi has stated as under:

"(vi) The assorter first checks the correctness of the lot wise weight declared in each of the import packets. Then he will start the process of actual assortment. Assortment would therefore include sieving, boiling and segregation.

The process of sieving on a sieve, which is a round apparatus which consists of perforated metal sheet of various sizes. The process of sieving for an average lot would normally take around 30 minutes. However, according to my experience, in the bonded warehouse activity, only about 25% consignments were put for sieving. The rest of the consignments did not go through this process at all.

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The process of boiling involves boiling of the diamonds in a small glass like see through beaker (machine) which operates on electricity. The diamonds are normally boiled for about 20 minutes to remove dust/impurities. Again according to my experience of bonded warehouse, only 50% consignments were subjected to boiling.

After the process of sieving and boiling, if at all done, the next process was assortment, i.e., segregating the diamonds on purity basis.

vii) Lot wise assorting of received consignments of CPD in the respective bonded warehouses of the aforesaid companies / firms by way of boiling for cleaning, sieving for separating diamonds size wise, size wise weighment of diamonds using weighing machine, further assortment with regard to quality required."

viii) Repacking of the assorted CPD for exports by the office staff."

C. In the same statement, Lumesh Sanghavi has further stated as under:

"Qn.5: Please state whether 03 activities, i.e., sieving, boiling and quality assessment were done in respect of all the lots? Also, explain each process in detail?"

Ans.5: No, in all cases all the above said 03 steps are not followed, as in some cases boiling may not be warranted and in some cases quality assessment may not be essential. The process of boiling of CPD is basically required to clean the diamonds. It is not done in all cases. For carrying out the process of sieving, the diamonds have to be placed on different sizes of metal sheets having perforations / holes and when the diamonds are placed on said metal sheets they pass through the holes and diamonds of one particular size gets eliminated from the lot. Thus, diamonds of different size are assorted by the process of sieving. Sometimes, the quality is assessed for ascertaining the impurity and thereby value of the CPD. This process is also not carried out 100%."

D. In his statement dated 28.02.2006, Lumesh Sanghavi once again deposed as under:

"On receipt of the imported consignment in the bonded warehouse, the process of assortment which included sieving, boiling and segregation would be undertaken for each lot (packet) separately, as detailed in reply to question No.3 of my statement dated 07/02/2006. As stated

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in my statement dated 07/02/2006, all the above processes of sieving, boiling and segregation would not be undertaken on all the consignments. Sometimes, only sieving and boiling would be undertaken and no segregation would be done. Similarly, some consignment would not be subjected to boiling. Thereafter, the diamonds would be packed in different lots for export and lot Nos. and weight in carats would be marked on each packet as was done in import consignments. The entire process of assortment would take 3 to 4 hours and the imported diamonds would be exported within 3 to 4 days of their imports. Sometimes the exports would also takes place on the second or third day of imports. On being asked, I state that the imported diamonds and the exported diamonds were in the same form i.e. cut and polished diamonds were imported and cut and polished diamonds were exported without carrying out any process except sieving, boiling and segregation."

E. On this issue of whether processing at all was carried out or not, Kamaraj Bodal, who reported to Lumesh Sanghavi in his statement dated 30.01.2006 stated as under:

"Qn.7: Who used to physically receive the diamonds and what activities were carried out in the office of M/s.Adani Exports Ltd after receiving the diamonds?"

Ans.7: I used to physically receive the diamonds brought by our Security Agency and I used make an entry of the same in bond register. Shri Lumesh Sanghavi used to bring assorters along with him and they used to assort the diamonds by sieving and boiling. They used to segregate the diamonds as per quality and they used to pack the same for exports. I have never participated in said assorting of diamonds. As per the instructions of Shri Lumesh Sanghavi, I used to prepare export invoices by typing the same on the computer installed in our office and I used to fax the same to our CHA and the Security Agency who used to transport the same from our office to Custom Office."

F. To the same effect is also the statement of Kaushal Pandya recorded on 06.02.2006 and the relevant portion reads as under:

"The imported diamonds were packed in transparent plastic bags inside the wrapper of plain white paper. On receipts of the parcel of diamonds we put it into the safe meant for the custody of diamonds in the office of Aditya Corpex Pvt Ltd. Thereafter, on the same day, Mr.Lumesh Sanghavi came to the office of Aditya Corpex Pvt Ltd, he

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checked the parcel and packets contained in it. Thereafter, as per the requirement, Mr.Lumesh used to take out the packets of certain lots from the parcel of imported diamonds for sorting into various size, by the assorters, in the office of Aditya Corpex Pvt Ltd. Sometimes, when Lumesh Sanghavi could not come to the office Aditya Corpex Pvt Ltd, he used to tell me on phone to take out packets of certain lots from the parcels (Aluminum Box) of imported diamonds and give them for sorting. On being asked I state that assorters used to separate the size of the different lot of imported diamonds with the help sieve of different size, as per instruction of Lumesh Sanghavi and this activity was supervised by myself. Upon sorting the imported diamonds into different sizes, two to four lots of different size group were made from the one lot and these lots were packed separately in plastic bags which were weighed in our presence, I tallied the total weight of the imported diamonds after separating into different sizes, with the total weight of diamonds imported lot wise. Thereafter, myself and mostly Rahul kept the diamonds in transparent plastic bags and wrapped these diamonds in a plain white paper and put lot No. and carats with pencil as per the details shown for these diamonds in the export invoice."


G. It is contended that Lumesh Sanghavi retracted his statements but the DRI denies having received the affidavits of retraction which are claimed to have been sent by Lumesh Sanghavi vide 'UCP'. No acknowledgement of receipt of affidavit of retraction have been produced before us to uphold such a contention. Be that as it may, it is not as if retracted statements cannot be looked into at all in law. The Hon'ble Supreme Court in Vinod Solanki Vs. Union of India, Laws(SC)-2008-12-139, has administered a word of caution in evaluating retracted statements. We have therefore closely examined not only the statements of Lumesh Sanghavi but two others who were also involved in the activities of import and export of diamonds from bonded warehouse. After careful consideration we find that there is no manner of doubt that processes such as sieving, boiling and sorting were carried out by the Indian companies in the bonded warehouse. It is therefore not possible to hold no process at all was carried out by the Indian companies in the bonded warehouse.

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18.1 This takes us to the next question as to whether processes of boiling, sieving and sorting carried out in the bonded warehouse resulted in value addition of 5% or more in the years 2004-05 and 2005-06. These percentages of value addition flow from provisions of Para 4A.18 of FTP which was amended in 2005-06 to increase the value addition from 5% to 10%. Para 4A.18 as it stood in 2004-05 reads as under:

"4A.18 Private / Public Bonded Warehouses may be set up in SEZ / DTA for import and re-export of cut and Polished diamonds, cut & polished coloured gemstones, uncut & unset precious & semi-precious stones, Import & re-export of cut & polished diamonds & cut & polished coloured gemstones will be subject to achievement of minimum value addition of 5%"

18.2 Save and except increase in the percentage of value addition there is no other charge in para 4A.18 in 2005-06. A plain reading of para 4A.18 shows that it does not contain any condition, that the value addition must be as a result of any kind of manufacturing or specific processing activity in the bonded warehouse. In fact, it refers to import of cut and polished diamonds and to the export also of cut and polished diamonds. It is implied that para 4A.18 does not necessarily envisage any kind of manufacturing or processing activity to achieve value addition, because it does not refer to any new article at the time of export, different from the goods at the time of import. The sole objective is to earn foreign exchange by value addition, and subject to achieving this object, import and re-export out of bonded warehouse of the same item, namely; cut and polished diamonds is permitted. The Ld. Senior Advocates submitted that there is no bar in achieving value addition to satisfy the condition of 4A.18 simply as a result of trading, i.e. buying and selling cut and polished

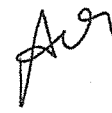


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diamonds from the bonded warehouse. While this may appear to be the intention because para 4A.18 does not prescribe any conditions as to how to achieve the value addition, we need not test the scope of para 4A.18 by this argument alone, having accepted the first contention that processes of sieving, boiling and sorting were carried out.

18.3 Having regard to the plain language of para 4A.18 we are not persuaded to agree with the Commissioner that the simple processes carried out by the Indian companies cannot result in the value addition of 5% or more. No such co-relation between value addition and processing activity in the bonded warehouse is required under para 4A.18. Sieving, boiling and assorting of diamonds is a recognised activity of the diamond industry, as can be seen from the clarification contained in Circular No.40/1999 dated 28.06.1999 issued by CBEC which was issued in the context of para 8.13 of the Import and Export Policy 1997-2002, which is parimateria to para 4A.18 of FTP 2004-09, para 2 thereof is reproduced herein:

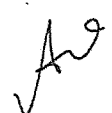
"2. The issue has been examined in consultation with the Ministry of Commerce and they have clarified that the activities of mixing, sieving, assortment and cleaning etc. are allowed in respect of imported cut and polished diamonds and cut & polished coloured gemstones in the private / public bonded warehouses set up under paragraph 8.13 of the Exim Policy. However, the activities of mixing, sieving, assortment and cleaning would be restricted to individual consignment only and mixing of different consignments for the purpose of carrying out the activities of assortment, sieving and cleaning shall not be permitted."



18.4 Besides, we find that the Commissioner has not relied upon any evidence to show that minimum value addition of 5% or more cannot be achieved by such processes. The show cause notice also does not refer to

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any evidence on this point. The question whether these simple processes can result in value addition of 5% or more is a matter of fact. If the Commissioner wants to read such a condition in para 4A.18, even though the same does not exist on the literal reading thereof, the burden lies on the department/Commissioner to lead evidence to show that these simple processes cannot result in achieving the value addition as required under para 4A.18, even if one were to presume that para 4A.18 has an inbuilt condition of achieving value addition out of processing activity in the bonded warehouse. Both sides agree and therefore, we take note, that value of a diamond depends on "4 Cs" which are colour, clarity, cut and carat. Therefore, if diamonds are segregated into a homogenous lot based on their size and quality, the value shall change even by employing simple labour intensive processes like sieving, boiling and assorting. The only piece of evidence we find on the relationship between the value addition and the process is in the form of representation made by Gem and Jewellery Export Promotion Council vide letter dated 23.10.2006 which relies on the same Circular of the CBEC while dealing with the various schemes in the Policy affecting the business of gem and jewellery including diamond industry. We are informed that the Customs Officers in charge of the bonded warehouse on being satisfied, have also cancelled the bonds, which aspect has been completely overlooked by the Commissioner.



18.5 It is true that Lumesh Sanghavi has not been able to say which of these processes were carried out in respect of how many consignments of imported diamonds before export, which (we are informed) aggregate to about 3000 consignments or whether all the processes were carried out for all the consignments, except making a general statement on 7.2.2006

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which has been referred to above. It is equally true that Lumesh Sanghavi in each of his statements mentioned that the FOB value, in the invoices prepared by them for export, was shown as instructed by Samir Vora or Saurin Shah. But the question is, does such FOB value become liable for rejection merely because these two persons superior to Lumesh Sanghavi in the organisation instructed him to do so. Once we hold that there is no basis to support the finding of the Commissioner, that minimum value addition under para 4A.18 cannot be achieved by simple process, both as a point of law on interpretation of para 4A.18 and as a question of fact, in the absence of any expert evidence holding the same, we go back to the question whether the FOB value as declared in the shipping bill is correct.

18.6 For this purpose, we have to bear in mind the distinction between FOB value and the value addition. Section 14 of the Act provides that where duty is chargeable on ad valorem basis, the value shall be deemed to be the price at which such or like goods are ordinarily sold or offered for sale for delivery at the time and place of importation or exportation as the case may be in the course of international trade. There is no dispute about the CIF value declared by the Indian companies in the bills of entry. Rather such CIF value has been adopted by the Commissioner, to be the correct FOB value. We shall deal with this aspect later in detail when dealing with circular trading. Value addition is a concept under the Foreign Trade Policy (FTP). The formula for determining value addition is given in para 4A.6 of the FTP for 2004-09 which is reproduced herein:

"4A.6 The value addition for the purpose of gem and jewellery sector shall be as per paragraph 4A.2.1 of Handbook (Vol.1)

$$V.A. = \frac{(A - B)}{B} \times 100, \text{ where}$$

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V.A. = Value Addition

A= FOB value of the export realised /FOR value of supply received.

B= The Value of inputs such as gold /silver /platinum content in the export product plus the admissible wastage along with the value of the other items such as gemstone etc. 'Value' for this purpose includes both imported as well as domestically procured inputs. Wherever gold has been obtained on loan basis, the value shall also include interest paid in free foreign exchange to the foreign supplier."

18.7 FOB value is therefore only one of the components for determining the value addition. Determination of value addition is a function of DGFT / licensing authorities. We are here not concerned with the determination of value addition. We are informed that the applications by the appellant companies under TPS are pending with the offices of Jt. DGFT. It will be for the licensing authority to determine the value addition at the appropriate stage. We are here concerned with the correctness of the FOB value as declared in the shipping bills which is within the jurisdiction of the Customs officer and for that the powers are derived from Section 14 of Act, which deals with determination of assessable value read with Section 17 of the Act which confer the power of assessment on consignments of exports, in respect of which shipping bills are filed under Section 50 of the Act. We shall first examine the law on this point.

(a) In *Frost International Vs. Commissioner 2006 (206) ELT 451 (Tri.)* the selling price of the manufacturer of garments was taken to be the correct Present Market Value (PMV) and on that basis, the Commissioner rejected the higher FOB value declared by the exporter. This Tribunal held that the concept of PMV cannot be equated with the FOB value of the goods which represents the price in the international market. The same view was also taken in the second case of *Frost International Vs. Commissioner*. The


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Tribunal also did not accept the evidence of clearance by the foreign buyer at a lower price received on overseas inquiry. Both these decisions in Frost International were upheld by Apex Court and appeals filed by the department were dismissed as reported at 2007 (216) ELT A55.

(b) In *Akshay Exports Vs. Collector* [2003 (156) ELT 268], the Tribunal held that in the absence of market inquiry of goods exported from India, the FOB value cannot be discarded.


(c) In *Siddachalam Exports Pvt. Ltd. Vs. CC* [2011 (267) ELT 3], the Hon'ble Supreme Court observed that although the Custom Valuation (Determination of Price of Imported Goods) Rules, 1988 applied only to goods imported into India, the principles thereof were also applicable to goods exported from India.

18.8 The 'transaction value' in the present case is established by the fact that sale proceeds in foreign exchange have been fully realised. There is also no evidence on record as required under Section 14, to show that the price of such or like goods for delivery at the time and place of exportation is lower. On the other hand the appellant companies have shown that the contemporaneous imports are at comparable prices, something which the Commissioner does not accept, because according to the Commissioner "*in case of diamonds, it is not possible to have evidence of identical or similar goods since each lot of diamonds varies from the other and valuation of diamonds, which is based on carat, colour, cut and clarity cannot be compared.*" May be the Commissioner is right. But that be so, we have no option but to go with the examination reports recorded at the time of assessment of the export consignments on the shipping bill, on the basis of



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which let export orders were passed by the proper officer of Customs under Section 51 of the Act, in each case. A few photocopies of the duplicate copy of the shipping bills have been produced before us. We have also perused the record of cross-examination of 5 Customs Officers, who examined the goods. All of them have unambiguously stated that they strictly followed the procedure prescribed by law as contained in Public Notice No.11/1998 dated 4.8.1998. The Commissioner confirms that these officers "..... only verified that the goods confirmed to the description, quantity and value as declared in the shipping bill." The confirmation of the value by these Customs officers in our opinion is a clinching evidence and there is nothing in the show-cause notice to rebut this primary evidence as to the correctness of FOB value. At no stage of the assessment of thousands of consignments, exported by the appellant companies, was any doubt raised as to the truth or accuracy of the declared FOB value. The confirmation by the Customs officers, and the admission by the Commissioner that they verified *inter alia* the value of the goods, is direct evidence of the correctness of the value on physical examination of the goods. In these circumstances, we do not see how the Commissioner can reject the declared FOB value.



18.9 Yet the Commissioner did so. And the only reason for the Commissioner to do so is because neither the Customs officers who examined the goods nor the appellant companies have been able to show how simple process of boiling, sieving and assortment can result in value addition of 5% or more. This is a fundamental fallacy, which the order of the Commissioner suffers from in not maintaining the distinction between FOB value, which is required to be determined under Section 14 and

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various tests laid down in the many precedents, and value addition, of which FOB value is only one of the components and which need not arise only out of processing and indeed may have nothing to do with the processing under para 4A.18 of FTP. It would be unfair to reject the FOB value on a criteria which is not prescribed by law. As we have held, processing has been undertaken in respect of the export consignments. When neither Section 14 of the Act nor para 4A.18 of FTP requires the exporter to establish a relationship between processing and the FOB value declared in the shipping bill, which is to be independently determined, applying the tests under Section 14, the question of verification of the value addition, by the Customs officers at the time of export does not arise at all. This is more so since determination of value addition is within the jurisdiction of licensing authorities and not the Customs authorities under the provisions of FTP to which we have already adverted. We therefore find that the sole ground of the Commissioner to reject the FOB value, is that the value addition of 5% or more cannot be achieved only by carrying out simple processes, is not sustainable. We therefore, hold that the FOB value declared is correct.



18.10 On the question of valuation, the Commissioner also records that evidences disclosed in the show-cause notice, there is an allegation that the FOB value declared is not genuine on account of control by AEL over all the overseas parties involved in the transactions as buyers or sellers of diamonds. Having recorded this objection, the Commissioner does not give any categorical finding thereon but instead treads into the question of circular trading. We however prefer to deal with this issue in the context of valuation and circular trading as the department has also heavily relied

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upon the allegations in the show cause notice on the inter relationship between AEL and other Indian companies as well as AEL and overseas entities.

18.11 We shall first deal with the relationship between AEL and Indian companies. There is no definition either in the Customs Act or the FTP of such a relationship. Obviously in such a case, one will have to go by the provisions of Companies Act, 1956 to see whether one company controls the other and broadly, the two tests to establish "control" of one over the other is either 'voting power' or control over the appointment of Board of Directors. The relationship in the context of determination of FOB value is the relationship between the buyer and the seller in the course of international trade. Hence, the issue of inter se relationship between AEL and Indian companies is not relevant for the purposes of Section 14. The show cause notice dwells on this issue only to show that AEL connived with the 5 other Indian entities to take advantage of benefits under TPS by showing higher incremental exports to derive maximum benefit under TPS. We do not see the relevance of the issue in this case. At the risk of repetition, we hold that since the application for grant of duty free scrips made by the Indian companies including AEL for the year 2004-05 is pending before the Licensing authority, it is for the licensing authority to consider whether the export turnover of each individual Indian company is to be reckoned or whether export turnover of all Indian companies to be clubbed for the purposes of calculating the benefits under TPS. We say no more than this so as not to prejudice the disposal of the application pending before the licensing authority. We remind ourselves that there is a concept and definition of "group company" in the FTP which we are sure



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shall be considered by the Licensing authority in determining the benefits under the TPS scheme.

18.12 As far as inter relationship between AEL and overseas entities is concerned, it is alleged that AEL controls the overseas entities. The basis for this allegation, as found in the impugned order, is as under:

- a) As per report received from Indian High Commission, Singapore, several entities in Hongkong and Singapore were incorporated or started business in or around the period when TPS was announced and stopped the business soon after the TPS was over;
- b) Registered office of some of the entities in Singapore like M/s.Planica Exports Pte Ltd and M/s.Emperor Exports Pte Ltd is common;
- c) The registered address in some cases is residence of individual Directors;
- d) Ms.MaryJoseph who is an employee of Adani Global Pte Ltd has also signed all contracts as Director of M/s.Gudami International and Mr.Chang Chung Ling - a Director of Gudami is shareholder / Director of M/s.Adani Global Mauritius and Adani Global Pte Ltd, Singapore;
- e) Rajendra Prasad Nair, Manoj Chandrasekharan Nair and Sudhkar Kannadiga who are Managers / Partners / Directors of Gold Star FZE, Shine Jewellery and Queen Jewellery, all UAE entities, respectively are employees of Adani Global FZE, while Vinod Shantilal Shah who is Director of Adani Global FZE and G A International is the brother in law of the Chairman and Managing Director of AEL.

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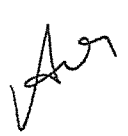
18.13 The fact that some of the overseas entities were started around time of introduction of TPS or closed business simultaneously with closure of TPS does not establish these entities in Singapore and Hongkong were controlled by AEL. We find that out of 45 overseas entities, six have started business between September and December, 2004 and two of them in May and August, 2005. Again out of 45 overseas entities, only 4 closed down and that too, between September and November, 2005 which is well before the deletion of diamonds from TPS on 20.02.2006 or the closure of TPS on 31.03.2006. No adverse inference can be drawn on this aspect. The fact that some of the companies have common registered offices or that registered office happened to be the residential premises of their Directors is again something which cannot be faulted in law and by no stretch of imagination shows control by AEL over them on this account. Common Directors or Directors who are employees of AEL or its subsidiaries also does not establish mutuality of interest. So also merely because Vinod Shantilal Shah is brother in law of the Chairman and Managing Director of AEL, it does not establish the relationship particularly when it is now shown that the Vinod Shantilal Shah is also Director in AEL or holds significant shares to exercise control over AEL and vice versa AEL has any shareholding or common Directors in G A International. Section 14 of the Act requires the interest of the buyer and the seller in the business of each other. There is no allegation of common shareholding except for the subsidiaries. It is also not shown that AEL has the power to appoint Directors or control the composition of Board of Directors of companies in which its employees or its Directors are also partners or Directors. It is not shown that AEL holds sufficient shares or voting power to control the decisions of the entities in which its Directors are also Directors or in which



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its employees are also Directors or Partners. Mutuality of interest must be proved both ways. It is interest in the business of each other which proves that the parties are related. The inquiries made through the Indian High Commission, Singapore or Indian Consulate in Dubai have not brought out any such factual position on either shareholding pattern or control over the composition of the Board of Directors of the overseas entities except the two subsidiaries.

18.14 Assuming that the relationship is established in those limited cases where the Directors or partners of overseas entities are also Directors or employees in AEL's subsidiaries, as per the details set out on Pages 49 to 52 of the show cause notice, that by itself cannot be a ground to reject the declared FOB value. If the relationship has not influenced the price, then such export price must be accepted. Out of all the overseas buyers to whom the cut and polished diamonds were exported from bonded warehouse by Indian companies, only two such buyers namely; G A International and Gudami International, Singapore are part of the list of alleged related parties, but the total exports to them in 2004-05 constitutes only about 22.45% which means that the remaining 77.55% of exports at or about the same price has been made to independent buyers. In 2005-06, exports to independent buyers is about 28.21% assuming all the buyers in Singapore are related. We have arrived at this finding based on the information given on page 46 of the show cause notice. As long as price of exports to independent parties in respect of whom there is no allegation of relationship is available, the same would apply to all other exports including those made to related persons. This is notwithstanding the fact



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that the department has failed to discharge the onus of proving relationship between AEL and overseas entities, as concluded above.

18.15 We have noted that Lumesh Sanghavi has in his statement said that the diamonds were over-invoiced. This statement by itself does not prove the case of the department. There are many reasons for the same. He himself admitted that he examined only a few consignments when the sorters were absent. Besides the price was decided by Sameer Vora or Saurin Shah based in Ahmedabad. This has also been admitted by Lumesh himself. Likewise, though Lumesh Sanghvi, admits to circular trading, on being shown during cross-examination the same examples referred to in his statements, which show the difference in quality, size and weight of each consignment, he has deposed to the contrary. We have independently also examined the evidence on record particularly Annexures 'H' and 'I' to the SCN and have found that the charge of the circular trading is not sustainable. Considering the overall facts and circumstances, this part of the statement of Lumesh Sanghvi cannot be seen as conclusive to the charge of, either over-valuation or circular trading.

18.16 In the above factual backdrop, we shall now deal with the case-law cited by the department. In the case of *Omprakash Bhatia Vs. CC, 2003 (155) ELT 423 (SC)*, the exporter did not lead any evidence to show that the export value mentioned in the shipping bill was the true sale consideration, and accepted the lower value ascertained on market inquiry even at the time of hearing, while giving up the claim of drawback. It is in these facts that the Court was called upon to decide whether section 113(d) was applicable or not. In the instant case neither any market inquiry has been

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conducted, nor the appellant has accepted the value suggested by the department.

18.17 In *CC Vs. Pankaj V. Sheth, 1997 (90) Cal. 31 (Cal.HC)*,^a the question was whether pending inquiry, the Court could direct the Customs Authorities to endorse the fact of exports in the DEEC book issued under the Advance Licensing Scheme. The Customs Authorities resisted on the ground that the enquiry in respect of export of plastic flat jet nozzles was pending since the goods were suspected to be over-invoiced and had been provisionally allowed exports. The High Court held that the Customs Authorities had the power to examine the correctness of the value of the goods under the DEEC scheme. Firstly, this case is not at the interim stage, and secondly, in the present case investigations have been completed and detailed show cause notice issued relying on the documents & statements, which we have examined as above.

18.18 The judgment in *Bussa Overseas Vs C.L. Mahar, 2004 (163) E.L.T. 304 (Bom.)* deals with a case where the goods were cleared under a Bond and therefore the argument that the proceedings could not have been commenced under Section 112 was not accepted. The Bonds in the present case were for the warehousing under Section 58 of the Act. These Bonds have been cancelled by the Bond Officer. In any case we have held the declared value to be correct. Hence, the question of confiscation does not arise at all. An

18.19 The issue involved in the judgment in *Euresian Equipment and Chemicals Ltd. and Others Vs CC, 1980 (6) E.L.T. 38 (CAL.)* does not arise

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for consideration in the facts of the instant case, as it is not the claim of the appellants that liability if any is wiped out or extinguished with the exportation of goods.

18.20 In *CC Vs. D. Bhoormull*, 1983 (13) E.L.T. 1546 (S.C.), the Hon'ble Apex Court held that a case need not be proved with a mathematical precision in the context of smuggled goods seized from the shop where the claimant sought to justify the purchase with the help of documents which were not found to be credible. The Apex Court observed that-

"30. It cannot be disputed that in proceedings for imposing penalties under clause (8) of Section 167, to which Section 178A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus legal proof is not necessarily perfect proof often it is nothing more than a prudent man's estimate as to the probabilities of the case."

"32..... However, this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue. It will only alleviate that burden to discharge which very slight evidence may suffice."

18.21 In the present case, we find that the department has failed in discharging the burden cast upon it to produce any tangible evidence in respect of the charge of over-valuation or circular trading. For the same reason, the judgment in *Steel India Company Vs. CCE*, 2014 (310) E.L.T. 184 (Tri.) is of no assistance to the department.


18.22 For reasons aforesaid, the declared FOB value is accepted to be the correct FOB value under Section 14 of the Act and to that extent the order of the Commissioner is set aside.

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19.0 Issue No. II

19.1 The allegations relating to circular trading are essentially set out in para 9.1 to 9.13 of the show cause notice. The Commissioner, as stated, did not confirm the allegation of circular trading and held that the defence to show that circular trading is not possible appears to be plausible. The department is aggrieved by this finding and has come in appeal.

19.2 Before examining the material marshalled in the show cause notice to show circular trading, we must record that it is admitted by the department that consignments of diamonds physically came into India and were also sent outside India, and further it is also admitted by the department that in all cases the FOB value as shown in the export invoices have been duly realised. In other words, it is not alleged that these were paper transactions. We find that the allegation of circular trading of diamond is based on same lot of diamonds being imported and exported over a number of times during different periods as detailed in the two tables on pages 81 to 83 of the show cause notice. We have therefore looked at import and export invoices to see how the individual lots referred to at pages 81 to 83 have been imported and exported. On examination of the invoices relating to import as well as export of cut and polished diamonds it is seen that each consignment consists of various lots of different descriptions, weight, value and quality. It is not the case of the department that all the lots referred to at pages 81 to 83 have been imported under one invoice. We have found each invoice to cover number of lots ranging from 8 to 23 in number. Identifying one or two lots from a



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consignment consisting of 8 to 23 different lots being the same which have been allegedly circulated more than once is a method which is unknown to law. The subject matter of assessment is a consignment as a whole. The Bill of entry under Section 46 or the shipping bill under Section 50 contains a declaration of the goods covered by the total quantity and value of the goods supported by the invoice, which covers the totality of all the lots constituting the consignment. Singling out one or two lots from a consignment to say that the same set of diamonds have been traded again and again is a misnomer. The Commissioner also admits in the impugned order that the value of each diamond varies on account of non-comparability of carat, colour, cut and clarity (4 C's). It is therefore not possible to come to the conclusion that the appellant companies indulged in circular trading merely with reference to single lots (out of a consignment) which are said to be imported and exported during different periods. Curiously, the show cause notice itself admits in para 9.2 that even these single lots which are said to be involved in circular trading varied in weight and clarity. It however describes such variation to be marginal or slight variations. We are not impressed by the use of such adjectives particularly when the Commissioner also admits the value of each lot varies on account of variation in the 4 Cs. Whether such variation is marginal so as not to affect price is not for us to say. This perhaps required expert evidence who can only do so after examining each lot. We find this is missing. We cannot indulge in conjecture whether the variation in weight or clarity is marginal so as not to affect the value or identity of the lots. Weight is directly related to the size of diamonds. If the size of the diamonds is small, a small variation in weight can substantially increase the pieces of diamonds and similarly, if the size of the diamonds is bigger,

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the price thereof may increase manifold even with a small variation in weight.

19.3 Based on the details of the lots allegedly involved in circular trading, Annexure-H & I to the show-cause notice, contain details of these lots, bill of entry wise, and shipping bill wise, to allege circular trading. AEL in its reply to the show cause notice sought to demolish Annexure-H & I by reference to Exhibit-D to the reply. We have perused the Annexure-H & I to the show cause notice and Exhibit-D to the reply. In Exhibit-D we find that AEL has given several examples where the export of the lot on first import has taken place after the second import of the same alleged lot, which belies the allegation of circular trading, which if true, means that the export of the lot on first import should have taken place before the second import of the same alleged lot and not thereafter. These several examples establish that the sequence in the movement of same alleged lot to prove circular trading does not exist. AEL also submits with reference to Exhibit-D, there is no explanation how the same alleged lot exported to Singapore or Hong Kong has been re-imported from Dubai the next day keeping in mind the locational difference in three countries and the time involved in transporting the goods from India to Singapore or Hong Kong and from there to Dubai and Dubai to India, suggesting thereby the whole theory of circular trading is bogus and impossible. We find no answers to this point in the contentions raised by the department.

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19.4 To prove circular trading show cause notice also relies upon the statement of Lumesh Sanghavi. In his statement dated 28.02.2006, he has admitted to circular trading in relation to documents shown to him in

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respect of imports and exports by and to the Indian companies in July, 2005 as recorded on pages 4 to 6 of the said statement. To the same effect, he has also admitted to lots of diamonds being imported and exported over and over again in the transaction which were shown to him and recorded by him on pages 4 to 8 of his statement dated 03.01.2007. We have already dealt with the aspect of retraction of the statements of Lumesh Sanghavi. We have also gone through the record of cross-examination of Lumesh Sanghavi which has been set out by the Commissioner in extenso. We find that when confronting with the same documents such as invoice relating to the transactions which he has deposed in statement dated 28.02.2006 and 3.1.2007, he accepted that there was a variation in the weight and quality of diamonds. On re-examination by DRI officer, Lumesh Sanghavi maintained the variation in the specifications of the lots covered by two different invoices. Besides the documents speaks for themselves, oral evidence if contrary to documents has no value since documentary evidence shall prevail over oral statements. At the time of hearing before us the Ld. Counsels also produced a typed statement analysing the transactions of July, 2005 shown to Lumesh Sanghavi as recorded in his statement dated 28.02.2006, to illustrate that on facts, the allegation of circular trading cannot be maintained. From the typed statements, it is seen that while exporting D-Cut white diamonds under invoice dated 21.07.2005, the weight of PK 4 variety was 486.57 carats and that of PK 5 variety was 733.67 carats and if the same set (lot) of diamonds were allegedly imported on 26.07.2005 from Spectrum Trading, UAE, then the weight of each variety at the time of second export ought to have been the same, but as seen from the export invoice dated 28.07.2005, the weight of PK 4 variety was 725.63 carats which is much more than 486.57 carats in

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the previous exports and so also in case of PK 5, the weight in the second export was significantly lower at 512.61 carats as compared 733.67 carats. This difference in the weight (carats) of the two different variety of diamonds – PK4 and PK 5 show that there is no circular trading, otherwise in the two export consignments of two similar variety of diamonds, weight should have been identical. The fact that the weight in carats of PK4 was much more in the second export and that of PK5 was substantially lower, it is evident that there is no circular trading. The second illustration in the typed statement, not only shows variation in carats but also sizes between the first and second round of diamonds which as submitted by the Ld. Senior Counsels fortifies their case that there is no circular trading, even if we go by the statement of Lurnesh Sanghavi, who did not correctly appreciate the facts as flowing from the same documents which were shown to him. We find force in these submissions and hold that not only is the defence to circular trading plausible but incontrovertible.


19.5 The third piece of evidence referred to in the show cause notice, to support the allegation of circular trading are the 3 charts reproduced on Pages 86 to 88. These charts have been recovered from the desktop (computer) of Vipul Desai who in his statement dated 19.02.2007 said that these were prepared by Sudhakar Nair, Junior Assistant in the Banking department. No statement of Sudhakar Nair has been recorded. We have however, independently considered these charts without the benefit of the statement of the author thereof. We find that the Chart by themselves do not prove circular trading. AEL has explained these charts to depict the business plan and a pattern of transactions. This in fact appears to be so, these charts appeared to be graphic representation of information

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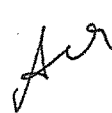
which have been tabulated by DRI in the show cause notice covering the names and identities of overseas entities and the classification of overseas entities into buyer and seller as can be seen from pages 40, 41 and 45 to 48 of the show cause notice. The Indian companies have also not disputed the fact that they were importing cut and polished diamonds from some of the overseas entities and exporting the cut and polished diamonds to other overseas entities. We do not find anything incriminating in the 3 charts except a pictorial representation admitted by the parties.

20. On the contrary, AEL has sought to justify what they call as the business plan and the pattern of transactions on the basis of MOU dated 19.03.2003 between its' subsidiary in Dubai, Daboul and Gudami whereby the UAE subsidiary agreed to arrange for and organise processing of unassorted diamonds in India through AEL or its nominees and Daboul agreed to procure unassorted diamonds directly or through its nominees for export to India and thereafter, purchase the same after processing in India through its intermediaries in Hongkong or Singapore for its European buyers. Shri Singh, Ld. Special Counsel, as has the Commissioner strongly objected to the reliance on this MOU. He submits that this MOU was never produced during investigations. On the other hand, AEL submits that, although a copy of this MOU was not produced during investigations there are enough references to the arrangement and understanding mentioned in the MOU in the statements of various persons recorded during investigations. Our attention has been drawn to the statement dated 24.01.2006 of Samir Vora in which he has, inter alia, stated that AEL's overseas agents Daboul sent them proposal for unassorted diamonds and Daboul gives them the range of existing international value and after



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discussions, AEL sends its own proposal and that the value is decided after negotiation, if necessary. Bhavik Shah is the other person who makes reference to Daboul in his statement recorded on 31.01.2006 wherein he refers to Rakesh Shah- an employee of Adani Global FZE to be the coordinator for import and export of gold, gold jewellery and articles and cut and polished diamonds with Daboul. No doubt, there is no specific reference to MOU in these statements, but nonetheless these statements prove the existence of business relationship with Daboul which is dealing in cut and polished diamonds. Moreover, AEL had disclosed a copy of the said MOU along with its reply to the show cause notice filed on 29.10.2007, against which DRI had ample opportunity to ascertain the veracity of the documents before filing its written comments to reply filed by AEL. The DRI made general and sweeping remarks about the genuineness of said MOU in its written comments filed before the Commissioner. The Commissioner could have caused necessary inquiry through DRI or otherwise to ascertain the genuineness of the said MOU. After all, as an adjudicating authority, the Commissioner must undertake fact finding especially when it is not as if AEL had adverted to business relationship with Daboul for the first time in its reply to show cause notice. We cannot help but noticing that the reply disclosing the MOU with Daboul was filed on 29.10.2007 and the adjudication order has been passed after more than 5 years, which gave ample opportunity to inquire into the genuineness of the said MOU.



21. The most significant material relied upon in the show cause notice are the number of e-mails sent mainly by Ms. Mary and others. Some of the e-mails have been extracted in the show cause notice, as for instance at

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pages 59 to 64, again from pages 67 to 69 and thereafter from 70 to 79. All the e-mails have been compiled in Annexure-M to the show cause notice. Although these e-mails have been relied upon in the show cause notice to support the allegation of control of overseas entities by AEL, in view of the overlapping submissions made by Ld. Special Counsel of the department, here while dealing with the issue of circular trading. According to the department, these e-mails reveal that AEL controlled all the overseas entities because there is reference to the bank accounts of different overseas entities in these mails and also to transfer of funds from account of one overseas entity to another. These e-mails are sent by Ms. Mary who is an employee / Director of Adani Global Pte Ltd, Singapore and these e-mails are sent internally to all persons connected with AEL based in either India or Singapore or Dubai. It is alleged that if AEL does not control overseas entities there was no reasons for Ms. Mary to pass on information relating to bank accounts and its details including password to other persons within the Adani group and likewise there was no need for Ms. Mary to report the transfer of funds with reference to certain specified transaction from one overseas entity to another or from Indian company to overseas entity or by an overseas entity to an Indian company. We find that except for agreeing to what has been stated in these e-mails, none of the persons like Bhavik Shah, Vipul Desai or C.E. Mahadevan have admitted to these e-mails being evidence of either control by AEL of the overseas entities or to circular trading. Unfortunately, hereto the statement of Ms. Mary Joseph, author of almost all these mails have not been recorded, we are left to imagination why she was writing such mails and on whose instructions. These gaps are extremely vital to the issues at hand and fatal to the case of the department. AEL submits that she was



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doing so on account of the agreement between the parties as recorded in Clause 6 of the MOU which is reproduced herein:

"In order to facilitate the movement of goods, Adani Global FZE has identified its business associate, M/s. Gudami International Pte Ltd as one of the parties who may be nominated as an intermediary where Daboul requires the transaction to be routed through an intermediary. Gudami shall arrange for funds wherever necessary to finance such imports, but Daboul shall assure AGFZE that funds will be available for the onward import from Gudami and for this purpose Gudami shall be entitled to call for and maintain and monitor financial information and records. In order to coordinate the working of these transactions, including movement of funds wherever necessary, Daboul, AGFZE and Gudami may nominate a common person to act as a representative of all the parties who is acceptable to all the parties."

For want of better explanation from the department, we have no option but to accept that the reason why Ms. Mary Joseph wrote e-mails was because of the understanding recorded in the said MOU.

21.1 We have independently gone through the set of e-mails which have been extracted in the show-cause notice on the pages referred to above. We observe as under:

(a) The e-mails pertain to large number of transactions like iron ore exports and coal transactions apart from the transactions of cut and polished diamonds;

(b) The e-mails referred to transactions with parties other than the 45 overseas entities, as for example, Aramex International Exchange, Radya Baqer Trading LLC, Navy Impex LLC and White Monitor General Trading LLC to name a few.

(c) The e-mails provide no explanation on the transfer of funds from one overseas entity to another. In many cases where there is no reference to corresponding invoice related to either import or export of cut and polished diamonds which are the subject matter of the present case. For instance against Sr.No.4 at page 71 of the show cause notice, why have GA

VAJ

C/86660, 85401 to 85405, 85396, 85423, 85521, 85533, 85549, 85599/13

International, Gold Star and Labdhi transferred funds to Al Shahad considering that Labdhi is not even one of the 45 overseas entities in this case or are these entries representing settlement of accounts of some other independent transactions which has nothing to do with the transactions of cut and polished diamonds.


(d) None of the e-mails show fund flow corresponding to the circular trading of the lots as alleged in the show-cause notice, meaning thereby the allegation of circular trading is unsupported by evidence of corresponding financial trail.

21.2 As has been stated in the show-cause notice, the e-mails referred to in Annexure-M to the show cause notice show control by AEL of the overseas entities. We have already held what tests and conditions needs to be satisfied in law to establish "control". It seems Ms. Mary Joseph has merely collated the information into e-mails which is otherwise available from the documents relating to the respective transaction which documents show the name of the buyer, name of the seller, serial number and date of the invoice, the amount and the bank in which the payment is to be remitted. These e-mails do not reveal the possibility of these e-mails being sent as a result of said MOU cannot be ruled out. We find nothing incriminating in these e-mails or anything to draw an inference of control of overseas entities by AEL.

21.3 Even if we were not to consider the said MOU, the e-mails can at best give rise to suspicion that AEL controlled the overseas entities. This, however, will remain a suspicion because statement of Ms. Mary has not been recorded. Suspicion howsoever strong cannot take the place of evidence.

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21.4 On behalf of the Indian companies, it was also submitted that the allegation of circular trading is absurd and illogical because the CIF value of all the imported consignments has been accepted and in fact, proposed to be adopted as the correct value of the goods exported instead of the declared FOB value as stated in para 21.1 (viii) and corresponding para in respect of each Indian company in the show cause notice. The argument is that, if it is alleged that the same lot was circulated number of times as tabulated from pages 81 to 83 of the show cause notice, then the CIF value of the lots repeatedly circulated ought not to have been accepted, whereas the CIF value of all the consignments of imported diamonds has been accepted to be true and correct value, meaning thereby each consignment is a fresh and a new transaction, independent of each other and not of the same goods repeatedly circulated. We do see force in this argument. We find the stand of the department in the show-cause notice to be self-contradictory. If the same lot is circulated into India a number of times, it is only rational to take the CIF value only once for the same lot to support the allegation of circular trading. By not doing so, and by accepting the CIF value of each individual consignments of imported diamonds, the department has admitted each consignment to be different from the other, and not of the same goods, thereby militating against their own case of circular trading. The Indian companies contend and rightly so, that the implications of acceptance of CIF value means each time a new consignment has been imported unrelated to any other in the past or future, duly corroborated by remittance of foreign exchange through banks or authorised dealers equal to the value of the goods received in India. Correspondingly in relation to exports, receipt of foreign exchange through




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banks and authorised dealers as proceeds of exports in compliance with the provisions of Foreign Exchange Management Act, 1999.

We, therefore, hold that the charge of circular trading fails.

22.0 Issue No. III

The Issue relating to payment of commission and fund flow through mechanisms such as buyers credit or LC discounting are connected to the charge of circular trading and to support the allegation of control by AEL. We have for reasons recorded above, found both these charges to be unsustainable. On behalf of the Indian companies it was submitted that payment of commission in fact proves that the transactions of import and export of diamonds were genuine and on principal to principal basis since otherwise there was no need for them to pay commission if the transactions were bogus or involved mere circular trading. So also in relation to LC discount and buyers credit, it is submitted that these transactions were entered into because of interest arbitrage, since there is wide variation in the rates of interest between international markets and India. It is submitted that they have acted like any other prudent business men would do in the like circumstances. The department however, contends that AEL was strictly monitoring the number of days involved in the fund flow and its banking team in India took all decisions in relation to payments for all imports and exports. Suffice for us to state that when we have held the declared FOB value to be correct and there is no circular trading, we need not go into these issues, more so, when in query from the Bench whether the payment of commission or LC discounts or availing buyers credit violated any law of India, both sides submitted that none of these actions



C/86660, 85401 to 85405, 85396, 85423, 85521, 85533, 85549, 85599/13

are in breach of any of the laws for the time being force in India. The Ld. Senior Counsels submitted that on the contrary the Circular No.12 dated 9.9.2000 issued by RBI and relied upon in the show cause notice supports the case of Indian companies that payment of commission is permissible and that it is not mandatory to disclose the same in the shipping bill as long as the agreement for payment thereof is produced to the authorised dealer at the time of remittance, which they have duly done so. There is according to them, no violation of the provisions of Foreign Exchange Management Act in the payment of commission or discounting of LC or availing buyers credit. We are unable to find any such allegation about these actions being in breach of the law in the show cause notice or any finding to this effect in the impugned order. Besides, the payment of commission would be relevant for calculating the value addition if and when the pending applications for grant of duty free scrip under TPS is taken up by the competent authority.

23.0 Issue No. IV

Having held that the declared FOB value is correct, we set aside the confiscation of the exports goods under Section 113 (i) of the Act, consequently, we also set aside the penalties imposed by the Commissioner in the impugned order under Section 114 of the Act.

23.1 Before parting, on behalf of some of the individuals on whom the penalties have been imposed it has been submitted that penalties have been mechanically imposed without ascertaining the role played by each of them. It was submitted that the penalty on Rajesh Adani has been imposed simply because he is Managing Director. Lumesh Sanghavi, who

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was in day to day in charge of the bonded warehouses into and from where all transaction of import and export took place, has not implicated Rajesh Adani. Samir Vora and Saurin Shah have stated that Rajesh Adani was only involved on Policy matters. We find that the same is the position in relation to Deven Mehta, Omi Bagadiya, Vithaldas Udeshi and Narottam Somani on whom penalties have been imposed only because they "have allowed themselves to act at the behest of AEL and have performed acts which have rendered the export goods liable to confiscation." without ascribing acts of omission or commission under the Act to levy penalty on them. Section 114 of the Act does not create vicarious liability. It is an action in personam. It is therefore necessary to show how each of these individuals acted in a manner which resulted in mis-declaration of FOB value to render the goods liable to confiscation under Section 113(i). We find no justification has been provided by the Commissioner in the order. The statement of these individuals are exculpatory, besides not being adversely implicated by others. In any case, we have set aside penalties on all concerned as aforesaid.

24. In the circumstances, we set aside the impugned order passed by the Commissioner and allow the appeals filed by all the parties and dismiss the appeals filed by the Department. Consequential reliefs if any are allowed.

(Pronounced in Court on 26-08-2015)

SD

(P.S. Pruthi)
Member (Technical)

Sp

SD

(Anil Choudhary)
Member (Judicial)

आदेश के प्रति मिला आवेदित
 Copy of the Order forwarded and
 कर द्वारा/आवेदित/विभागाध्यक्ष/परिनिधी
 The Assessee/The Commissioner/The
 Dr. C.E.S.I.A.T
 कस्यचित् परिनिधी
 TRUE COPY



सहायक रजिस्ट्रार
 Assistant Registrar
 सीमांकित उद्योगों और
 सेवायुक्तों पर कर आयोग
 Customs, Excise & Service Tax
 Appellate Tribunal

26 AUG 2015

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO..... of 2016
(@ CIVIL APPEAL DIARY NO. 12231/2016)

COMMISSIONER OF CUSTOMS -II
(AIRPORT SPECIAL CARGO), MUMBAI

Appellant(s)

VERSUS

M/S ADANI ENTERPRISE LTD ETC.ETC.

Respondent(s)

O R D E R

Delay condoned.

Heard learned counsel for the parties.

We see no reason to interfere with the orders passed by the
Customs, Excise and Service Tax Appellate Tribunal.

The civil appeals are dismissed.

.....J.
[Madan B. Lokur]

.....J.
[R.K. Agrawal]

NEW DELHI;
JULY 22, 2016.

Signature Invalid
Digitally signed by
SANJAY K. AR
Date: 2016.07.22
18:45:15 IST
Reason:

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Civil Appeal Diary No(s). 12231/2016

COMMISSIONER OF CUSTOMS -II
(AIRPORT SPECIAL CARGO), MUMBAI

Appellant(s)

VERSUS

M/S ADANI ENTERPRISE LTD ETC.ETC. Respondent(s)
(With appln. (s) for c/delay in re-filing appeal and condonation of
delay in filing appeal)

Date : 22/07/2016 These appeals were called on for hearing today.

CORAM : HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE R.K. AGRAWALFor Appellant(s) Mr. Tushar Mehta, ASG
Mr. H. Raghavendra Rao, Adv.
Ms. Hari Priya, Adv.
Mr. B. Krishna Prasad, Adv.For Respondent(s) Mr. Harish N. Salve, Sr. Adv.
Mr. Vikram S. Nankani, Sr. Adv.
Mr. Alok Yadav, Adv.
Mr. Somnath Shukla, Adv.
Mr. Udit Jain, Adv.
Mr. Harish Pandey, Adv.

UPON hearing the counsel the Court made the following

O R D E R

The civil appeals are dismissed in terms of the signed order.

(Meenakshi Kohli)
Court Master(Jaswinder Kaur)
Court Master

[Signed order is placed on the file]

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

REVIEW PETITION (C) Nos.512-513 OF 2017

IN

CIVIL APPEAL Nos.7016-7027 OF 2016

COMMISSIONER OF CUSTOMS II,
(AIRPORT SPECIAL CARGO), MUMBAI

...PETITIONER(S)

VERSUS

M/S ADANI ENTERPRISES LTD ETC ETC

...RESPONDENT(S)

O R D E R

Applications for hearing in open court are
rejected.

Delay condoned.

We have carefully gone through the review
petitions and the connected papers. We find no merit in
the review petitions and the same are accordingly
dismissed.

.....J.
(MADAN B. LOKUR)

.....J.
(R.K. AGRAWAL)

NEW DELHI
MARCH 30, 2017

Annexure 6: Order of Customs, Excise & Service Tax Appellate Tribunal (CESTAT)
dated 27th July 2022

Tel : 022-23754933
Fax : 022-23754910

OUTWARD NO. : A-441
REGISTERED / AD / SPEED POST

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH : MUMBAI
3RD, 4TH, & 5TH FLOOR, JAI CENTRE, 34 P. D'MELLO ROAD,
POONA STREET, MASJID BUNDER (E), MUMBAI- 400 009.

From : The Assistant Registrar, CESTAT, MUMBAI.

Dated: 27/07/2022

File No.:-C/87758/2017

In the matter of :-

COMMISSIONER OF CUSTOMS
NHAVASHEVA - (IMPORT)

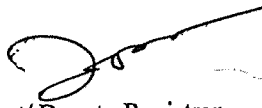
(Appellant)

Vs

MS ADANI POWER MAHARASHTRA
LTD
ADANI HOUSE,
MITHAKHALI CIRCEL,
NAVARANGPURA,
AHEMDABAD
380009

(Respondent)

I am directed to transmit herewith a certified copy of Order No. : A/85641/2022 dated : 18/07/2022 passed by the Tribunal under section 129-A(4) of the Customs Act, 1962.


Assistant/ Deputy Registrar,
Customs Appeal Branch
CESTAT - MUMBAI

Copy To :-


1. Commissioner Customs & Central Excise (Appeal) : COMMISSIONER OF CUSTOMS NHAVASHEVA(PORT IMPORT)
2. Master File
3. M/s Centax Publications Pvt. Ltd.
4. Taxmann Allied Services (P) Ltd.
5. Additional Party's Name & Address :
6. Advocate^(s) / Consultant^(s) / Representative:-

ECONOMIC LAWS PRACTICE(AHM)

801 8th floor abhijeet III
Opp mayors bungalow
nr mithakhali cross roads
law garden
ellisbridge
Ahmedabad 380006

JitendraMotwani@elp-in.com

2-D

Prepared By :- 

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

WEST ZONAL BENCH - COURT NO. 1

Customs Appeal No. 87758 of 2017

(Arising out of Order-in-Original No. 12/KVSS(12) ADG(ADJ.)/DRI, MUMBAI/2017-18 dated 22.08.2017 passed by Additional Director General, DRI (Adjudication), Mumbai)

Commissioner of Customs (Import),
NS-III, Jawaharlal Nehru
Customs House, Post-Sheva,
Taluka-Uran, Dist.-Raigad,
Mharashtra-400707

...Appellant

VERSUS

(1) M/s. Adani Power Maharashtra Ltd.
Adani House, Mithakhali Circle, Navrangpura,
Ahmedabad-380009.

...Respondent

(2) M/s. Adani Power Rajasthan Ltd.,
Adani House, Mithakhali Circle, Navrangpura,
Ahmedabad-380009.

(3) M/s. Electrogen Infra FZE,
SAIF Plus, R4, 38/A, SAIF Zone,
P.O.Box 122528, Sharjah, UAE.

**(4) Shri Vinod Shantilal Shah alias Vinod
Shantilal Adani,**
SAIF Plus, R4, 38/A, SAIF Zone,
P.O.Box 122528, Sharjah, UAE.

(5) Shri Jatin Shah,
SAIF Plus, R4, 38/A, SAIF Zone,
P.O.Box 122528, Sharjah, UAE.

(6) Shri Moreshwar Vasant Rabade,
SAIF Plus, R4, 38/A, SAIF Zone,
P.O.Box 122528, Sharjah, UAE.

APPEARANCE:

Shri PRV Ramanan, Special Counsel of the Department
Shri Vikram Nankani, Senior Advocate, Shri Jitendra Motwani and Ms. Shilpi
Jain, Advocates for the Respondent

CORAM:

**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)**

**Date of Hearing: 14.02.2022
Date of Decision: 18.07.2022**

FINAL ORDER No. A/85641/2022**JUSTICE DILIP GUPTA:**

This Customs Appeal has been filed by the Department to assail the order dated 22.08.2017 passed by the Additional Director General DRI, (Adjudication)¹ by which the proceeding initiated against **M/s. Adani Power Maharashtra Ltd.², M/s. Adani Power Rajasthan Ltd.³** and four others by a show cause notice dated 15.05.2014 has been dropped.

2. The issue involved in this appeal relates to the allegation of over-valuation of the goods imported by APML and APRL for setting up power projects at Tiroda in the State of Maharashtra and Kawai in the State of Rajasthan. The department alleges that though the power sector projects carry NIL rate of duty and the goods were imported directly to India, but the documents were routed through an intermediary entity created by APML and APRL for the purpose of raising invoices with inflated prices.

3. To appreciate the issues involved in this appeal, it would be necessary to first take note of some important factual aspects pertaining to APML and APRL.

APML

4. APML is a 100% subsidiary of Adani Power Limited and is engaged in operating Thermal Power Plants. There was an acute shortage of power in the State of Maharashtra and in order to overcome this deficit of approximately 27.4% and meet the future

-
1. the adjudication authority
 2. APML
 3. APRL

requirements, the Government of Maharashtra encouraged private sector to set up power generating stations without the requirement of a license under The Electricity Act, 2003. APML was one such company that came forward to set up power generation plants in the State of Maharashtra. It acquired land in village Tiroda in the State of Maharashtra to develop a green field Thermal Power Plant. This power plant was originally envisaged to be of 1980 MW capacity, but the capacity was later on increased to 3300 MW. The project was to be implemented in three phases consisting of 5 Units. Phase I was for a total capacity of 2 x 660 MW, and Phase II was for a capacity of 1 x 660 MW. While Phase I consisted of Units 1 and 2, Phase II consisted of Unit 3. Phase III consisted of Units 4 and 5, each of 1 x 660 MW. The aggregate capacity of the entire plant, therefore, comes to 3300 MW. The dispute in the present appeal relates to the imports made by APML for Phase III.

5. It needs to be noted that prior to undertaking the project, APML had prepared project reports through M/s. SBI Capital Market Limited, which reports were approved by the lenders. The original per MW cost worked out for Phase I of the project was Rs. 4.97 crores and Rs. 4.10 crores and Rs. 4.76 crores for Phases II and III respectively.

6. Though, as noted above, the present appeal deals with the imports made by APML for the Phase III (Units 4 & 5), it would be useful to note certain facts relating to imports made for the purpose of setting up Phases I & II of the Thermal Power Plant consisting of Units 1, 2 & 3.

7. APML had entered into four Power Purchase Agreements⁴ on long term basis with the Maharashtra State Electricity Distribution Company Limited⁵. The bids made by APML were accepted through a tariff based competitive bidding process, on the basis of which the following PPA were signed:

| Quantum | Date of PPA |
|---------|-------------|
| 1320MW | 08.09.2008 |
| 1200MW | 31.03.2010 |
| 125MW | 09.10.2010 |
| 440MW | 06.02.2013 |

8. It is stated that APML started the process of procuring equipment and machinery on a single turnkey engineering, procurement and construction⁶ basis for setting up Units 1, 2 and 3. A 'turnkey' basis is a fixed price schedule-intensive engineering, procurement, and construction contract. It is typically used in the construction of single-purpose projects, such as energy plants in which the contractor agrees to a wide variety of responsibilities, including the duties to provide for the design, engineering, procurement, and construction of the facility; to prepare start-up procedures; to conduct performance tests; to create operating manuals; and to train people to operate the facility.

9. Accordingly, APML invited tenders based on guidelines relating to International Competitive Bidding for setting up of the Thermal Power Plant, including design, procurement and commissioning thereof. It is further stated that at the time when APML floated the tender for sourcing of Boiler-Turbine-Generator⁷, no credible local

4. PPA
5. MSEDCL
6. EPC
7. BTG

supplier/manufacture having a facility to manufacture/ supply the same was available and so APML had to invite global bids to source the BTG and related equipments from reputed foreign manufacturer/supplier. A Notice Inviting Tender was, therefore, issued on 08.01.2008. The bid of M/s. Sichuan Machinery & Equipment Export and Import Co. Limited, China⁸ was found to be the lowest and most competitive and so the same was accepted and consequently APML entered into a contract with SCMEC on 28.11.2008 for supply of BTG and related equipments at a lumpsum value of USD 999.90 Million. Thereafter, APML applied for registration of the entire contract under Chapter Heading 98.01 of the Customs Tariff Act, 1985⁹ as the same was in relation to setting up of mega power project. This registration of the contract allowed the imported goods to be cleared under NIL rate of duty. The entire contract for supply of BTG equipment and machinery for Phases I & II (Units 1, 2 & 3) entered between APML & SCMEC was registered on 06.01.2010 with the Customs House at Nhava Sheva in terms of Regulation Nos.4 and 5 of the Project Import Regulations, 1986¹⁰.

10. After the registration of the contract with respect to Unit 1 & 2, an essentiality Certificate dated 18.12.2009 addressed to the Commissioner of Customs, Nhava Sheva, was issued by the Principal Secretary, Energy Department, Maharashtra specifying the goods which were required to be imported by APML for the project. Likewise, an essentiality Certificate for Unit 3 was issued on 01.06.2010 by the Principal Secretary giving details of the goods required to be imported. The goods were, thereafter, imported and

8. SCMEC
9. Tariff Act
10. PIR

allowed to be cleared under Chapter Heading 98.01 of the Tariff Act under a registered contract dated 28.02.2008 entered between APML and SCMEC.

11. On similar basis, APML issued a Notice Inviting Tender in respect of the design, engineering, supply, erection, testing and commissioning of equipment and machinery on a turnkey EPC basis for Phase-III (Units 4 and 5) of the Thermal Power Plant on 07.09.2009.

12. Three bids qualified and the details of the bids that were received are as follows:

| Name of the Bidder | Bid Amount |
|---|------------------|
| M/s. SP Long Yuan Power Technology & Engineering Co. Limited, China | USD 1296 Million |
| M/ China National Electric Equipment Corporation, China | USD 1249 Million |
| M/s. Sichuan Machinery & Equipments FZE, Sharjah | USD 1202 Million |

13. The bids were evaluated by APML and it is stated that the bid dated 21.10.2009 of the consortium led by M/s. Sichuan Machinery & Equipments FZE, Sharjah¹¹ was found to be the lowest and competitive. The bid documents submitted to APML in this appeal also reveal that the total bid amount of SME led consortium was USD 1.2 Billion covering BTG supply, BTG services as well as Balance of Plant¹² supply and services. The contract dated 05.11.2009 entered between APML and SME reveals that contract for USD 736 Million was towards supply of BTG alone and the balance amount was divided at the instance of SME into BTG services, BOP supply and services. This

11. SME
12. BOP

supply contract was also registered by APML under Chapter Heading 98.01 of the Tariff Act read with the relevant provisions of the PIR.

14. The entire contract entered between APML and SME for Phase III (Units 4 and 5) was registered with the Commissioner of Customs, Nhava Sheva on 06.01.2010. The essentiality Certificates for Units 4 and 5 were granted on 01.06.2010 and 30.09.2010 respectively by the Principal Secretary. These Certificates describe the equipments that were to be imported.

15. In the meantime the name of SME was changed to M/s. Electrogen Infra FZE, UAE¹³ with effect from 04.01.2010. It needs to be noted that EIF became a 100% subsidiary of M/s. Electrogen Infra Holding Private Limited, Mauritius¹⁴ w.e.f. 29.03.2010.

16. Upon import of the goods under the said supply contract dated 05.11.2009, APML filed Bills of Entry which were assessed provisionally and subject to reconciliation of the contract registered under the 2009 Regulations for Phase III (Units 4 & 5).

17. The total project cost on the date of financial closure of Phase III was Rs.6,290 crores per MW, as the cost per MW was Rs. 4.76 crores. According to APML, the project cost was in consonance with the Central Electricity Regulatory Commission (Terms and Condition of the Tariff) Regulation, 2009¹⁵ and to support this connection, reliance has been placed on an order dated 04.06.2012 passed by the Central Electricity Regulatory Commission¹⁶. Annexure-II of the Order provides the benchmark fixed for the per MW cost in setting up a similar power project at Rs.5.01 crores for two Units and Rs.5.37 crores for one Unit.

-
- 13. EIF**
14. EIH
15. 2009 Regulation
16. CERC

APRL

18. APRL is also a subsidiary of Adani Power Limited. The State of Rajasthan was also facing acute power shortage and in order to overcome this deficit power shortage of approximately 12.7% and to meet the future requirements, the Government of Rajasthan encouraged private sector participation in power generation, transmission and distribution. The private sector was encouraged to set up power generating stations without the requirement of a license under The Electricity Act, 2003. APRL was one such company that came forward for setting up a power generating plant in Rajasthan. It acquired land in village Kawai in the State of Rajasthan to set up a green field Thermal Power Plant of 1320 MW capacity (2 x 660 MW).

19. APRL entered into PPA on long term basis with Rajasthan Rajya Vidhyut Prasaran Nigam Limited¹⁷ on behalf of the Distribution Companies of Rajasthan. The bids made by APRL were accepted through tariff based competitive bidding process, on the basis of which a 1200 MW PPA was signed on 28.01.2010.

20. APRL started the process of procuring equipment and machinery on a single turnkey EPC basis for setting up of the Thermal Power Plant. It has been stated that at the time of floating the tender for sourcing of BTG and related equipment, no local supplier/manufacturer having the relevant credentials and facility to manufacture/supply the same was available and so APRL invited global bids to source the BTG and its equipments from foreign manufacturer/supplier. Tenders were, therefore, invited based on

17. RRVPNL

guidelines relating to international competitive bidding for setting up of the Thermal Power Plant including design, procurement and commissioning thereof. The Notice Inviting Tender was issued on 05.10.2009. Three bids qualified and all the bids were evaluated. The details of these bids are as follows:

| Name of the Bidder | Bid Amount |
|---|---------------------|
| M/s. Sichuan Machinery & Equipment FZE, Sharjah | USD 1206 Million |
| M/s. SEPCO III Electric Power Construction Corporation, China | USD 1471 Million |
| M/s. Guangdong Electric Power Design Institute, China] | USD 1490.57 Million |

21. After evaluation, the bid dated 19.11.2009 of the consortium led by SME (later known as EIF) was found to be the lowest. From the bid documents submitted by APRL in this appeal, it appears that the total bid amount of SME led consortium was USD 1.2 Billion covering BTG supply, BTG services as well as BOP supply and services. It also transpires from the supply contract dated 02.04.2010 entered between APRL and EIF that out of the total bid amount, the contract for USD 790 Million was awarded to EIF towards supply of BTG and related equipment. The balance amount was divided, at the instance of EIF, into BTG services, BOP supply and services. The contract was thereafter registered under Chapter Heading 98.01 of the Tariff Act to seek the benefit of NIL rate of duty. An essentiality certificate dated 01.06.2010 was issued by the Principal Secretary certifying the goods that were to be imported by APRL for the project. Consequently, the goods were imported on the basis of a registered contract dated 02.04.2010 entered between APRL and EIF.

22. The total project cost on the date of financial closure was Rs.7,030 crores since the per MW cost was stated to be Rs.5.33 crores. According to APRL, the project cost was in consonance with the 2009 Regulations and to support this contention reliance was placed on an order dated 04.06.2012 passed by the CERC that provides the benchmark fixed for the per MW cost in setting up a similar power project at Rs. 5.01 crores for two units.

SHOW CAUSE NOTICE

23. An investigation was, however, initiated by the Department of Revenue Intelligence regarding the goods imported by APML and APRL. The investigation for APML was carried out only with respect to Units 4 and 5 of Phase III. Post investigation, a common show cause notice dated 15.05.2014 was issued by the Additional Director General, Department of Revenue Intelligence, Mumbai. The show cause notice alleges that EIF and APML/APRL were related entities for the reason that EIF was owned and controlled by Vinod Shantilal Adani (also known as Vinod Shantilal Shah) through EIH and Vinod Shantilal Adani was also a shareholder of Adani Enterprises Limited, which in turn owned and controlled APML and APRL through its subsidiary Adani Power Limited. The show cause notice also alleges that APML, APRL, EIF and other respondents conspired to siphon off foreign exchange abroad for the benefit of their related entities. It further alleges that APML and APRL had imported goods by declaring values which they knew were not true and these imports were effected contrary to the prohibition imposed in rules 11 and 14 of the Foreign Trade (Regulation) Rules, 1993¹⁸, thus rendering the goods liable for confiscation under sections 111(d) and 111(m) of the

18. Foreign Trade Rules

Customs Act 1962¹⁹. Consequently, the show cause notice called upon the respondents to show cause as to why the declared value in respect of the goods imported by APML and APRL should not be rejected under rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules 2007²⁰ and should not be redetermined under rules 4/9 read with section 14 of the Customs Act.

24. The relevant portions of the show cause notice are reproduced below:

"17.0 SUMMARY OF INVESTIGATION

From the foregoing investigation, it appears that:-

17.1 APML, APRL & EIF, various related entities of Adani Group; Shri Vinod Shatilal Adani; Shri Jatin Shah & Shri Moreshwar Vasant Rabade of EIF and others have conspired between themselves to execute the planned conspiracy of siphoning off foreign exchange abroad to and for the benefit of their related entity. APML and APRL appear to have indulged in Trade Based Money Laundering by trade mis-pricing by routing invoice through an intermediary invoicing agent (EIF) in the UAE-a front company of the Adani Group run and controlled by one of the Adani brothers and assisted by ex-employees of the Adani Group. EIF in UAE appears to have been created as a front for siphoning off of money under the guise of outward remittances for over-valued imports, by indulging in invoice inflating.

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17.3 The relationship between EIF and APML and APRL has been established during the investigation. EIF is owned and controlled by Shri Vinod Shantilal Adani @ Vinod Shantilal Shah through M/s Electrogen Infra Holding Pvt. Ltd., Mauritius. Shri Vinod Adani is shareholder in flag ship company of Adani Group viz. Adani Enterprises Limited (AEL). AEL owns and controls APML and APRL through its subsidiary company M/s Adani Power Limited.

19. Customs Act
20. the Valuation Rules

17.4 Investigation in the present case has clearly revealed that while the critical BTG and its auxiliaries from SEC were sourced and shipped directly to India, the OEM invoices were routed through the above EIF i.e. the intermediary invoicing agent for inflating the value as a part of modus-operandi to siphon off money from India. SEC is a world-renowned supplier of BTG. It is also an undisputed fact that BTG are key components of a power plant and constitute a substantial portion of the cost of the power plant in terms of the aggregate value of equipment required for setting up the power plant. As stated earlier, EIF had entered into four contracts with SEC (the OEM for BTG) for supply of BTG and its auxiliaries, as summarised below:-

| S. No. | Agreement Date | Brief of scope of supplies covered by agreement | Executing parties | Consideration amount as per agreement (USD) | Purpose |
|--------|----------------|--|--------------------|--|---|
| 1. | 15.07.2009 | Steam Generator (boiler) and Auxiliaries 2x660 MW Power Project at Tiroda, Maharashtra | EIF/SME and SEC | 97465318 | For supply to APML's power project at Tiroda in Maharashtra |
| 2. | 15.07.2009 | Turbine, Generator and its Auxiliaries 2x660 MW Power Project at Tiroda, Maharashtra | EIF/SME and SEC | 81509682 | For supply to APML's power project at Tiroda in Maharashtra |
| | | | (1+2) | 178,975,000 | Total for APML power project |
| 3. | 06.11.2009 | Steam Generator (boiler) and Auxiliaries 2x660 MW Power Project at Tiroda, Maharashtra | EIF/SME and SEC | 97465318 | For supply to APML's power project at Tiroda in Maharashtra |
| 4. | 06.11.2009 | Turbine, Generator and its Auxiliaries 2x660 MW Power Project at Tiroda, Maharashtra | EIF/SME and SEC | 82679682+addition of 7920000 after amendment | For supply to APML's power project at kawai in Rajasthan |
| | | | (3+4) | 188,065,000 | Total for APML power project |
| | | | Grand Total | 367,040,000 | |

17.5 The aggregate value of all the contracts between EIF and SEC (as detailed above) put together work out to **USD 367,040,000**. Investigation has brought out the fact that goods shipped by SEC to APML and APRL were invoiced by EIF, the UAE based intermediary invoicing agent to APML and APRL. Investigation have been able to clearly identify consignments shipped by SEC to APML and APRL, which were cleared on the strength of EIF's invoices by APML and APRL upon importation in India on the basis of

combined analysis of invoice numbers & dates, shippers/exporters as appearing in the Bills of Lading/COO certificates and AORs/ORTTs showing the name of SEC as the beneficiary.

The aggregate value of shipments invoiced by EIF to APML and APRL, wherein the actual shipper is SEC works out to USD 633,562,594 (APML:USD 307147429.72 + APRL:USD-326415164). Analysis of the outward remittances through AORs/ORTTs to SEC made from the accounts of EIF held with Axis Bank and Bank of Baroda has revealed a total outflow of USD 335,732,220 for consignments shipped to APML and APRL on the basis of invoice numbers appearing on the AORs/ORTTs made by EIF (which were found to match with invoice numbers of invoices raised by EIF on APML and APRL) to the Banks requesting for outward remittances through SWIFT mode. The extent of value inflation is summarised at Table-24 which is repeated below:-.

(Table-24)

Extent of Overvaluation i.r.o of supplies made by SEC

| Sr. No. | Aggregate value of EIF invoices raised on APML and APRL where the actual supplier is Shanghai Electric Group Co. Ltd., China in USD | Aggregate value of remittance made by EIF to Shanghai Electric Group company for supplies to APML & APRL (USD- based on AORs/ORITs) | Difference (B-C) | Variation (B) as % of (C) |
|---------|---|---|------------------|---------------------------|
| (A) | (B) | (C) | (D) | (E) |
| 1. | 633,562,594 | 335,732,220 | 297,830,374 | 189% |

It is evident from above that against the aggregate payments of USD 335,732,220 paid by EIF to SEC for shipments made to APML & APRL, EIF appears to have raised back-to-back invoices with inflated price aggregating to USD 633,562,594 thereby leading to an inflation of nearly 189% over the OEM invoice-value (amounts actually remitted to SEC by EIF).

17.6 Similarly in case of supplies by two OEMs (Shanghai Shantra Trading Co. Limited, Shanghai, China and Reynold Power Transmission Limited) as per invoices raised by said OEMs on EIF with the corresponding back-to-back invoice of EIF on APML & APRL are as Table -11, ibid, which is repeated below-

| Sr. No. | OEM invoice raised on EIF | | Invoice raised by EIF on APML/APRL | | Difference (USD) | (F) as % of (C) |
|---------|--|---|--|-------------|------------------|-----------------|
| A | B | C | D | E | F | G |
| A | Inv.No./date | Value (USD) | Inv.No./date | Value (USD) | | |
| 1. | 10SDMS01G1 60 DE dt. 26.01.2011 | 1647395 | 10SDMS01G1 60 DE dt. 26.01.2011 (on APML) | 3294790 | 1674395 | 100% |
| 2. | 10SDMS01G1 80 IN dt. 04.05.2011 (Shanghai Shantra) | 1647395 | 10SDMS01G1 80 IN dt. 04.05.2011 (on APRL) | 3294790 | 1674395 | 100% |
| 3. | 50582 dt.25.06.2013 (Reynold Transmission) | 85041.22 (equivalent of GBP 54279.68 converted to USD) | 500582 dt. 25.06.2013 (on APML) | 230550 | 145509 | 171% |

The inflation to the extent of 100% and 171% in case of shipments by two OEMs also corroborates the fact the EIF has resorted to value inflation in the invoices raised by it on APML and APRL.

17.7 Thus, the declared values in the impugned 301 & 262 consignments imported by APML & APRL respectively totally amounting to **Rs. 3469,07,79,940/-CIF** and **Rs. 3692,65,37,178/--CIF** respectively, declared on the basis of inflated invoice prices in invoices of the intermediary EIF, do not represent the actual value of the goods as has been brought out by the investigation. The overall overvaluation to the extent of **Rs. 3974,12,13,183/- CIF** is summarised in Table below:-

Table-32

**Proportionate distribution of over-valuation between APML & APRL
(Figures in Rs.)**

| Sr. No. | Name of the importer | Declared CIF in Rs. Based on EIF invoices raised on APML & APRL | Remittances made by EIF to OEM (Rs.) | Difference in Rs. (C-D) |
|---------|----------------------|---|--------------------------------------|-------------------------|
| A | B | C | D | E |
| 1. | APML | 34690779941 | 15574421785 | 19116358156 |
| 2. | APRL | 36926537178 | 16301682151 | 20624855027 |
| | Total | 7161,73,17,119 | 3187,61,03,936 | 3974,12,13,183 |

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17.10 In the guise of import of power sector machinery and equipment, APML and APRL, the two entities of Adani Enterprises Limited appear to have indulged in over-valuation of impugned imported goods. The actual value of

the imported goods is **Rs. 3187,61,03,936/-**, whereas the same have been invoiced at **Rs. 7161, 73,17,119/-**, thus leading to an over-valuation **Rs. 3974,12,13,183/-** which appears to have been siphoned off abroad through EIF, an intermediary at UAE, which is controlled and managed by Shri Vinod Shantilal Adani @ Vinod Shantilal Shah, one of the promoters of Adani Enterprises Limited (flagship company of the Adani Group)."

REPLY TO SHOW CAUSE NOTICE

25. APML and APRL filed separate replies dated 25.11.2016 to the aforesaid show cause notice. Apart from stating that the documents obtained from the banks which formed the basis for issuance of the show cause notice were not admissible in evidence as they had been obtained contrary to the provisions of law, submissions on merits were also made. The reply states that the Notice Inviting Tender and the contract entered with the successful bidder would prove beyond reasonable doubts that the power project covered supply of goods and services. It was, therefore, required to be dealt with as an EPC and the respondents were not concerned with prices of individual equipments and machineries. The reply also states that the department had not disputed the value of the goods imported for setting up Phases I and II of Thermal Power Plant (Units 1, 2 & 3) and that the prices of the goods imported for Phases I & II were comparable with the prices for imports made for Phase III. The allegation made in the show cause notice that APML & EIF were related parties was also denied. The relationship between APRL and the consortium led by EIF was also denied and it was also stated that in any case the relationship, even if it was assumed to be correct, had not influenced the price. It has further been stated that the contract was awarded to the EIF led consortium by following the International

Competitive Bidding route and the two Notices Inviting Tender were published in national newspapers having wide circulations with bids being open to all eligible bidders of foreign countries. The redetermination of the value under rule 4 of the Valuation Rules was stated to be erroneous and the show cause notice had also ignored the contemporaneous data provided by the respondents which clearly depict that the value was comparable with the MW per unit cost of other projects undertaken by the competitors.

ORDER

26. The adjudicating authority, on an analysis of the allegations made in the show cause notice and the reply filed by the APML/APRL, dropped the proceedings initiated by the show cause notice dated 15.05.2014. The adjudicating authority found that the relationship alleged between APML and EIF could not be established and even though the relationship between APRL and EIF was found to be established but the same had not influenced the price of the imported goods. The adjudicating authority also noticed that the contract between EIF and APML/APRL was a lumpsum contract wherein EIF was responsible for the entire gamut of activities as against the individual supply contracts between the Original Equipment Manufacturers and EIF, which was for supply of goods alone. The adjudicating authority, therefore, concluded that such individual stand alone contracts cannot be compared with the EPC contract that had several other factors built in it affecting various elements thereof namely the cash flow and the risks undertaken by the parties, which could potentially result in liabilities well beyond the total contractual payment over a period of time and also the fact that the obligation subsisted even after the supply was completed. The adjudicating

authority also found that the terms and condition of the contract between EIF and APML/ APRL were far more stringent than the contracts between the Original Equipment Manufacturers and EIF, which led to an upward escalation in the price. The adjudicating authority, in such circumstances, concluded that the conditions such as extended warranty being a part of the condition of sale was a part of the contract between APML/APRL and EIF and further that the extra money involved in giving the extended warranty became the part of the value of goods thereby adding to the cost of imports. The adjudicating authority also concluded that the contract between APML/APRL and EIF encompassed all the factors of an EPC contract. The adjudicating authority also considered that the project cost was comparatively lower when the cost per MW of APML/APRL was compared with other projects of super critical technology. In so far as the Phase III project of APML is concerned, the adjudicating authority also accepted the submission of the respondents that the same was comparable with the earlier contract for the Phase I & Phase II entered into with SCMEC, though this was not the sole criteria for deciding the value of the imported goods.

27. The relevant portions of the order passed by the adjudicating authority are reproduced below:

"5.1 I would like to examine in detail the main issue involved in the SCN as to whether the value declared by M/s APML & M/s APRL be rejected in terms of Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 read with Section 14 of the Customs Act, 1962 and the same may be redetermined as per Rule 4/9 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 read with Section 14 of the Customs Act, 1962.

5.1.1.10 Thus, I find that it was alleged in the show cause notice that for every transaction there were two invoices - i.e. one from OEM to M/s EIF and, the other from EIF to APML/APRL which was grossly inflated and did not appear to be bonafide for the reason that -

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5.1.3 Thus on perusal of the SCN and the various replies filed by the noticees (APML & APRL) I find that one of the main allegations in the SCN is that Adani group companies and EIF were related to each other through Shri Vinod Shantilal Shah @ Vinod Shantilal Adani in terms of Rule 2(2) of the CVR, 2007. **Thus, I have to examine as to whether the two entities viz. APML/APRL and EIF were related and if related, whether the relationship influenced the price of the imported goods.** I find that EIF was initially registered in SAIF Zone, Sharjah, UAE on 07.07.2009 as M/s Sichuan Machinery & Equipments FZE with its sole promoter and shareholder Mr. Nasser Ali Shaban Ahli, a UAE. The ownership of EIF was subsequently transferred to Electrogen Infra Holding Pvt. Ltd., Mauritius on 29.03.2010. I find that Shri Vinod Shantilal Adani was the sole 100% shareholder and Director of EIH from 12.01.2010. In effect, therefore, he was the owner of EIF from 29.03.2010. I find that the show cause notice has alleged that APML/APRL was related to EIF under section 2(2) of the CVR, 2007. I find that the show cause notice is silent on the specific sub-section under which the said two parties were related.

Rule 2(2)(iv) - any person directly or indirectly owns, controls or holds five percent or more of the outstanding voting stock or shares of both of them;

Rule 2(2)(viii) - they are members of the same family.'

5.1.3.1 Thus, to establish relationship one of the above conditions needs to be satisfied. I will discuss the same for each noticee individually.

5.1.3.1.1 In the case of Adani Power Maharashtra Ltd. (APML) I find that the contract between APML and EIF (erstwhile SME) was signed on 05.11.2009 after following the elaborate process of Global Tendering and evaluation of bids. Thus, I find that during the period of signing of the contract, EIF was still owned by Shri Nasser Ali Shaban Ahli, a UAE

national. Therefore, I find that the condition prescribed in Rule 2(2)(i) i.e. they are officers or directors of one another's businesses is not fulfilled since Shri Vinod Shantilal Jain alias Adani was not a Director of EIF during the relevant time. Similarly, I find that for Rule 2(2)(iv) to be satisfied Shri Vinod Shantilal Adani needs to own or control five percent or more of the outstanding voting stock or shares of both APML and EIF during the relevant time. I find that he was one of the promoters and shareholders of AEL. As per the declarations filed with the market regulators Shri Vinod Shantilal Adani held 8.27% of the shares of AEL. However, Shri Vinod Shantilal Adani became a Director of EIF only on 29.03.2010 by virtue of it becoming a subsidiary of EIH. Thus, I find that the condition stipulated in Rule 2(2)(iv) is also not satisfied. Further, I find that the third condition as per Rule 2(2)(viii) i.e. they are members of the same family is also not satisfied since at the time of the signing of the contract, Shri Nasser Ali Shaban Ahli, a UAE national was the Director of EIF. **Thus, I find that the two entities i.e. APML and EIF were not related in terms of Rule 2(2) of the CVR, 2007 on the date of the signing of the contract.**

- 5.1.3.1.2 As regards APRL I find that the contract between APRL and EIF was signed on 02.04.2010 i.e. after Shri Vinod Shantilal Adani became a Director of EIF on 29.03.2010 by virtue of it becoming a subsidiary of EIH. On going through the provisions of Rule 2(2) of the CVR, 2007, with respect to Rule 2(2)(i). I find that Shri Vinod Shantilal Adani was a director of EIF by virtue of it becoming a subsidiary of EIH, as regards Adani group of companies he was only one of the promoters and shareholders in flagship company of the Adani group viz. M/s Adani Enterprises Ltd. which is evident from contents of copy of a letter dated September 13, 2012 signed by him and addressed to, inter-alia, the Bombay Stock Exchange Limited and the National Stock Exchange of India Limited regarding disclosure under Regulation 31 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. **Thus, I find that the conditions of Rule 2(2)(i) were not fulfilled since they are not officers or Directors of one another's businesses.** As already mentioned above I find that Rule 2(2)(iv) stipulates that any person directly or indirectly owns,

controls or holds five percent or more of the outstanding voting stock or shares of both of them then the entities are related. I find that during the relevant time i.e. when the contract was signed Shri Vinod Shantilal Adani owned 100% of the shares of EIF by virtue of being the sole Director of EIH, its holding company. Further, I find that as discussed supra he was one of the promoters and shareholders of AEL. As per the declarations filed with the market regulators Shri Vinod Shantilal Adani held 8.27% of the shares of AEL. **Thus, I find that the two entities were related by virtue of the provisions of Rule 2(2)(iv) of the CVR, 2007 on the date of signing of the contract.**

5.1.3.3 Further I find that it was also alleged in the SCN that several ex-employees of Adani Group viz. Shri Jatin Shah & Shri Moreshwar Vasant Rabade joined EIF to manage its operations, and that in fact Shri Jatin Shah was made an authorised signatory in Sichuan Machinery & Equipments FZE even before it was acquired by Shri Vinod Shantilal Shah @ Adani. I find that the allegation is a matter of conjecture because the only way Shri Jatin Shah could be related would be by way Rule 2(2)(i) i.e. where they are officers or Directors of one another's businesses. I find that in the show cause notice it is mentioned that Shri Jatin Shah worked for various entities of Adani group before resigning in August, 2009. It is mentioned that Shri Jatin Shah resigned on 19.08.2009 and the same was accepted by M/s Adani Power Ltd. on the same day while communicating to him that he would stand relieved from the services of the company with effect from 31.08.2009. Thus, I find that from 01st September, 2009 he was a free agent and being a professional was free to accept employment from anybody. Further, as regards Shri M.V. Rabade, it was alleged that he had signed the contract between EIF and APML as Director on behalf of APML and that he was also a Director of EIF which obliterated the distinction between the two companies. However Rule 2(2)(i) requires the person be officer or Director of each others business at the relevant time which is not the case here. I find that the SCN itself mentions that Shri Moreshwar Vasant Rabade (Director of Electrogen Infra FZE UAE at one point of time) had signed the said agreement for and on behalf of M/s Adani Power Maharashtra Limited. Thus, it is not alleged in the SCN

that he was Director/ officer in EIF and APML at the same time. Thus I do not agree with the contention in the show cause notice.

5.1.3.12 I further find that the SCN mentions that the intermediary EIF was remitting the payments to its OEM through its two accounts held by them in Axis Bank and Bank of Baroda by way of Outward Remittances by way of Telegraphic Transfer (ORTT) using SWIFT Network. I find that it was alleged that the payments made by APML/APRL to EIF against the back to back invoices raised by it. I was in excess by 180% to 190% the aggregate remittances made by EIF to its OEMs thereby leading to allegation of gross over-valuation of the goods at the time of import by APML/APRL.

5.1.3.12.1 **I find that the contract between APML/APRL and EIF was a lumpsum contract whereas the payment terms in the contracts between EIF and the OEMs was consignment based i.e. whenever a particular payment was due because of the OEM reaching a target, EIF released the payment through ORTT. I find that in some of the remittances (for eg. ORTT 0202310 & ORTT 0453410), in the column for purpose of remittance the remarks 'ADVANCE AGST CONTRACT' is mentioned. Thus, some of the payments made by EIF to its OEM through those ORTT's were advance payments. Furthermore I find that in majority of the ORTT the multiple invoice numbers were mentioned without any breakup of the invoice wise value. Therefore, in order to find out the true and correct picture of the remittances made, it is essential to compare the remittances made through ORTT against the actual invoices raised by the OEMs. I find that the department had been able to find only three invoices of the OEMs. Thus I find that the allegation made in the SCN was based on extrapolation of the available data and thus was a conjecture and not based on any hard evidence. Therefore I am not in agreement with the allegation made in the SCN.**

5.1.3.13.1 **Further, I find that the other terms and conditions of the contract between EIF and APML/APRL are also much more stringent than the terms and conditions between OEM and EIF. xxxxxxxxx**

5.1.3.18.7 Thus, I find that the goods in question were eligible for benefit under Project Import since it was meant for Power Plant. Further I find that the sponsoring authority is the Secretary (Energy) of Maharashtra and Rajasthan which was in line with the requirement of Regulation 7 of the PIR, 1986. Lastly the said contracts were registered with the relevant Customs authorities under Project Imports under Regulation 5 of the PIR, 1986. Further I find that as per requirement the noticee has filed the Reconciliation statement with the relevant customs authorities where the Project Import contract was registered and BG was executed. Thus, I find that all the requirements of the Project Imports have been followed by the noticee. Thus, as per the PIR, 1986 it is the contract as a whole which needs to be assessed on completion of the contract and not the individual consignments. To avoid numerous assessments requiring splitting of value for all the machineries brought under a single project contract and to provide for single assessment at a lower/nil duty, project imports had been brought under a separate tariff heading. **It, therefore, followed that comparison of value of goods covered by each and every individual consignment was impermissible and unjustified in law because the SCN has not challenged the validity of the contract between APML/APRL and EIF. Nevertheless, I find that the contract had been allotted to EIF on the basis of International Competitive Bidding wherein the said bid was found not only to be in order by a technical evaluation team but was also found to be the lowest.**

5.1.3.19 In view of the above discussions I am of the opinion that:

- (i) the two entities viz. APRL and EIF were not related during the relevant period;
- (ii) APRL and EIF may be considered as related during the relevant period, but the price was not affected by the relationship because the contract entered into between them was on the basis of International Competitive Bidding (ICB), and
- (iii) all the payment made as a condition of sale of the imported goods by the importer to the

seller are includable in the assessable value since the goods were imported under PIR against EPC contract.

Thus, I find that the value declared by the notices is correct and proper."

(emphasis supplied)

SUBMISSIONS

28. Shri P.R.V. Ramanan, learned special counsel appearing for the department made the following submissions:

- (i)** The adjudicating authority has given contradictory findings with regard to the relationship between EIF and APML/APRL. In paragraph 5.1.3.3 of the impugned order the adjudicating authority has found that APRL and EIF are related whereas in paragraph 5.1.3.19 it has been recorded that APRL and EIF were not related parties during the relevant period. Again, in paragraph 5.1.3.19 (i) and (ii) the adjudicating authority concluded that APRL and EIF can be considered as related;
- (ii)** The finding recorded by the adjudicating authority that the show cause notice did not challenge the validity of the invoices issued by EIF and also the validity of the contracts between EIF and APML/APRL is not correct as the show cause notice had alleged that the transaction between APML/APRL were sham transactions and that EIF was only a front of Adani Group, which acted merely as an intermediary invoicing agent for inflation of value;
- (iii)** The adjudicating authority accepted the contentions of the respondent without critically examining the manner in which the International Competitive Bidding was conducted. It is apparent that the whole International Competitive Bidding process was undertaken as part of a plan to provide the cloak of legality and transparency to

an otherwise fraudulent act. It is evident that SME/EIF and APML/APRL were working in tandem as part of the plan. The adjudicating authority ignored the facts evident from the record and came to a conclusion that APML and APRL had selected a vendor after following a fair, bonafide, transparent and independent International Competitive Bidding process;

- (iv)** The adjudicating authority held that the contracts were EPC contract without critically examining the nature of the contract;
- (v)** The adjudicating authority could not have ignored that the so-called EPC contracts and other paper documentations were tailor-made to give the transaction a colour of a bonafide transaction, which was otherwise a sham transaction;
- (vi)** The adjudicating authority erred in holding that in case of Project Import, valuation of each and every consignment is not permissible and valuation has to be done at project level;
- (vii)** The adjudicating authority erred in concluding that the transactions between APRL/APML and EIF were at arm's length as per the assessment orders passed by the Income Tax Authority;
- (viii)** Neither the respondents nor the adjudicating authority advanced any tangible data or valid basis to justify gross over-valuation at the hands of an intermediary invoicing agent who apparently did nothing except value inflation; and
- (ix)** The adjudicating authority erred in holding that the relevant time/date for determining the relationship between the parties was the date of contract and not the actual date of import.

29. Shri Vikram Nankani, assisted by Shri Jitendra Motwani and Ms. Shilpi Jain, made the following submissions:

- (i)** The whole transaction is based on genuine international competitive bidding process. In fact the notice inviting tender was published in various newspapers and as the bid was for turnkey project at lumpsum amount, APML/ APRL were not concerned with the break-up of individual items or services. The show cause notice also does not allege the validity and/or correctness of the tendering and/or bidding process;
- (ii)** The contract price is at par with statutory norms and peer projects. The contract value at which the contract was awarded to EIF is comparable to the value of the previous contract dated 28.02.2008 that was awarded to SCMEC. The value of the disputed supply contract for Phase-III is USD 736 million, which is comparable to the value of the contract dated 28.02.2008 with SCMEC for Phases I & II which is USD 999.90 million. Phase I and II covered three Units whereas Phase III covers two Units. Thus, the pro rata price of the contract dated 28.02.2008 for two units works out to USD 666 million, as against USD 736 million under the contract dated 05.11.2009. The price difference of around USD 70 million is due to market price escalation during these twenty months;
- (iii)** The entire investigation is incomplete and inconsistent. The allegation of overvaluation is based on half-baked information received from the banks in relation to EIF;
- (iv)** The documents adduced by the department from foreign banks were obtained contrary to the provisions of law and hence inadmissible as evidence. The allegations raised in the show cause notice are based on photocopies of documents allegedly recovered from overseas banks or overseas branches of Indian banks. The said documents are not authenticated and have not

been proved under section 139(ii) of the Customs Act;

- (v)** APRL and EIF are not related party. In any event, the alleged relationship has not influenced the price. Even the revenue has not specified under which clause of rule 2(2) of Valuation Rules the relationship has been alleged;
- (vi)** The bank account entries do not prove over-valuation. The entries set out in Tables 13 and 15 of the show cause notice do not correlate to the supplies made by EIF to APML/APRL;
- (vii)** The proposed rejection of the transaction value and the proposed re-determination is not tenable in law;
- (viii)** In terms of PIR, the contract as a whole has to be assessed and not individual consignments of goods;
- (ix)** The contract between APML/APRL and EIF cannot be compared with contract between EIF and the Original Equipment Manufacturers. The Revenue committed an error in alleging that the contract between APML/APRL and EIF is not an EPC contract;
- (x)** The Deputy Commissioner of Income Tax had issued show cause notice for the financial Year 2012-13 & 2013-14 on the basis of alleged over-valuation but after considering the submissions of APML/APRL, the Income Tax authorities found no overvaluation in the prices of equipment imported by APML/APRL from EIF;
- (xi)** There is no contradiction in the findings of the adjudicating authority since it is apparent that the adjudicating authority in paragraph 5.1.3.19 of the order had by mistake mentioned 'APRL' instead of 'APML', because in the subsequent paragraph the relationship between APRL and EIF has been considered;

- (xii) The issue on merits was settled in favor of APML/APRL in the decision of the Tribunal in **Knowledge Infrastructure Systems Private Limited vs. Additional Director General D.R.I.**²¹. This fact is admitted to the Revenue, as can be seen from the submissions made by the Revenue in the early hearing application;
- (xiii) The respondent is eligible for refund of the excess duty, if any, paid by it;
- (xiv) The imported goods are not liable for confiscation in terms of section 111(d) and (m) of the Customs Act. Further, no penalty is imposable on the respondents under sections 112 and 114AA of Customs Act; and
- (xv) The Revenue has not contested the findings on confiscation and penalty.

30. The submissions advanced by the learned special counsel for the appellant and the learned senior counsel for the respondents have been considered and they shall be examined under different heads.

CONTRADICTORY FINDINGS

31. The first issue that needs to be addressed is whether contradictory findings have been recorded by the adjudicating authority in the order dated 22.08.2017. This submission of learned special counsel appearing for the department is based on the findings recorded in paragraphs 5.1.3.1.1 and 5.1.3.1.2 on the one hand of the order dated 22.08.2017 and paragraph 5.1.3.19 of the said order on the other hand. While examining whether APML and EIF were related, the adjudicating authority held in paragraph 5.1.3.1.1 that they were not related. While examining the relationship between APRL and EIF, the adjudicating authority observed in paragraph

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

5.1.3.1.2 that though APRL and EIF were related but the said relationship had not influenced the price. After having recorded such findings, the adjudicating authority summed up the discussion in paragraph 5.1.3.19 in the following manner:

"5.1.3.19 In view of the above discussions I am of the opinion that:

(i) the two entities viz. APRL and EIF were not related during the relevant period;

(ii) APRL and EIF may be considered as related during the relevant period, but the price was not affected by the relationship because the contract entered into between them was on the basis of International Competitive Bidding (ICB), and

(iii) all the payment made as a condition of sale of the imported goods by the importer to the seller are includable in the assessable value since the goods were imported under PIR against EPC contract."

32. A conjoint reading of all the aforesaid paragraphs leaves no manner of doubt that while summing up the discussion, the adjudicating authority wrongly mentioned 'APRL' instead of 'APML' in paragraph 5.1.3.19 (i). This is also clear from the fact that the relationship between APML and EIF has not be summed up and the relationship between APRL and EIF has been dealt with in paragraph 5.1.3.19(ii). This correction will bring paragraph 5.1.3.19(i) in conformity with the findings recorded in paragraph 5.1.3.1.1. In paragraph 5.1.3.19 (ii), the adjudicating authority dealt with the relationship between APRL and EIF and this is in conformity with the findings recorded in paragraph 5.1.3.1.2. The department has unnecessarily made an attempt to capitalize on this typographical error that has crept in paragraph 5.1.3.19 (i) of the order. If the

typographical error is recognized, there would be no inconsistency between the finding recorded in earlier paragraph and the subsequent paragraph.

RELATIONSHIP

33. To support case of overvaluation, the department alleges that APML/APRL and EIF are related and in this connection the following two factors have been highlighted.

(a) APML and APRL are 100% subsidiary of Adani Power Limited and Mr. Vinod Shantilal Shah holds more than 8% shares in Adani Enterprises Limited. At the same time Mr. Vinod Shantilal Shah is 100% owner of the EIH, of which EIF became 100% subsidiary on 29.03.2010. Therefore APML/APRL and EIF are related through Vinod Shantilal Shah.

(b) Mr. Jatin Shah worked with various entities of Adani Group till August 2009 and thereafter was the authorised signatory of the EIF. This shows that Jatin Shah was handling the affairs of EIF at the behest of Adani Group. Further, one of the employees of APML namely Mr. M V Rabade has signed the contract on behalf of both APML and EIF.

34. It is seen that the contract between APML and EIF was signed on 05.11.2009 pursuant to a bid submitted on 21.10.2009. Vinod Shantilal Shah became shareholder of EIF only on 29.03.2010 and, therefore, the contract awarded to EIF was by way of an independent process without being influenced by any relationship.

35. The contract between APRL and EIF was signed on 02.04.2010, which was four days after Vinod Shantilal Shah became a shareholder of EIF. However, what is important to notice is that the bid for APRL was submitted by EIF much earlier on 19.11.2009. Even if it is

assumed that there was a relationship between APRL and EIF, the transaction value cannot be questioned unless the department is able to prove that the relationship has influenced the price. The evidence that has been led on behalf of the respondents in the form of contemporaneous data showing the per unit MW price of other projects undertaken by the competitors is similar to or higher than per unit MW cost of APML and APRL. This establishes there was no overvaluation as would be apparent from the following chart:

| Project | Technology | Project Year | Capacity | Unit Size | Cost (Rs. Crs.) | Cost Per MW (Rs. Crs.) |
|---|----------------|--------------|----------|-----------|-----------------|------------------------|
| APML (Phase-III) | Super Critical | 2009 | 1320 | 660*2 | 6,290 | 4.76 |
| Indiabulls-Sophia Power | Super Critical | 2009 | 1320 | 660*2 | 6888 | 5.22 |
| GMR Chattisgarh (without Mega Power Status) | Super Critical | 2010 | 1320 | 660*2 | 8200 | 6.21 |
| JPL Dumka Jharkhand | Super Critical | 2010 | 1320 | 660*2 | 7224 | 5.47 |
| Jaypee-Prayagraj | Super Critical | 2009 | 1980 | 660*3 | 10780 | 5.44 |
| Moser Baer | Super Critical | 2010 | 1200 | NA | 6240 | 5.2 |
| Jindal India Powertech Ltd. | Super Critical | 2009 | 660 | NA | 3160 | 5.27 |
| APRL | Super Critical | 2010 | 1320 | 660*2 | 7,030 | 5.33 |

36. This apart, the per MW capax for APML/APRL was less than the benchmark fixed cost for per MW capax in setting up green field power project determined by CERC. As noticed above, CERC had fixed per unit MW price of green field power project at Rs. 5.01 crores, whereas per MW cost for APML and APRL was Rs. 4.76 crores and Rs. 4.53 crores respectively, excluding the soft cost and other development cost. Thus, the per MW capax cost of APML and APRL

was lower than the benchmark MW capax determined by CERC. It has also been found as a fact in the impugned order that the relationship had not influenced the price and this finding, as noticed above, does not suffer from any error.

37. With regards to Jatin Shah being an employee of both Adani Group and EIF, it is an undisputed position that Jatin Shah left the Adani Group on 19.08.2009. Thereafter he could join any organization and he decided to join EIF. At no point in time he was holding a position in Adani Group and EIF at that same time. Further, rule 2 (2) of the Valuation Rules, that defines the term 'related person' does not provide for a situation by which two parties can be treated as related just because one company has employed an employee of another company and both the companies have entered into an agreement for a particular transaction at a later date.

38. Merely because M V Rabade signed the contract both on behalf of APML and EIF will not have any bearing on the relationship aspect. It is not in dispute that M V Rabade signed the contract on behalf of APML in the capacity of a Director and he signed the contract on behalf of EIF as an authorised representative. The authorization given to M V Rabade by EIF has not been challenged in the show cause notice and as such this will not advance the case of the department on the relationship aspect between APML/APRL and EIF. Even otherwise, there is no variation in the ultimate price paid by APML/APRL to EIF from the agreed contractual price and these contracts were arrived at through international competitive bidding process.

39. Learned senior counsel appearing for the respondents also contended that the show cause notice should have disclosed the

particular clause of rule 2 (2) of the Valuation Rules that would be attracted for establishing the relationship between APRL and EIF, but it failed to so disclose. It would, therefore, not be open to the appellant to make any submission about the alleged relationship. In support of this submission, learned senior counsel placed reliance on the decisions of the Supreme Court in **Amrit Foods Co. Ltd. vs. Commissioner of C. Ex., Meerut-I**²² and **Commissioner of Central Excise, Nagpur vs. Ballarpur Industries Ltd**²³. Learned senior counsel for the respondent also submitted that when clause (v) of rule 2 (2) was not mentioned in the show cause notice for establishing the relationship, it is not open to the appellant to place reliance on this rule to establish that the relationship stood established.

40. In view of the aforesaid judgments of the Supreme Court in **Amrit Foods** and **Ballarpur Industries**, there is substance in this submission made by the learned senior counsel for the respondent.

TENDER PROCESS

41. Much emphasis has been placed by the learned special counsel appearing for the department on the manner in which the contract was awarded to EIF. In this connection, it needs to be noted that the contract was awarded on the basis of international competitive bidding process. The notice inviting tender was published in various national and regional news-papers having wide circulation and the notices were also sent to twenty seven Consulates/Embassies. The tender was for setting up of a thermal power plant on EPC basis and the lowest bidder was awarded the contract.

22. 2003 (190) E.L.T. 433 (S.C.)

23. 2007 (215) E.L.T. 489 (S.C.)

42. It also transpires from the tender notice that the scope of work was very wide and included design, engineering, manufacturing, procurement, packing & forwarding, supply, transportation, receipt, unloading, installation, erection, testing, commissioning, and performance guarantee test. Detailed scope was contained in the technical specification Vol. II of the bid document. The qualification of the bidder is contained in paragraphs 6.1 and 6.2 of the tender document and they are reproduced:

"6.1 The Bidder should meet the qualifying requirement stipulated hereunder:

If the Bidder is not a Manufacturer of Boiler and Turbine Generator Sets, he should have sourced the Boiler or Turbine Generator Sets from the Manufacturers who have supplied at least 2 nos of Boiler and Turbine Generator Sets of Minimum 300 MW Capacity which should be in Operation for a period of 2 years at the time of Bid Submission.

OR

If the Bidder is a Manufacturer of Boiler and Turbine Generator Sets, he should have supplied at least 2 nos of Boiler and Turbine Generator Sets of Minimum 300 MW Capacity which should be in Operation for at least 2 years at the time of Bid submission.

6.2 If the Bidder does not fulfils the condition stipulated in clause 6.1 above, in such case, he may form a Joint Venture or Consortium with one or more Bidder/Bidders who must meet the qualifying requirement for the components they are designated to perform. In respect of Joint Venture or Consortium, the Bidders are requested to follow the conditions indicated in respective clauses of Conditions of Contract, section-2 of GCC of Bidding Document."

43. Three bids were received for **APML** project. The consortium led by SMEs submitted their bid on 21.10.2009. Two other bidders had also bid. The bidding was done by following the ICB guidelines and the bid by the consortium led by SME was found to be the lowest. The total bid amount of SME was USD 1.2 Billion covering BTG supply, BTG services as well as BOP supply and services. Out of the total bid price, contract for USD 736 Million was awarded to SME on 05.11.2009 towards the supply of BTG alone. Learned senior counsel for the respondent stated that the balance amount was divided at the instance of SME into BTG services, BOP supply and services. As required by the consortium, the remaining three contracts were entered into with other consortium members. The exchange rate of the two contracts which were awarded in INR resulted in reduction of bid price to USD 1.13 Billion, which was the final bid price.

44. **APRL** invited tenders based on ICB guidelines for setting up of the Thermal Power Plant including design, procurement and commissioning thereof for the said power plant. This notice inviting tender was issued on 05.11.2009. The bid by SME was found to be the lowest. The total bid amount of SME was USD 1.2 Billion covering BTG supply, BTG services as well as BOP supply and services. The name of SME was changed to EIF with effect from 04.01.2010. With effect from 29.03.2010 EIF became a 100% subsidiary of M/s. Electrogen Infra Holding Pvt. Ltd., Mauritius (EIH). EIF thereafter requested for forming of a consortium and the same was accepted. The bid submitted by the three bidders were evaluated and it was recommended that consortium led by EIF, then known as SME, should be awarded the contract. Out of the total bid price, contract for USD 790 Million was awarded on 02.04.2010 to EIF towards

supply of BTG alone. The balance amount was divided, at the instance of EIF, into BTG services, BOP supply and services. As required by the consortium led by EIF, the balance two contracts were entered into with other consortium members.

45. On behalf of the department it was submitted that it was a sham transaction and elaborating this submission, learned special counsel for the appellant pointed out that SME/EIF had signed contracts with the original equipment manufacturers even before they submitted the bid. The learned senior counsel for the respondent, however, submitted since that entire contract was awarded by meticulously following the ICB process, the department cannot allege that it was a sham process.

46. Merely because the successful bidder had entered into an agreement with one of the original equipment manufacturer prior to submission of bid cannot be a reason to hold that the entire ICB process was a sham. The department has not raised doubts on the bids received by APML and APRL from other independent parties pursuant to the ICB process. It was for the department to have established its case and substantiated it by producing evidence.

47. The submission of the department can also be rejected for the reason that the project cost of the competitors for the similar project during the same time was comparable to the project cost of APML and APRL. This apart, it has been found that the per MW capex for both APML and APRL are within the benchmark fixed by CERC. Further, the contract value at which the contract was awarded by APML to EIF was comparable to the value of previous contract dated 28.02.2008 awarded to SCMEC for Units 1, 2 and 3 (Phases I and II). The awarding of the contract has not been disputed by the revenue.

The department is, therefore, not correct in asserting that the ICB Process was a sham.

48. The department, in order to support its claim that the transaction was a sham transaction and more in the nature of tender fixing, has also placed reliance upon the letter of credit having being opened by APML and APRL in favour of EIF. The said action of opening the letter of credit cannot in any manner establish that the transaction was a sham transaction or that there was over-valuation. The adjudicating authority correctly appreciated that the letter of credit was opened by APML and APRL in favour of EIF in terms of Annexure-2 of the contract dated 05.11.2009 and was in relation to the payments to be made to EIF for purchase of BTG. The submission that the letters of credit were opened as EIF was an intermediary invoicing agent is without any basis as the amount mentioned in the letters of credit were payable only on submission of shipping documents showing clearance of BTG consignments.

49. There is also force in the submission of the learned senior counsel for the respondent that a belated challenge to the genuineness of the ICB process at the stage of appeal should not be entertained as this was not even a charge in the show cause notice. It is seen that the department had not at the stage of show cause notice questioned the ICB process followed by the respondent before awarding the contract to consortium led by SME/EIF. In **Commissioner of C. Ex., Nagpur vs. Ballarpur Industries**²⁴ the Supreme Court held that show cause notice is the foundation of a matter and the department cannot travel beyond its contents.

24. 2007 (215) E.L.T. 489 (S.C.)

DOCUMENTS NOT ADMISSIBLE AS EVIDENCE

50. The case of the department as regards over-valuation is based on certain documents received from the UAE branches of Axis Bank, ICICI Bank and Bank of Baroda. The onus to prove over-valuation was on the Revenue, which burden was required to be discharged with cogent evidence. The department, therefore, had to establish the allegation on the basis of documents which were admissible as evidence. The documents obtained by the Department of Revenue Intelligence can be categorized into three categories. The first is in connection with the three consignments where back-to-back documents are available with respect to transaction between Original Equipment Manufacturers & EIF and EIF & APML/APRL and with respect to this category, the value is sought to be re-determined based on the invoice of the Original Equipment Manufacturers. The second is with respect to the six consignments where AORs/ORTTs were received from Bank of Baroda. Table-21 to the show cause notice indicates that the amount remitted by APRL to EIF and also the amount remitted by EIF to Original Equipment Manufacturers. With respect to these six consignments, rule 4 of the Valuation Rules has been invoked to re-determine the value, basis the amount remitted by EIF to Original Equipment Manufacturers. The third is with respect to the balance imports (299 for APML and 255 for APRL), where the Original Equipment Manufacturers invoices are not available. The value of such individual consignments has been determined under rule 9 of the Valuation Rules by reducing the declared value by 2.2 times of the transaction value. The same has been done on the basis of the aggregate outward remittance of invoice value made by EIF to the Original Equipment Manufacturers.

51. The respondents disputed these documents before the adjudicating authority on the ground that the same had been obtained contrary to the Trade Agreement signed between UAE and India on 22.09.1993 and, therefore, could not be admitted as evidence. The admissibility of the said documents was also questioned in terms of the provisions of sections 138C (4) and 139 (ii) of the Customs Act.

52. To appreciate this contention, it would be necessary to reproduce section 138C of the Customs Act and it is as follows:

"Section 138C- Admissibility of micro films, facsimile copies of documents and computer print outs as documents and as evidence. **(1)** Notwithstanding anything contained in any other law for the time being in force,-

- (a) a micro film of a document or the reproduction of the image or images embodied in such micro film (whether enlarged or not); or
- (b) a facsimile copy of a documents; or
- (c) a statement contained in a document and included in a printed material produced by a computer (hereinafter referred to as a "computer print out").

(2) The conditions referred to in sub-section (1) in respect of a computer print out shall be the following namely:-

- (a) the computer print out containing the statement was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer,
- (b) during the said period, there was regularly supplied to the computer in the ordinary course of

the said activities, information of the kind contained in the statement or of the kind from which the information so contained is derived;

- (c) throughout the material part of the said period, the computer was operating properly or, if not, then any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of the contents; and
- (d) the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether -

- (a) by a combination of computers operating over that period; or
- (b) by different computers operating in succession over that period; or
- (c) by different combinations of computers operating in succession over that period; or
- (d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combination of computers,

all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings under this Act and the rules made thereunder where it is desired to give a statement in evidence by virtue of this section, a

certificate doing any of the following things, that is to say, -

- (a) identifying the document containing the statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer,
- (c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to be to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section, -

- (a) Information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;
- (b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

- (c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation - For the purposes of this section,-

- (a) "computer" means any device that receives, stores and processes data, applying stipulated processes to the information and supplying results of these processes; and
- (b) any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process."

53. A bare perusal at the aforesaid provision reveals that a computer print-out is admissible as direct evidence under the Customs Act if the condition mentioned in sub-section (2) is satisfied. Section 138 C (4) deals with cases where any document is required to be produced as an evidence in proceedings under the Customs Act and the Rules framed thereunder. It specifically mandates production of a certificate containing the following:

- (i) Identifying the document containing the statement and describing the manner in which it was produced;
- (ii) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer,
- (iii) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

to be provided by a person occupying a responsible position in relation to the operation of the device in question or the management of the relevant activities shall be evidence of any matter which is stated therein.

54. The Customs Act contains a specific provision that describes the manner in which the admissibility of computer print outs will be accepted as evidence in proceedings initiated under the Customs Act. When law requires a thing to be done in a particular manner it should be done in that manner alone. The Department had obtained the documents from foreign branches of the Indian banks, but the conditions prescribed under section 138 C (4) of the Customs Act were not fulfilled as the certificate giving the details was not produced.

55. The learned special counsel appearing for the department submitted that none of the documents were print outs retrieved from either the data contained in the computer maintained by banks or EIF or APML and APRL since the banks had furnished the documents in response to the letters issued by the Department of Revenue Intelligence.

56. The entire case of the department in the show cause notice relates to data obtained from the banks. It is not the case of the department that the said data was hand written or typed. The said data provided by the foreign branches was admittedly stored in electronic form and print outs of the same were furnished by the foreign banks. The banks may have given these documents at the behest of the investigating authority, but they were print outs of some electronic record. Nothing prevented the investigating authority from seeking the certificate as required under section 138C (4) of the Customs Act from the person responsible at the bank who was handling such electronic medium for storage of the said documents. The documents annexed to the appeal do not bear any signature nor do they bear a proper seal or signature of the issuing authority. The

onus was on the department to prove the correctness and the authenticity of the same. A perusal of the documents relied upon in the show cause notice show that the ORTTs/AORs and the invoices, which form the basis of the re-determination of the transaction value, have not been signed nor attested. In relation some documents, though a seal is appended, but they do not contain signatures. Similarly, few documents other than ORTTs, bear initials without the name and designation of person signing the document. In such a situation obtaining a certificate under section 138C (4) of the Customs Act was extremely necessary to prove the authenticity of the documents but the same has not been done.

57. In this connection, would be relevant to refer to the observations of the Supreme Court in **Anvar P. V. vs. P. K. Basheer**²⁵ wherein the Supreme Court, in respect of section 65B of the Evidence Act which is pari materia to the provisions of section 138C (4) of the Customs Act, held that evidence relating to electronic record shall not be admitted in evidence unless the requirement of section 65B of the Evidence Act is fulfilled. Paragraph 22 of the said judgment is relevant and the same is reproduced:

"22. The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Section 59 and 65A dealing with the admissibility of electronic record. Section 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by

25. AIR 2015 SC 180

Section 65A and 65B. to that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in Navjot Sandhu case (supra), does not laydown the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is admissible."

58. The aforesaid judgment of Supreme Court was followed by the Supreme Court in **Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal & others**²⁶. The Supreme Court held in paragraph 72 of the judgment that if the original device is not produced, then electronic record can be produced in accordance with section 65B (1) of the Evidence Act together with requisite certificate under section 65B (4). The relevant portion of the judgment is reproduced below:

- "(a) Anvar P.V. (supra), as clarified by us hereinabove, is the law declared by this Court on Section 65B of the Evidence Act. The judgment in Tomaso Bruno (supra), being per incuriam, does not lay down the law correctly. Also, the judgment in SLP (Crl.) No. 9431 of 2011 reported as Shafhi Mohammad (supra) and the judgment dated 03.04.2018 reported as (2018) 5 SCC 311, do not lay down the law correctly and are therefore overruled.
- (b) The clarification referred to above is that the required certificate under Section 65B (4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and

26. AIR 2020 SC 4908

proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information contained in such electronic record can be in accordance with Section 65B(1), together with the requisite certificate under Section 65B(4). The last sentence in Anvar P.V. (supra) which reads as "... if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act..." is thus clarified; it is to be read without the words "under Section 62 of the Evidence Act,..." With this clarification, the law stated in paragraph 24 of Anvar P.V. (supra) does not need to be revisited."s

59. The Mumbai Bench of the Tribunal in **Agarvanshi Aluminium Ltd. vs. Commissioner of Customs (I), Nhava Sheva²⁷**, where the issue was with respect to section 138C (4) of the Customs Act, also observed:

"12. it is clear that for admissibility of computer printout there are certain conditions have been imposed in the said section. Admittedly condition 4C of the said section has not been complied with and in the case of Premier Instruments & Controls (supra) this Tribunal relied on the case of International Computer Ribbon Corporation - 2004 (165) E.L.T. 186 (Tri.-Chennai) wherein this Tribunal has held that "computer printout were relied on by the Adjudicating Authority for recording a finding of clandestine manufacture and clearance of excisable goods. It was found by the Tribunal that printouts were neither authenticated nor recovered under Mahazar... The Tribunal rejected the printouts... Nothing contained in the printout generated by the PC can be admitted as evidence." In this case also, we find that the parallel situation as to the decision of Premier Instruments & Controls (supra).

27. 2014 (299) E.L.T. 83 (Tri.-Mum)

13. Therefore, the printout generated from the PC seized cannot be admitted into evidence for non-fulfillment of statutory condition of Section 138C of the Customs Act, 1962."

60. Thus, as the provisions of section 138C (4) of the Customs Act have not been satisfied for the reason that the certificate prescribed therein has not been furnished, the documents obtained by Department of Revenue Intelligence from various banks outside India cannot be admitted as evidence. Reliance cannot, therefore, be placed on these documents for this reason.

61. The learned senior counsel for the respondents also made submissions with regard to non-fulfillment of the provisions of section 139 (ii) of the Customs Act. It is the case of the respondents that the presumption under section 139 (ii) of the Customs Act would not be available as the authenticity of documents have been challenged. Under section 139 (ii) of the Customs Act, where any document has been received from any place outside India during the course of investigation under the Customs Act and such document is tendered as evidence, then unless it is proved to the contrary, the contents of the documents will be taken to be true, basis the signature in the case of the document executed or attested. In the present case it is seen that the ORTTs/AORs and the invoices which form the basis of redetermination of the transaction value have not been signed or attested. The documents that are neither signed nor authenticated cannot be admitted as evidence.

62. The learned special counsel of the department placed reliance on the purported originals of ORTTs and AORs that are supposedly on record of the banks and copies were furnished to Department of Revenue Intelligence. Further, he has placed reliance on the

statement of Vineet Jain - CEO of Adani Power Limited, who has verified the same. These do not satisfy the requirement of section 139 of the Customs Act. A statement obtained under section 108 of the Customs Act, basis such unauthenticated and unsigned documents, from a person who has neither authored nor received it cannot be a substitute to the requirement of section 138 C (4) of the Customs Act.

63. This is what was stated by the Supreme Court in **Collector of Customs, Bombay vs. East Punjab Traders**²⁸ wherein it was held that presumption under section 139 (ii) of the Customs Act cannot be raised because the document did not bear any signature. The Supreme Court held that when the authenticity of the photocopies of the documents itself is suspected, the presumption under section 139(ii) of the Customs Act is not available. Paragraph 5 of the judgment is reproduced below:

"5. The single Technical Member, who wrote the minority judgment, however, held the view that it was not essential on the part of the Customs Officer to strictly prove the documents as required by the Evidence Act and that the authenticity of the documents, though copies, could not be doubted as they had been collected by the Collector from foreign sources and could be admitted in evidence by virtue of Section 139(ii) of the Customs Act, 1962 which permits the raising of a presumption in respect of documents received from any place outside Indian in the course of investigation of any offence alleged to have been committed by any person under the Act. The majority points out that these documents, which are photocopies, do not bear the signature either of the exporter, the forwarding agent, the stevedore or the Customs Officer. In fact, they do not bear any signature whatsoever and, therefore, the authenticity of these documents is suspect and it is not possible to presume

28. (1998) 9 SCC 115

that the originals are duly signed. It is for this reason that the majority did not consider it safe to place reliance on photocopies of copies of the documents recovered by the Customs Officer not from the Customs Department in Japan but from the agencies which are stated to have exported the material in question. It is also found that one of these copies of the alleged declarations bears the seal of the Customs at Kobe and the name of the vessel is shown to be 'Raya Fortune' but the itinerary of that vessel collected at the instance of the Indian Customs shows that the said vessel had never touched Kobe which raises a serious doubt as to how far this document is authentic. The majority raises the question as to how the declaration at Kobe and shipment from Osaka are reconcilable noting that there is no explanation coming forth. The majority feels that the authenticity of the documents itself is suspect. In these circumstances, the presumption to be raised under Section 139 (ii) of the Customs Act could not be raised because the document did not bear any signature, did not come from proper custody and it is difficult to understand why the Indian Customs did not interact with the Japan Customs and obtain authentic copies of the document from the latter. Merely because the Department offered cross-examination of the steamer agency from whom the export declaration had been obtained and the Respondents chose not to avail of that opportunity is no ground for holding that the requirements of Section 139 are satisfied for the purpose of raising the presumption. In order to raise the presumption under the said provision, the basis facts had to be laid. Even though they bear a serial number and stamp of Japan Customs, the fact remains that they are copies of copies and indisputably bear no signature of the exporter, the forwarding agent, the stevedore or the Customs Officer, no signature at all of any of them. The discrepancy in regard to copies bearing the seal of customs at Kobe also raises a serious doubt whether the copies relate to any of the consignments in question. In these circumstances, if the majority was disinclined to place reliance on these documents we find it difficult to hold that it was in error in doing so."

64. This view was also expressed by the Tribunal in **Truwoods Pvt. Ltd. vs. Commissioner**²⁹ and the Appeal filed before the Supreme Court by the department against the aforesaid decision was dismissed. This decision is reported in **Commissioner of Cus., Visakhapatnam vs. Truwoods Pvt. Ltd**³⁰.

65. The documents relied upon by the department are, therefore, inadmissible as evidence as the authenticity of the same has not proved in terms of the provisions of sections 138C (4) and 139 (ii) of the Customs Act.

WHETHER THE CONTRACT WAS EPC

66. Learned special counsel for the department submitted that the contracts were not EPC. However, learned senior counsel for the respondent urged that both APML and APRL had awarded contracts to SME/EIF and the consortiums which were in the nature of EPC. Learned senior counsel submitted that splitting the contract into two separate contracts at the instance of EIF into the supply and service portions of the contract would not change the nature of contract for the reason that the respondent was concerned not just with the supply of the equipments but with the contract as a whole.

67. The submission advanced by the learned senior counsel for the respondent has substance. Merely because, for the sake of convenience and/ or commercial exigencies of the parties, a contract is broken into different sub-parts would not alter and/or change the nature of the contract. SME/EIF and its constituents in the consortium were awarded the contract as their bid was found to be the lowest covering BTG supply, BTG service as well as BOP supply and service.

29. 2005 (186) E.L.T. 135 (Tribunal)

30. 2016 (331) E.L.T. 15 (S.C.)

68. In relation to APML, it is submitted that out of the total bid price, contract for USD 736 million was awarded to SME on 05.11.2009 towards supply of BTG alone. The balance amount was divided between the balance consortium members, at the instance of SME into BTG services, BOP supply and services. As required by the consortium, the remaining three contracts were entered into with other consortium members.

69. The relevant clauses of the BTG supply contract in relation to APML are as follows:

"Para IV of the agreement deals with contract price and the same reads as under:

Para IV: Contract Price

The lump sum contract price payable under this supply contract by the employer to the supplier shall be United States Dollars 736,000,000/- (United States Dollars Seven Hundred Thirty Six Million only).

- (a) Payment for the supply of Goods shall be made on the basis of dispatch of shipments, in accordance with Annexure 3 hereto.
- (b) The Supplier shall pay all taxes, duties and fees required to be paid by him under this Supply Contract in its country, and the Contract Price shall not be adjusted for any of these costs, except as stated in Sub-clause 13.4 [adjustments for changes in legislation] of the Conditions of the Contract;

The Employer shall pay all taxes, duties and fees under this Supply Contract in his country (India).

4.0 THE SUPPLIER

4.1 Suppliers General Obligation

The supplier shall be responsible for the basic and detailed design, engineering, procurement, supply,

storage at Port of Loading and marine transportation of the Goods of all equipment and system(s).

The Supplier shall advise the Employer of the shipping schedules of the Goods to the destination Port of Entry as far as possible, transshipment of major items shall be avoided.

The Supplier shall supply the Goods in accordance with the Contract and Goods Industry Practice, and shall remedy any defects in the Goods. When completed the Goods shall be fit for the purposes for which the Goods are intended as defined in the Contract.

The supplier shall, whenever required by the Employer, submits details of the arrangements and methods which the supplier proposes to adopt for the supply of the Goods. No significant alteration to these arrangements and methods shall be made without the prior written consent of the Employer.

The Supplier shall provide at its own costs, training to Employer's staff for operation and maintenance of the Goods at manufacturer's work in China and at a Site, in accordance with Training Schedule as per Appendix B and guidance to Employer's staff on operation and maintenance of the Goods for a period of 12 months from the date of completion of successful performance guarantee tests, the costs of transportation and accommodation of Employer's staff for the purpose of such training shall be borne by the Employer.

4.8 Sufficiency of the Contract Price

The Supplier has satisfied himself as to the correctness and sufficiency of the Contract price.

Unless otherwise stated in the Contract, the Contract Price covers all the supplier's obligations under the Contract including those under Provisional Sums, if any and all things necessary for the Supply of the goods and the remedying of any defects therein.

Clause 7.3 of Annexure 5 deals with inspection of goods which provides that Company Personnel shall at all times during production and manufacture, will be entitled to examine, inspect, measure and test the goods and to check the progress of manufacture of goods.

7.4 Testing

The Sub-Clause shall apply to all tests specified in the Contract, other than the Tests on Completion and the Tests after Completion.

The Supplier shall provide all apparatus, assistance, documents and other information, electricity, equipment, fuel, consumables, instruments, materials, and suitably and experienced staff, as are necessary to carry out the specified tests efficiently. The Supplier shall agree, with the Employer, the time and place for the specified testing of any Goods.

The assistance and cooperation to be provided by the Supplier to the Employer under this Sub-Clause shall also be similarly provided to any person nominated by the Employer to conduct tests in relation to the Goods.

The Employer may, under Clause 13[Variations and Adjustments], instruct the Supplier to carry out additional tests. If these varied or additional tests show that the tested goods is not in accordance with the Contract, the Costs of carrying out this variation shall be borne by the Supplier, notwithstanding other provisions of the Contract.

The Employer shall give the Supplier not less than 24 hours notice of the Employers intention to attend the tests. If the Employer does not attend at the time and place agreed, the Supplier may proceed with the tests unless otherwise instructed by the Employer, and the tests shall then be deemed to have been made in the Employers presence.

The Supplier shall promptly forward to the Employer duly certified reports of the tests. When the specified

tests have been passed, the Employer shall endorse the Suppliers tests Certificate, or issue a certificate to him, or to that effect. If the Employer has not attended the tests, he shall be deemed to have accepted the readings as accurate.

The Supplier shall inform the Employer at least 3(three) weeks in advance of any performance tests of all major Goods such as, but not limited to, pumps, boiler, burners, heat exchangers, turbines, cubicles, switchgears etc. The notification period for the purposes of this Sub-Clause shall be three weeks.

The tests carried out in accordance with this Sub-Clause shall not relieve and absolve the supplier from its responsibility and obligations under the Contract,

7.5 Rejection

If, as a result of an examination, inspection, measurement, or testing any Good is found to be defective or otherwise not in accordance with the Contract, the Employer may reject the Goods by giving notice to the Supplier, with reasons. The Supplier shall then promptly make good the defect and then ensure that the rejected good comply with the requirements of the Contract.

If the Employer requires the Goods to be retested, the goods shall be repeated under the same terms and conditions. If the Rejection and retesting cause the Employer to incur additional costs, the Supplier shall subject to Sub-Clause 2.3 (Employers Claims) pay these costs to the Employer."

70. The aforesaid clauses of the contract dated 05.11.2009 entered into between APML and EIF demonstrate that the same are part of the EPC awarded in respect of design, engineering, manufacturing, procurement, packing & forwarding, supply, transportation, receipt, unloading, installation, erection, testing, commissioning, and

performance guarantee test of the equipment and machinery required for the power project at a lumpsum price. Thereafter, Essentiality Certificates were granted in respect of Unit 4 on 01.06.2010 and for Unit 5 on 30.09.2010. The entire contract entered between the APML and SME for Phase III (Units 4 and 5) was registered under the same file No. for Phases I and II on 06.11.2010 with the Commissioner of Customs, Nhava Sheva, as prescribed under Regulation Nos. 4 and 5 of the PIR.

71. Pursuant to the said contract dated 05.11.2009, APML imported the said goods. Before import of the first consignment under the said contract dated 05.11.2009, APML registered the same under the PIR and consequently, the said goods were duty assessed under Heading 98.01 of the First Schedule to the Tariff Act. All Bills of Entry were assessed provisionally and subject to reconciliation under PIR. No objection was or has been taken, at any time, during the assessment of each of the Bills of Entry. Further, in respect of imports made for Phase I and II, the reconciliation was submitted in terms of PIR.

72. In relation to APRL, it is stated out of the total contract, contract worth USD 790 million was awarded on 02.04.2010 to EIF towards supply of BTG alone and the balance amount was divided between the consortium members at the instance of EIF, being the lead member, into BTG service and BOP supply and service. A contract was also entered into with the other consortium members for this purpose.

73. The relevant clauses of the supply contract in relation to the Thermal Power Plant set up by APRL are as follows:

"Para IV of the agreement deals with contract price and the same reads as under:

Para IV: Contract Price

The lump sum contract price payable under this supply contract by the employer to the supplier shall be United States Dollars 790,000,000/- (United States Dollars Seven Hundred Ninety Million only).

- (a) Payment for the supply of Goods shall be made on the basis of dispatch of shipments, in accordance with Annexure 3 hereto.
- (b) The Supplier shall pay all taxes, duties and fees required to be paid by him under this Supply Contract in its country, and the Contract Price shall not be adjusted for any of these costs, except as stated in Sub-clause 13.4 [adjustments for changes in legislation] of the Conditions of the Contract;

The Employer shall pay all taxes, duties and fees under this Supply Contract in his country (India).

4.0 THE SUPPLIER

4.1 Suppliers General Obligation

The supplier shall be responsible for the basic and detailed design, engineering, procurement, supply, storage at Port of Loading and marine transportation of the Goods of all equipment and system(s).

The Supplier shall advise the Employer of the shipping schedules of the Goods to the destination Port of Entry as far as possible, transshipment of major items shall be avoided.

The Supplier shall supply the Goods in accordance with the Contract and Goods Industry Practice, and shall remedy any defects in the Goods. When completed the Goods shall be fit for the purposes for which the Goods are intended as defined in the Contract.

The supplier shall, whenever required by the Employer, submits details of the arrangements and methods

which the supplier proposes to adopt for the supply of the Goods. No significant alteration to these arrangements and methods shall be made without the prior written consent of the Employer.

The Supplier shall provide at its own costs, training to Employer's staff for operation and maintenance of the Goods at manufacturer's work in China and at a Site, in accordance with Training Schedule as per Appendix B and guidance to Employer's staff on operation and maintenance of the Goods for a period of 12 months from the date of completion of successful performance guarantee tests, the costs of transportation and accommodation of Employer's staff for the purpose of such training shall be borne by the Employer.

4.8 Sufficiency of the Contract Price

The Supplier has satisfied himself as to the correctness and sufficiency of the Contract price.

Unless otherwise stated in the Contract, the Contract Price covers all the supplier's obligations under the Contract including those under Provisional Sums, if any and all things necessary for the Supply of the goods and the remedying of any defects therein.

Clause 7.3 of Annexure 5 deals with inspection of goods which provide that Company Personnel shall at all times during production and manufacture, will be entitled to examine, inspect, measure and test the goods and to check the progress of manufacture of goods.

7.4 Testing

The Sub-Clause shall apply to all tests specified in the Contract, other than the Tests on Completion and the Tests after Completion.

The Supplier shall provide all apparatus, assistance, documents and other information, electricity, equipment, fuel, consumables, instruments, materials, and suitably and experienced staff, as are necessary to carry out the specified tests efficiently. The Supplier

shall agree, with the Employer, the time and place for the specified testing of any Goods.

The assistance and cooperation to be provided by the Supplier to the Employer under this Sub-Clause shall also be similarly provided to any person nominated by the Employer to conduct tests in relation to the Goods.

The Employer may, under Clause 13[Variations and Adjustments], instruct the Supplier to carry out additional tests. If these varied or additional tests show that the tested goods is not in accordance with the Contract, the Costs of carrying out this variation shall be borne by the Supplier, notwithstanding other provisions of the Contract.

The Employer shall give the Supplier not less than 24 hours notice of the Employers intention to attend the tests. If the Employer does not attend at the time and place agreed, the Supplier may proceed with the tests unless otherwise instructed by the Employer, and the tests shall then be deemed to have been made in the Employers presence.

The Supplier shall promptly forward to the Employer duly certified reports of the tests. When the specified tests have been passed, the Employer shall endorse the Suppliers tests Certificate, or issue a certificate to him, or to that effect. If the Employer has not attended the tests, he shall be deemed to have accepted the readings as accurate.

The Supplier shall inform the Employer at least 3(three) weeks in advance of any performance tests of all major Goods such as, but not limited to, pumps, boiler, burners, heat exchangers, turbines, cubicles, switchgears etc. The notification period for the purposes of this Sub-Clause shall be three weeks.

The tests carried out in accordance with this Sub-Clause shall not relieve and absolve the supplier from its responsibility and obligations under the Contract,

7.5 Rejection

If, as a result of an examination, inspection, measurement, or testing any Good is found to be defective or otherwise not in accordance with the Contract, the Employer may reject the Goods by giving notice to the Supplier, with reasons. The Supplier shall then promptly make good the defect and then ensure that the rejected good comply with the requirements of the Contract.

If the Employer requires the Goods to be retested, the goods shall be repeated under the same terms and conditions. If the Rejection and retesting cause the Employer to incur additional costs, the Supplier shall subject to Sub-Clause 2.3 (Employers Claims) pay these costs to the Employer."

74. The aforesaid clauses of the contract entered into between APRL and EIF would show that the same are a part of EPC job awarded in respect of design, engineering, manufacturing, procurement, packing & forwarding, supply, transportation, receipt, unloading, installation, erection, testing, commissioning, and performance guarantee test of the equipment and machinery required for the respective power projects at a lumpsum price. APRL was concerned only with the said lumpsum price which was for the entire power project and not with the price of individual goods.

75. In terms of General Exemption No. 122 (Serial No. 400 of Notification dated 01.03.2002, which was amended to Serial No. 507 by Notification dated 17.03.2010), goods, equipment and machinery falling under Heading 98.01 of the Customs Tariff and required for setting up a Mega Power Project are allowed to be imported and cleared under Nil rate of duty. In order to obtain the benefit of concessional rate of customs duty for the goods to be imported for the entire contract under the aforesaid Notification, APRL had

submitted an application to the Principal Secretary, Energy Department, Rajasthan. The Principal Secretary, on being satisfied as to the eligibility to avail the benefit of the aforesaid exemption, issued the Essentiality Certificate dated 01.06.2010. The said Essentiality Certificate, addressed by the Principal Secretary to the Commissioner of Customs, Kandla mentions that the list of items to be imported were essentially required for the Project and qualified for concessional rate of duty. On receipt of the Essentiality Certificate, the entire contract for supply of BTG equipment and machinery for the said power project entered between APRL and EIF, was registered on 06.07.2010 with the Customs House at Kandla as prescribed under Regulation Nos. 4 and 5 of the PIR.

76. Pursuant to the said Contract dated 02.04.2010, APRL imported the said goods. Before import of the first consignment under the said Contract dated 02.04.2010, it was registered under PIR and consequently, the said goods were duly assessed under Heading 98.01 of the First Schedule to the Tariff Act. All the Bills of Entry were assessed provisionally at the time of import but this was subject to reconciliation under PIR. The assessment with respect to APRL has been finalized by Order-in-Original dated 21.10.2019 passed by Assistant Commissioner of Customs, Kandla.

77. Learned special counsel for the department vehemently submitted that the contract entered between APML/APRL and EIF was not an EPC contract but was simply a supply contract. In this connection learned special counsel placed reliance on certain clauses of the EPC contract executed between APML & EIF and APRL & EIF to contend that identical provisions relating to the obligation of testing on the part of Original Equipment Manufacturers were also present in

the contract executed between the Original Equipment Manufacturers and EIF. Learned special counsel also submitted that EIF made supplies under the contract, but rest of the activities were required to be carried out by the Original Equipment Manufacturers. Learned special counsel also submitted that the original contract had warranty/defect notification/ extended warranty for 1-2 years and not 10 years and the casting of additional responsibility without increase in the contract price and the purported addendum is an afterthought. It was, accordingly, submitted that the adjudicating authority erred in accepting the submission of the respondents that the contract was an EPC contract.

78. It needs to be noted that the ICB process followed by APML and APRL to award the contract to EIF cannot be faulted. The scope of work mentioned in the EPC contract also clarifies beyond doubt that what was awarded by APML and APRL to SME/EIF was a complete EPC contract which included supply and service components. The entire contract was awarded on a turnkey basis and a lumpsum price was fixed for the entire contract as a whole. The execution of another contract by EIF or any of the consortium partners would, therefore, have no relevance so far as APML and APRL are concerned. It is also not the case of the department that APML and APRL paid any amount over and above the agreed contract value. The said contract was for design, engineering, manufacturing, procurements, packing & forwarding, supply, transportation, receipt, unloading, installation, erection, testing, commission and performance guarantee test and it was not merely a supply contract.

79. What further needs to be noted is that the bid was awarded to a consortium headed by SME/EIF and the scope of work was divided

between the consortium members as per their commercial understanding. The amount received by each consortium member or the amount paid by the consortium members to the vendors or service providers would not be relevant for APML or APRL. Even if it is assumed that the service and/or testing was to be done by the Original Equipment Manufacturers, as has been pointed out, the same will not change the nature of the contract awarded by APML and APRL to SME/EIF in as much as the responsibility to execute the contract would be that of SME/EIF only.

80. In this connection, it would also be useful to reproduce paragraphs 5.1.3.17 to 5.1.3.17.4 of impugned order concerning this issue and they are as follows:

5.1.3.17 The noticee has submitted that the contract as a whole was an EPC (Engineering, Procurement, and Construction) Contract. The projects were turnkey projects where the scope of work was not only supply of goods but also included designing, installation, civil work and commissioning. While the scope of work was divisible, the price was a lump sum price. The contracts were, therefore, composite in nature with a lump sum price, that it was evident from the PPA agreements entered into by APML/APRL with the respective state electricity bodies that the contract for set up and commissioning of the mega power plants was on EPC basis. Therefore, as per notices Customs today had no ground to question the nature of the contract entered into between APML/APRL with EIF and claim the same to be a simple contract for supply of goods. I find that in the Power Purchase Agreement between Maharashtra State Electricity Distribution Company Ltd. (Procurer and Adani Power Maharashtra Ltd. (Seller) dated 31.03.2010 in Article 3: Conditions Subsequent to be satisfied by Seller/Procurer in condition 3.1.1 (e) it is mentioned that "the seller shall have awarded the Engineering, Procurement and

Construction contract (EPC contract) or main plant contract for boiler, turbine and generator (BTG'), for setting up of the Power Station and shall have given to such contractor on irrevocable NTP and shall have submitted a letter to this effect to the Procurer,". Similarly, I find that vide PPA agreement between Jaipur Vidyut Vitran Nigam Ltd. (Procurer 1), Ajmer Vidyut Vitran Nigam Ltd. (Procurer 2), and Jodhpur Vidyut Vitran Nigam Ltd. (Procurer 3) and Adani Power Rajasthan Ltd. dated 28.01.2010 in Article 3: Conditions Subsequent to be satisfied by Seller/Procurer in condition 3.1.1 (e) it is mentioned that "The seller shall have awarded the Engineering, Procurement and Construction contract (EPC contract) or main plant contract for boiler, turbine and generator (BTG), for setting up of the Power Station and shall have given to such contractor an irrevocable NTP and shall have submitted a letter to this effect to the Procurer. I find that EPC is a particular form of contracting arrangement used in some industries where the EPC Contractor is made responsible for all the activities from design, procurement, construction, to commissioning and handover of the project to the End-User or Owner. Essentially an EPC project is similar to a turnkey project.

5.1.3.17.1.1 I also find that the contract between APML and Sichuan Machinery & Equipments FZE and APRL and EIF encompasses all the factors of an EPC contract. The relevant portion of the contract at Sr. No. III is reproduced below -

- iii. In consideration of the Supplier agreeing to do the designing, Engineering, procurement and supply of goods an Equipment and remedy any defects therein, in condormity with the provis the provisions of this Contract, the Employer agrees to pay to the Supplier the final contract Price in accordance with Clause IV (Contract Price) hereto. The work shall be executed in accordance with

the Delivery Schedule annexed at Annexure-3.

5.1.3.17.2 Further, I find that in the contract between APML ana sichuan Machinery & Equipments FZE dated 05.11.2009, in Annexure - 5 i.e. Conditions of Contract, in para 14.0 the details regarding Contract Price and Payment is mentioned wherein in para 14. 1 reads as follows-

"14.1 The Contract Price

The lump sum Contract Price payable under this contract by the Employer to the Supplier shall be United States Dollars 736,000,000 (United States Dollars Seven Hundred Thirty Six million only)."

5.1.3.17.3 Similarly, I find that in the contract between Adani Power Rajasthan Limited and Electrogen Infra FZE dated 02.04.2010, in Annexure 5 i.e. Conditions of Contract, in para 14.0 the details regarding Contract Price and Payment is mentioned wherein in para 14.1 reads as follows -

"14.1 The Contract Price

The lump sum Contract Price payable under this contract by the Employer to the Supplier shall be United States Dollars 790,000,000 (United States Dollars Seven Hundred Ninety million only)."

5.1.3.17.4 Thus, I find that in an EPC contract the contractor is responsible for the entire gamut of the contract, i.e. right from detailed engineering design of the project, procuring all the equipment and materials necessary and then to construct and deliver a functioning facility or asset to their clients. Thus, the projects were turnkey projects where the scope of work was not only supply, but also included designing, installation, civil work and commissioning. Therefore, while the scope of work was divisible, the price was a lump sum price as determined from the contract between APML/APRL and EIF. Thus, I find that the

contention of the notice that EIF was merely an intermediary invoicing agent for inflating value does not appear to be correct."

81. It can, therefore, safely be concluded that APML and APRL had awarded contracts to EIF/SME which were in the nature of EPC.

WHOLE EFFECT OF CONTRACT /EFFECT OF REGISTRATION UNDER PIR

82. The adjudicating authority concluded in paragraph 5.1.3.18 of the order as follows:

- (i) The project cost of the contract between APML/APRL and EIF is within the norm fixed under Annexure II of the order dated 04.06.2012 issued under Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulation, 2009;
- (ii) Further, in terms of Information Memorandum of SBI Capital Markets Limited cost per MW of APRL is competitive when compared with other projects of super critical technology;
- (iii) It is contended by APML / APRL that the value of the current contract in respect of Tiroda project was for Phase III of the project and is comparable with the earlier contract for Phase I & II entered into with Sichuan Machinery and Equipment Import and Export Co. Ltd. China. That no objection as to value of consignment imported in the past for Phase I & II. The argument may be valid, but it cannot be sole criteria for valuation of disputed goods; and
- (iv) All the requirement of the Project Import has been fulfilled by APML and APRL. In terms of Project Import Regulation, the contract has to be assessed as a whole and not the individual consignment. Comparison of value of goods covered by each and every individual consignment is impermissible and unjustified because the show

cause notice has not challenged the contract between APML/APRL and EIF."

83. The adjudicating authority, in paragraph 5.1.3.18.7 also concluded that the contract as a whole was required to be assessed and not individual consignments.

84. The learned special counsel for the appellant challenged the said finding and submitted that even if the imports are covered by a single contract, the assessment thereof is required to be carried out against individual imports, with the only difference being that all the imports are housed under Tariff Heading 98.01 of the Tariff Act. Learned special counsel also submitted that it may not be necessary to carry out an assessment in respect of classification of each and every product but there is no bar to ascertain the transaction value of each individual import consignment in terms of the Valuation Rules, even though the contract may have been registered under PIR.

85. It would, therefore, be necessary to examine the provisions Chapter 98.01 of the Tariff Act and PIR issued under Chapter 98.01 of the Tariff Act. While Chapter 98.01 deals with imports under project import, regulations 2, 4, 5 & 7 of PIR deal with assessment and clearance, eligibility, registration of contract and finalization of contract. They are as follows:

CHAPTER 98 OF TARIFF ACT

"Project imports; laboratory chemicals; passengers' baggage, personal importations by air or post; ship stores

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 in the said regulations.

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 PURPOSES, TESTING AND QUALITY CONTROL), AS WELL AS ALL COMPONENTS (WHETHER FINISHED OR NOT) OR RAW MATERIALS FOR THE MANUFACTURE OF THE AFORESAID ITEMS AND THEIR COMPONENTS, REQUIRED FOR THE INITIAL SETTING UP OF A UNIT, OR THE SUBSTANTIAL EXPANSION OF AN EXISTING UNIT, OF A SPECIFIED:

"REGULATION"

REGULATION 2. Application. These regulations shall apply for assessment and clearance of the goods falling under heading No. 98.01 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975).

REGULATION 4. Eligibility. The assessment under the said heading No. 98.01 shall be available only to those goods which are imported (whether in one or more than one consignment) against one or more specific contracts, which have been registered with the appropriate Custom House in the manner specified in regulation 5 and such contract or contracts has or have been so registered,

(i) before any order is made by the proper officer of customs permitting the clearance of the goods for home consumption;

REGULATION 5. Registration of Contracts. Every importer claiming assessment of the goods falling under the said heading No. 98.01, on or before their importation shall apply in writing to the proper officer

at the port where the goods are to be imported or where the duty is to be paid for registration of the contract or contracts, as the case may be:

Provided that in the case of consignments sought to be cleared through a Custom House other than the Custom House at which the contract is registered, the importer shall produce from the Customs House of registration such information as the proper officer may require.

The importer shall apply, as soon as may be, after he has obtained the Import trade control licence wherever required for the import of articles covered by the contract and in case of imports covered by the Open General Licence or imports made by Central Government, any State Government, statutory corporation, public body or Government undertaking run as a joint stock company (hereinafter referred to as "Government Agency") as soon as clearance from the concerned Administrative Ministry or Department, as the case may be, has been obtained.

The application shall specify -

- (a) the location of the plant or project;
- (b) the description of the articles to be manufactured, produced, mined or explored;
- (c) the installed or designed capacity of the plant or project and in the case of substantial expansion of an existing plant or project the installed capacity and the proposed addition thereto;
- (d) such other particulars as may be considered necessary by the proper officer for purposes of assessment under the said heading.

The application shall be accompanied by the original deed of contract together with a true copy thereof, the import trade control licence, wherever required, and an approved list of items from the Directorate General of Technical Development or the concerned sponsoring authority.

The importer shall also furnish such other documents or other particulars as may be required by the proper officer in connection with the registration of contract.

The proper officer shall, on being satisfied that the application in the order register the contract by entering the particulars thereof in a book kept for the purpose, assign a number in token of the registration and communicate that number of the importer and shall also return to the importer all the original documents which are no longer required by him.

REGULATION 7. Finalisation of contract. – The importer shall within three months from the - Customs clearance for home consumption of the last consignment of the goods or within such extended period as the proper officer may allow, submit a statement indicating the details of the goods imported together with necessary documents as proof regarding the value and quantity of the goods so imported in terms of this Regulation and any other document that may be required by the proper officer for finalisation of the contract.”

86. Note 2 to Chapter 98 clarifies that Heading 98.01 will apply to all goods which are imported in accordance with the Regulations issued under section 157 of the Customs Act. PIR has been issued by the Central Government in exercise of the powers conferred by section 157 of the Customs Act. Regulation 2 clarifies that the Regulations shall apply to assessment and clearance of goods falling under Heading 98.01 of the Tariff Act. In terms of regulation 4, assessment under Heading 98.01 shall be available only to those goods which are imported in one or more than one consignment against one or more than one specific contract, which has been registered with the appropriate Customs House as specified in regulation 5. Regulation 4 further specifies that the contract should

be registered prior to the clearance of the imported goods for home consumption in terms of regulation 5. The contract under PIR has to be registered in terms of regulation 5 and the details mentioned therein have to be mentioned in the application made for the registration. Regulation 7 provides for the finalization of the contract. An importer has to within three months from the date of clearance for home consumption of the last consignment or within such extended time submit a statement indicating details of goods imported together with the necessary documents as proof regarding value and quantity of goods so imported.

87. A conjoint reading the aforesaid provisions makes it is clear that Heading 98.01 of the Tariff Act shall be available to the goods which are imported under a specific contract registered with the appropriate Customs House under PIR. What is evident from the provisions and requirements of PIR is that it recognises contracts of the nature that APML/APRL had executed with EIF and the other consortium members. Infact, PIR ensures that large infrastructure projects benefit from the duty exemption. As such, it is clear that what is registered is the contract as a whole. When considered in this light, the goods imported for the project become a subject matter of assessment as whole and individual consignments are not required to be separately assessed. It is, therefore, clear that PIR does not deal with import of individual consignment and the assessment of the goods imported for the project have to be dealt with together.

VALUATION

88. The issue under consideration is whether the value declared by APML and APRL is required to be rejected in terms of rule 12 of the

Valuation Rules read with section 14 of the Customs Act and the same is required to be redetermined under rules 4/9 of the Valuation Rules read with section 14 of the Customs Act.

89. The aforesaid redetermination of the value has been sought by the department on the basis of an allegation that the goods imported by APML and APRL for setting up the Thermal Power Plants were grossly over-valued and basis the said over-valuation, excess money was siphoned off abroad. As per the department, the declared value as against the actual value post redetermination is mentioned in Table 33 of the show cause notice and the same is reproduced below:

"Table 33

| Importer | No. of Consignment | Declared Value (CIF) (in Rs.) | Actual value (CIF) (as redetermined) (in Rs.) |
|----------|--------------------|-------------------------------|---|
| APML | 301 | 3469,07,79,941 | 1557,44,21,785 |
| APRL | 262 | 3692,65,37,178 | 1630,16,82,151 |
| TOTAL | 563 | 7161,73,17,119 | 3187,61,03,936 |

90. The adjudicating authority has not found any merit in said allegation made in the show cause notice proposing redetermination of value on various counts and consequently has dropped the proceedings against all the noticees.

91. It is seen that both APML and APRL set up Thermal Power Plants at Tiroda in Maharashtra and Kawai in Rajasthan. The contract was entered into between APML and SME (which is now known as EIF) on 05.11.2009. Similarly, a contract was entered into between APRL and EIF on 02.04.2010. While in both the cases, the case of the respondents is that the contract is EPC, the department contends that the said contracts are not in the nature of EPC but are purely supply

contracts. It has been found as a fact that the contracts are in the nature of EPC.

92. It is the case of APML and APRL that the per MW cost fixed by CERC, by order dated 04.06.2012, for setting up a similar green field power project was 5.01 crore for two Units and Rs. 5.37 crore for one Unit and in comparison, the project cost with respect to APML- Phase III was Rs. 4.76 crore per MW. The status of assessment of the goods imported to set up Units 1, 2 and 3 (Phases I and II) of APML is not in dispute and the present proceedings are only in relation to Units 4 and 5 (Phase-III). The per MW cost of Units 1, 2 and 3 (Phases I and II) of APML are comparable and contemporaneous to the cost of per MW cost of Units 4 and 5 (Phase-III). With respect to APRL, it is seen that the same consisted of two Units of 660 MW each and the per MW cost, excluding the soft cost, is Rs. 4.53 crore, which is lesser than the benchmark price fixed by CERC at Rs. 5.01 crore.

93. The department proceeded to reject the value of imported goods declared by APML and APRL and intended to redetermine it on the basis of the transaction between the supplier namely EIF and Original Equipment Manufacturers. For this purpose, the provisions of rule 12 of Valuation Rules read with section 14 of the Customs Act have been invoked. The following three sets of the documents have been relied upon for this purpose:

- a. Three consignments where back-to-back documents are available;
- b. Six consignments where remittance was made by way of single invoice AORs/ORTTs; and
- c. Other consignments where remittance details are available against multiple invoices.

94. It has been found in the earlier part of this order that the documents on the basis of which redetermination of value has been proposed are inadmissible in evidence. Thus, if the said documents are not admissible in evidence, the department cannot seek redetermination of value on the basis of these documents.

95. Even if the documents are relied upon, it is seen that in relation to the three consignments where there are back-to-back invoices and in six cases where the remittance was made by way of a single invoice AORs/ORTTs, the department alleges that the price paid by EIF to the Original Equipment Manufacturers represents the actual transaction value of the imported goods and the redetermination of the value has been made under rule 4 of the Valuation Rules read with section 14 of the Customs Act. For the balance of over 550 consignments, the value is sought to be redetermined under rule 9 of the Valuation Rules by proportionately reducing the declared value in ratio of inflation i.e. 2.2 times. The said figure of 2.2 inflation has been arrived at by the department by taking the total value of ORTTs by which payments have been made by EIF to Original Equipment Manufacturers as the amount representing actual transaction value and reducing the same with the transaction value declared by APML/APRL. Learned special counsel for the department, therefore, contends that the total transaction value of 563 consignments should be USD 669, 595,215/- instead of USD 1477,934,270/- as declared by APML/APRL.

96. Section 14 of the Customs Act, deals with valuation of goods. It was amended on 10 October 2007, and the amended section is as follows:

Section 14. Valuation of goods. – (1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf:

Provided that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf:"

97. The Supreme Court in **Wipro Ltd. vs. Assistant Collector of Customs**³¹ noticed that under the unamended provisions of section 14 of the Customs Act, the principle was to find out the valuation of goods "by reference to the value" and it introduced a determining / fictional provision by stipulating that the value of all the goods would be the price at which such or like goods are "ordinarily sold". However, under the amended provisions, the valuation is based on the "transaction" price namely, the price "actually paid or payable for the goods". It is in this context, that the Supreme Court observed:

"26) On the aforesaid examination of the scheme contained in the Act as well as in the Rules to arrive at the valuation of the goods, it becomes clear that wherever actual cost of the goods or the services is available, that would be the determinative factor. Only in the absence of actual cost, fictionalised cost is to be adopted. Here again, the scheme gives an ample message that an attempt is to

31. 2015 (319) E.L.T. 177 (SC)

arrive at value of goods or services as well as costs and services which bear almost near resemblance to the actual price of the goods or actual price of costs and services. That is why the sequence goes from the price of identical goods to similar goods and then to deductive value and the best judgment assessment, as a last resort.

27) In the present case, we are concerned with the amount payable for costs and services. Rule 9 which is incorporated in the Valuation Rules and pertains to costs and services also contains the underlying principle which runs through in the length and breadth of the scheme so eloquently. It categorically mentions the exact nature of those costs and services which have to be included like commission and brokerage, costs of containers, cost of packing for labour or material etc. Significantly, Clause (a) of sub-rule (1) of Rule 9 which specifies the aforesaid heads, cost whereof is to be added to the price, again mandates that it is to be "to the extent they are incurred by the buyer". That would clearly mean the actual cost incurred. Likewise, Clause (e) of sub-rule (1) of Rule 9 which deals with other payments again uses the expression "all other payments actually made or to be made as the condition of the sale of imported goods".

31) In contrast, however, the impugned amendment dated 05.07.1990 has changed the entire basis of inclusion of loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation. Whereas fundamental principle or basis remains unaltered insofar as other two costs, viz., the cost of transportation and the cost of insurance stipulated in clauses (a) and (c) of sub-rule (2) are concerned. In respect of these two costs, provision is retained by specifying that they would be applicable only if the actual cost is not ascertainable. In contrast, there is a complete deviation and departure insofar as loading, unloading and handling charges are concerned. The proviso now stipulates 1% of the free on board value of the goods irrespective of the fact whether actual cost is ascertainable or not. Having referred to the scheme of Section 14 of the Rules in detail above, this cannot be countenanced. This proviso, introduces fiction as far as addition of cost of loading, unloading and handling charges is concerned even in those cases where actual

cost paid on such an account is available and ascertainable. Obviously, it is contrary to the provisions of Section 14 and would clearly be ultravires this provision. We are also of the opinion that when the actual charges paid are available and ascertainable, introducing a fiction for arriving at the purported cost of loading, unloading and handling charges is clearly arbitrary with no nexus with the objectives sought to be achieved. On the contrary, it goes against the objective behind Section 14 namely to accept the actual cost paid or payable and even in the absence thereof to arrive at the cost which is most proximate to the actual cost. Addition of 1% of free on board value is thus, in the circumstance, clearly arbitrary and irrational and would be violative of Article 14 of the Constitution.

34) In the present case before us, the only justification for stipulating 1% of the F.O.B. value as the cost of loading, unloading and handling charges is that it would help customs authorities to apply the aforesaid rate uniformly. This can be a justification only if the loading, unloading and handling charges are not ascertainable. Where such charges are known and determinable, there is no reason to have such a yardstick. We, therefore, are not impressed with the reason given by the authorities to have such a provision and are of the opinion that the authorities have not been able to satisfy as to how such a provision helps in achieving the object of Section 14 of the Act. It cannot be ignored that this provision as well as Valuation Rules are enacted on the lines of GATT guidelines and the golden thread which runs through is the actual cost principle. Further, the loading, unloading and handling charges are fixed by International Airport Authority.

36) We are, therefore, of the opinion that impugned amendment, namely, proviso (ii) to sub-rule (2) of Rule 9 introduced vide Notification dated 05.07.1990 is unsustainable and bad in law as it exists in the present form and it has to be read down to mean that this clause would apply only when actual charges referred to in Clause (b) are not ascertainable."

98. The Supreme Court also noticed the change in the principle that had been brought about in section 14(1) of the Customs Act in paragraph 22 judgment and they are as follows:

"22) The underlying principle contained in amended sub-section (1) of Section 14 is to consider transaction value of the goods imported or exported for the purpose of customs duty. Transaction value is stated to be a price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation. Therefore, it is the price which is actually paid or payable for delivery at the time and place of importation, which is to be treated as transaction value. However, this sub-section (1) further makes it clear that the price actually paid or payable for the goods will not be treated as transaction value where the buyer and the seller are related with each other. In such cases, there can be a presumption that the actual price which is paid or payable for such goods is not the true reflection of the value of the goods. This Section also provides that normal price would be the sole consideration for the sale. However, this may be subject to such other conditions which can be specified in the form of Rules made in this behalf.

23) As per the first proviso of the amended Section 14(1), in the transaction value of the imported goods, certain charges are to be added which are in the form of amount paid or payable for costs and services including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner which can be prescribed in the rules. Sub-section (2) of Section 14, which remains the same, is an over-riding provision which empowers the Board to fix tariff values for any class of imported goods or export goods under certain circumstances. We are not concerned with this aspect in the instant case."

99. Thus, what has to be seen under section 14(1) of the Customs Act, as amended in 2007, is the transaction value of the goods imported or exported for the purpose of customs duty and transaction

value is stated to be the price actually paid or payable for the goods when sold for export to India for delivery at that time and place of importation. Sub-section (1) of section 14 also makes it clear that the price actually paid or payable for the goods will not be treated as "transactional value" where the buyer and the seller are related to each other. As per the first proviso to the amended section 14 (1), certain charges are to be added in the transaction value of the imported goods.

100. It would now be appropriate to examine the relevant provisions of the Valuation Rules. In terms of rule 3, the valuation of the imported goods should be the transaction value adjusted in accordance with provisions of rule 10. Rule 3 further provides for certain cases where the transaction value declared by the importer should not be accepted. Rule 4 states that the transaction value of the imported goods is the value of identical goods. Rule 5 provides that the value of imported goods shall be the transaction value of the similar goods. Rule 6 states that when the value cannot be determined under rules 3, 4 and 5, the value should be determined under rule 7. Rule 7 provides for deductive method of valuation. In terms of rule 8, when value cannot be determined under any of the above rules, the value should be determined basis the computed value. Rule 9 is a residual rule made applicable if the value cannot be determined under the provisions of the preceding rules. Rule 10 deals with certain cost and services which have to be added to the price actually paid or payable for the imported goods. Rule 12 gives power to department to reject the value. Thus, rules 3 to 9 are the rules under which the value of the goods can be redetermined.

101. While rule 3 is a general rule, as the same states that the value of the imported goods shall be treated as transaction value, rule 9 is a residual rule which can be resorted to only if the other rules cannot be applied. It is also important to note that rules 4 to 9 are subject to the provisions of rule 3. This means that if the transaction value of the goods is not doubted, the same will have to be treated as the transaction value under rule 3 read with section 14 of the Customs Act and the provisions of rules 4 to 9 will not be available for the purpose of redetermination.

102. As noticed above, the documents which formed the basis of redetermination have been held to be inadmissible as evidence. Further, the contracts which are in the nature of EPC contract were awarded by APML and APRL to EIF after following the ICB process. SME/EIF was awarded the contract, being the lowest bidder, and the price payable for the entire scope of work, which included the supply and service, was a lumpsum price. The finding of the adjudicating authority that the entire contract registered under PIR has to be assessed as a whole and the department cannot be permitted to look into assessment of individual consignment as this would be contrary to the provisions of Chapter 98.01 of the Tariff Act and PIR has also been upheld.

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

104. Even otherwise, the value has to be redetermined under rule 4 by relying upon the value of identical goods. A plain reading of rule 4

would show that it speaks of identical goods imported at or about the same time as the goods being valued, which necessarily means that the identical goods should be goods other than the goods being valued and which are imported at or about the same time as the goods being valued.

105. At the cost of repetition, it needs to be noted that the terms and conditions of the contract between EIF and APML/APRL in respect of exposure to foreign exchange variation, stringent payment terms, higher liquidated damages in case of delay, higher interest on delayed payment, period of warranty than in the contract executed between Original Equipment Manufacturers and EIF has led to an upward escalation in price. The said two contracts cannot, therefore, be treated as comparable.

106. The contention advanced on behalf of the revenue that once information under rule 11 of the Valuation Rules is obtained and it is established that intermediary invoice was grossly inflated in comparison to manufacturer's invoice or other information, there is no option but to reject value under rule 12 of the Valuation Rules. It has been also submitted that the rule does not prescribe the manufacturer's invoice alone as sole document for ascertaining authenticity of the declared value, but also includes any other statement, information, or document. Reliance has been placed on the mechanism provided under rule 11 to doubt the accuracy of declared value and in case there is a reasonable doubt, it permits comparison with manufacturer's invoice or other information.

107. The department has failed to appreciate that for accepting the invoice value of Original Equipment Manufacturers in terms of rule 11 of Valuation Rules, it was necessary to compare the contract between

the Original Equipment Manufacturers and EIF and between APML/APRL and EIF.

108. The contract between APML/APRL & EIF and between EIF & the Original Equipment Manufacturers cannot be treated as a comparable contract by any stretch of imagination. This is for the reason that the contract between APML/APRL and EIF was a turnkey contract, whereas the contract between EIF and Original Equipment Manufacturers was a stand alone contract.

109. This would be apparent from the findings of the adjudicating authority in paragraph 5.1.3.13.1, wherein a comparative chart has been drawn pointing out the difference in warranty and other conditions of the contract between APML/APRL & EIF and SME/EIF & SEC and they are as follows:

| Sr. No. | Description | APRL/APML-EIF | SME/EIF-SEC |
|---------|--------------------|--|--|
| 1. | Scope of Supply | EPC supply contract for BTG | Supply of Steam Generator & Auxiliaries |
| 2. | Incoterms | CFR, Indian Port | FOB, Port of Loading (China) |
| 3. | Price Basis | Lumpsum fixed price | Price based of 1USD=6.8332 RMB and any variation to be compensated by either party at actual. |
| 4. | Payment Terms | (a) 10% advance against ABG of equivalent amount by TT/LC with 30 days (b) 75% prorate by LC against shipment docs (c) 5% Security deposit by LC against TOC (Unit wise) (d) Retention (i) 5% against TOC (Unit wise on submission of PBG of equivalent amount. (ii) 5% retention against PGT (Unit wise) on submission of PGB of equivalent amount | A1) 3 Million USD as part of advance against ABG after signing of Contract. This advance to be adjusted at sr. no.A2. B) 60% prorate by LC against shipmens docs. C) Retention C1) 5% against TOC (Unit wise) on submission of PBG of equivalent amount. C2) 5% against PGT (Unit wise) on submission of PGB of equivalent amount. |
| 5. | Liquidated Damages | 1) LD for delay: 0.5% per week price or | 1. LD for Delay: 0.5% per week on the delayed |

| | | | |
|--|--|--|--|
| | | <p>part thereof subject to max LD of 19% Contract price.</p> <p>2) LD for shortfall in performance guarantee-</p> <p>a) Gross Electrical Power Output per Generating Unit: If the measured Gross Electrical Power Output (at the Generator terminals) for each Generating Unit falls short of Guarantee Gross Electrical Power Output specified by the Supplier, the Supplier shall be liable to pay damages to the Employer at the rate of USD 1090.00 per KW of shortfall</p> <p>b) Gross Heat Rate per generating Unit: if the measured Gross Heat Rate specified by the Supplier, the Supplier will be liable to pay damages to the Employer at the rate of USD 400,000.00 per kCal/kWhr increase in Gross Unit Heat per Unit</p> <p>c) Auxiliary Power Consumption per Generating Unit: if the measured Auxiliary Power Consumption of each Generating Unit is greater than the Guaranteed Auxiliary Power Consumption specified by the Supplier, the Supplier will be liable to pay damages to the Employer at the rate of USD 4000.00per KW increase in Auxiliary Power Consumption</p> | <p>equipment price, max LD of 10% of respective unit price.</p> <p>2. LD for Shortfall in performance guarantee:</p> <p>a. For every 0.1% decrease in Steam Generator efficiency at 100% TGMCR:USD175,000</p> <p>b. For every 1 Tph shortfall in guaranteed steam output at BMCR USD 50,000</p> <p>If shortfall in efficiency or steam generator is more than 3% of the value guaranteed under PG, Employer has option to reject the equipment. Max LD for shortfall in performance is 5% of respective Unit.</p> <p>Max LD under 1 & 2 shall be 12.5% of Price of respective Unit.</p> <p>Total liability under this Contract shall be 100%</p> |
|--|--|--|--|

| | | | |
|--|--|---|--|
| | | <p>per Unit</p> <p>d) The sum of all damages payable by the Supplier for Shortfall in performance will not exceed USD 57,500,000.00 except in the following cases (threshold limit) on breach of which Employer shall have the option to reject the Contractual Plant.</p> <p>i. If the Gross Electrical Power output per Generating Unit of the Contractual Plant falls short below 97.5% of the Guaranteed Gross Electrical Power Output Specified by the Supplier or</p> <p>ii. If the Gross Heat Rate per Generating Unit of the Contractual Plant is greater than 2205 kcal/kWhr or</p> <p>iii. If the percentage of Auxiliary Power Consumption per Generating Unit of the Contractual Plant exceeds by 5% over the Guaranteed Auxiliary Power Consumption per Generating Unit as specified by the Supplier</p> | |
| | | <p>The major difference in LD clause between two contracts is LD calculation (i.e. 0.5% for per week delay) is on complete contract price in case of EIF, whereas it is on delayed equipment price in case of SEC. also, EIF has taken a lumpsum EPC contract from APML/APRL for supply of BTG; however, as evident from the scope of supply of SEC contract EIF have broken the scope in several small contracts. SEC contract mainly covers Steam Turbine, condenser, LP heater, generator & Steam generator and many major items like ESP, critical piping, Coal mills & feeder, BFPs, draft fans, EOTs etc. are missing in the delivery schedule attached with the commercial contract provided under RUD. This indicates that EIF had not given the single back to back contract to SEC but broken the scope in several parts and awarded as separate contracts. Even if one assumes that the LD clauses in those other contracts are similar of this contract, the LD risk gets diluted due to smaller contract values of these each individual</p> | |

| | | | |
|----|-------------------------------|---|--|
| | | contract. E.g. If one of the small package supplier default in delivery, he is liable to pay LD maximum @10% of only undelivered portion of contract price, whereas because of this default, EIF shall be exposed of maximum 10% whole contract value of its single EPC contract. | |
| 6. | Warranty/Defects Notification | One (1) year from the date of TOC As per Addendum I - Ten (10) years from the date of TOC | 12 months from the date of TOC to Service Contractor 24 months from after last delivery if issuance of TCC is delayed due to reasons not attributable to Supplier |
| 7. | Interest on delayed Payment | Financing charges on delayed payments shall be at LIBOR+2% per annum | After grace period of 14 days simple interest @ 6% shall be payable on delayed payments |

110. A perusal of the terms of the contracts do substantiate the findings of the adjudicating authority that the terms and conditions in respect to the contract between APML/APRL and EIF are much severe in respect of exposure to foreign exchange variation, stringent payment terms, higher liquidated damages in case of delay, higher interest on delayed payments when compared to contract between EIF & Original Equipment Manufacturers.

111. The contract between APML/APRL and EIF is for entire gamut of goods and services and hence cannot be compared with stand alone supply contract with Original Equipment Manufacturers. Invoices issued under two different sets of contractual obligation cannot be compared and relied upon to determine the value. Rule 11, therefore, has no application to the facts of the present case.

112. The revenue has sought to invoke rule 9 by placing reliance on payments made by EIF to different vendors and/or manufacturers of the goods. The said evidence has been held to be not conclusive, as the revenue has considered the payment made through Axis Bank and Bank of Baroda only.

113. This apart, what further needs to be noted is that the value of BTG in relation to Phase I and II (Units 1, 2 and 3) has not been disputed by the department. The said BTG was supplied by SCMEC which is a party unrelated to APML and APRL. The price at which the goods were supplied by SCMEC for Phases I and II are comparable to the price of goods imported for Phase III.

114. The redetermination of the value of the goods under rule 4/9 of the Valuation Rules, cannot, therefore, be sustained and the adjudicating authority committed no illegality in rejecting this allegation made in the show cause notice.

INCOMPLETE INVESTIGATION

115. The department made an attempt to substantiate the overvaluation on the basis of the certain documents. It is the case of the department that the aggregate invoice value of the goods invoiced by EIF to APML and APRL for 301 and 262 consignments respectively was USD 1477,934,270/- as mentioned in Table 20 and 21 of the show cause notice, against which the aggregate invoice value remitted by EIF to various Original Equipment Manufacturers was USD 669,595,215/- as mentioned in the Table 23 of the show cause notice. It is on the basis the difference in these two values, that the department alleged over-valuation to the extent of 220%. Apart from fact that the Original Equipment Manufacturers invoice could not have been treated as transaction value, even the basis of arriving at the figures mentioned in Table 23 (the amount paid by EIF to Original Equipment Manufacturers) is based on the ORTTs received by the Department of Revenue Intelligence from two banks namely

Axis Bank and Bank of Baroda. The department has placed reliance on the following documents:

- (i) Contract between EIF (under its erstwhile name) and Shanghai Electric Corporation (SEC);
- (ii) Outward Remittance Telegraphic Transfers (ORTTs) as evident from the details supplied by the banks;
- (iii) 3 invoices issued by the first vendor in the name of EIF; and
- (iv) 6 consignments where remittance has been made by way of a single invoice.

116. On the basis of these documents, the Revenue has alleged that all supplies were made by EIF on back-to-back basis with invoice number and dates also remaining the same. Consequently, it was submitted that there is an over-valuation since the price indicated in the invoices submitted by APRL/APML are higher than the price indicated in the above documents. While the documents were received from Axis Bank and Bank of Baroda, the relied upon document at page 689 shows the name of Standard Chartered Bank as one of the other banks used by EIF. The same therefore, belies the case of the department that ORTTs and back-to-back invoices received from Bank of Baroda and Axis Bank are complete remittances made by EIF to Original Equipment Manufacturers. Merely because the department could not interrogate or make the Standard Chartered Bank join the investigation cannot be a reason to ignore the possibility of it acting as an active banker on behalf of EIF for the purpose of remitting the amount of Original Equipment Manufacturers. The burden was on the department to prove why the total remittance amount was only through these two banks and no

other bank. It, therefore, follows that the investigation carried out by the revenue was incomplete.

CONFISCATION

117. Another important issue that arises for consideration in this appeal is as to whether the goods can be held liable for confiscation under section 111 (d) and (m) of the Customs Act when there is no case of short levy of duty and assertion that the goods were prohibited in nature. The respondents have relied upon the decision of the Tribunal in **Knowledge Infrastructure Systems Private Limited vs. Additional Director General, D.R.I.**³², wherein Tribunal held as follows:

“Confiscation under Section 111 of Customs Act is not an end in itself but has to be in respect of dutiable or prohibited goods barring a few exceptions. Even in case of exception to prohibited/dutiable goods, it is breach of Customs Act which attract confiscation. For confiscation under Section 111(m) *ibid* there is no judicial approval of proposition that goods be held liable for confiscation without nexus with collection of duty and enforcement of prohibitions or without breach of the machinery provisions for safeguard of revenue and prevention of smuggling.”

118. Learned special counsel for the appellant submitted that the decision of the Tribunal in **Knowledge Infrastructure** was delivered without considering the past decisions and properly appreciating the provisions of the Customs Act and this decision is also under challenge before the Supreme Court. It needs to be noted that in early hearing application, the department opposed the prayer for an early hearing for the reason the decision of the Tribunal in **Knowledge Infrastructure** is applicable to the facts of this case.

32. 2019 (366) E.L.T. A95 (Tri.- Mumbai)

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

120. Thus, as none of the contention advanced by the learned special counsel for the appellant have any force, the order dated 22.08.2017 passed by the adjudicating authority dropping the proceedings that were initiated by issuance of a show cause notice dated 15.05.2014 does not call for any interference in this appeal. The appeal is, accordingly, dismissed.

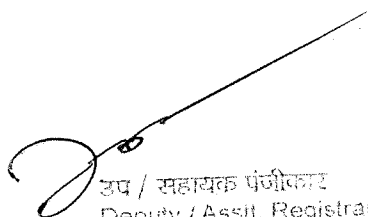
(Order Pronounced on **18.07.2022**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

JB/Shreya

“वेबसाईट से डाउनलोड के रूप में प्रमाणित”
"Certified as downloaded from the website"



उप / सहायक पंजीकार
Deputy / Assit. Registrar
सीमा शुल्क, उत्पाद शुल्क एवं सेवा कर,
CUSTOMS, EXCISE & SERVICE TAX,
अपीलीय अधिकरण, मुंबई.
APPELLATE TRIBUNAL, MUMBAI.



27 JUL 2022

Annexure 7: Order of the National Company Law Tribunal NCLT approving Adani
Power Limited's resolution plan for Mahan Energen Limited

IN THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH NEW DELHI

Company Petition No. (IB)863(PB)/2020

IA -2829, IA -3286,
IA -3293, IA -3318,
IA -3396, IA -3614,
IA -3862, IA -3869
IA -,4099, IA -3608,
IA -3619, IA -3620,
IA -3621, IA -3015,
IA -2897, IA -2785,
IA -4367 of 2021

IN THE MATTER OF:

ICICI Bank Ltd.

...Financial Creditor

Versus

Essar Power M.P. Ltd.

...Corporate Debtor

AND

IN THE MATTER OF I.A.2829 OF 2021:

Under Section:30(6) read with 31(1) of IBC,2016

Mr. Ashish Chhawchharia
Resolution Professional of Essar Power M.P Ltd.
Grant Thronton, 10C, Hungerford
Street, Kolkata-700017, West Bengal

...Applicant



AND

In the Matter Of I.A.3286 OF 2021

Under Section - 60(5) of IBC, 2016 r/w Rule 11 of NCLT Rules, 2016

**Balaji Minerals
Through Authorised Signatory
1-B, Vidyut Vihar Colony, Shaktinagar,
Distt. Sonhabadra, UP-231222**

...Applicant/Objector

Versus

**Essar Power M.P. Ltd.
Through RP
Grant Thornton, 11th Floor, Tower II,
One International Centre, SB. Marg
Elphinstone (W), Mumbai-400013**

...Respondent

AND

IN THE MATTER OF I.A.3293 OF 2021

Under Section - 60(5) of IBC, 2016 r/w Rule 11 of NCLT Rules, 2016

**Pawan Associates
Through its Authorized Signatory
Ward No. 23, Amlori, Singrauli,
Madhya Pradesh-486886**

...Applicant/Objector

Versus

**Essar Power M.P. Ltd.
Through RP
Grant Thornton, 11th Floor, Tower II,
One International Centre, SB. Marg
Elphinstone (W), Mumbai-400013**

...Respondent

AND

IN THE MATTER OF I.A.3318 OF 2021

Under Section – 60(5) of IBC, 2016 r/w Rule 11 of NCLT Rules, 2016

V2P Engineering Services Private Limited
BC No. 118/124, Matrix Tower,
Sector- 132, Noida-201301

...Objector/Applicant

Versus

Essar Power M.P. Ltd.
Through RP
Grant Thornton, 11th Floor, Tower II,
One International Centre, SB. Marg
Elphinstone (W), Mumbai-400013

...Respondent

AND

IN THE MATTER OF I.A.3396 OF 2021

Under Section – 60(5) of IBC, 2016 r/w Rule 11 of NCLT Rules, 2016

S.M. Automart Private Limited
Through its Authorized Signatory
1st Floor, Plot No. 322, Beside, B.N Shiksha Mandir,
Maa Vishno Nagar. Chandpur,
Lahratara, Varanasi, Uttar Pradesh-221106

...Objector/Applicant

Versus

Essar Power M.P. Ltd.
Through RP
Grant Thornton, 11th Floor, Tower II,
One International Centre, SB. Marg
Elphinstone (W), Mumbai-400013

...Respondent



AND

IN THE MATTER OF I.A.3614 OF 2021

Under Section – 60(5) of IBC, 2016 r/w Rule 11 of NCLT Rules, 2016

M/s Shree Enterprises

Through its Partner

**House No. 719G, Tel Mill Gali, Gatu Road,
Piska More, Hehal, Ranchi, Jharkand**

...Applicant/Objector

Versus

Essar Power M.P. Ltd.

Through RP

**Grant Thornton, 11th Floor, Tower II,
One International Centre, SB. Marg
Elphinstone (W), Mumbai-400013**

...Respondent

AND

IN THE MATTER OF I.A3862 OF 2021

Under Section – 60(5) of IBC, 2016 r/w Rule 11 of NCLT Rules, 2016

M/s SK Construction

Through its authorized signatory

Transport Nagar, Shiva Park

Renukoot, Sonebadhra

UP-231217

...Objector/ Applicant

Versus

Essar Power M.P. Ltd.

Through RP

**Grant Thornton, 11th Floor, Tower II,
One International Centre, SB. Marg
Elphinstone (W), Mumbai-400013**

...Respondent



AND

IN THE MATTER OF IA3869 OF 2021

Under Section - 60(5) of IBC, 2016 r/w Rule 11 of NCLT Rules, 2016

M/s J B Transport

Through its Authorised Signatory

Transport Nagar, Shiva Park,

Renukoot, Sonebadhra

UP-231217

...Objector/ Applicant

Versus

Essar Power M.P. Ltd.

Through RP

Grant Thorton, 11th Floor, Tower II,

One International Centre, SB, Marg

Elphinstone (W), Mumbai-400013

...Respondent

IN THE MATTER OF I.A 4099 OF 2021

Under Section - 60(5) of IBC, 2016 r/w Rule 11 of NCLT Rules, 2016

Central Transmission Utility

Of India Limited

Plot No. 2, Sector 29

Gurgaon, Haryana-122001

...Applicant

Versus

Ashish Chhawchharia

Resolution Professional of Essar Power M.P Ltd.

Grant Thronton, 10C, Hungerford

Street, Kolkata-700017, West Bengal

....Respondent No.1

Adani Power Limited

Resolution Applicant

...Respondent No.2

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AND

IN THE MATTER OF I.A 3608,3619,3620 AND 3621 OF 2021

Under Section – 60(5) of IBC, 2016 r/w Rule 11 of NCLT Rules, 2016

**Committee of creditors of Essar M.P. Ltd.
Through ICICI Bank Limited
NBCC Place, Bhisma Pitamah Marg
New Delhi – 110 003**

...Applicant

AND

IN THE MATTER OF I.A 3015 OF 2021

Under Section – 60(5) of IBC, 2016 r/w Rule 11 of NCLT Rules, 2016

**Central Transmission Utility
Of India Limited
Plot No. 2, Sector 29
Gurgaon, Haryana-122001**

...Applicant

Versus

**1 Ashish Chhawchharia
Resolution Professional of Essar Power M.P Ltd.
Grant Thronton, 10C, Hungerford
Street, Kolkata-700017, West Bengal**

....Respondent No.1

**2 CoC of Essar Power M.P Ltd.
NBCC Place, Bhisma Pitamah Marg
New Delhi – 110003**

...Respondent No.2



AND

IN THE MATTER OF I.A 2897 OF 2021

Under Section - 30(2)(a) of IBC

SHAARC Projects Ltd.

....Operational Creditor/Applicant

Versus

Ashish Chhawchharia

Resolution Professional of Essar Power M.P Ltd.

Grant Thorton, 10C, Hungerford

Street, Kolkata-700017, West Bengal

....Respondent

AND

IN THE MATTER OF I.A 2785 OF 2021

Under Section - 60(5) of IBC, 2016 r/w Rule 11 of NCLT Rules, 2016

U.P. Jal Vidyut Nigam Limited

...Applicant

Versus

Essar Power M.P. Ltd.

Through RP

Grant Thorton, 11th Floor, Tower II,

One International Centre, SB. Marg

Elphinstone (W), Mumbai-400013

....Respondent

AND

IN THE MATTER OF I.A 4367 OF 2021

Under Section - 60(5) of IBC, 2016 r/w Rule 11 of NCLT Rules, 2016

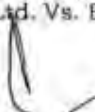
Trikaya Township Private Limited

....Applicant

Date of Pronouncement - 01.11.2021



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CORAM:

SH. BHASKARA PANTULA MOHAN, HON'BLE ACTING PRESIDENT

SH. HEMANT KUMAR SARANGI, HON'BLE MEMBER (T)

PRESENT:

IA 2829/2021 - For Resolution Professional - Mr Ramji Srinivasan, Sr Adv, Mr Abhijeet Sinha, Mr Diwakar Maheshwari, Mr Rajeev Vidhani, Mr Vishnu Shriram, Aditya V Singh, Mr Ashwij Ramaiah, Adv. Kairav Trivedi, -IA Nos. 3286 / 2021, 3318 / 2021, 3293 / 2021, 3396 / 2021, 3614 / 2021, 3869 / 2021, 3862 / 2021-Adv. Piyush Singh, Adv. Aditi Sinha, Adv. Akshay Srivastava for the Applicants/Operational Creditor, Mr. P.Nagesh, Sr. Adv. with Mr. Shubham Arya, Ms. Poorva Saigal, Ms. Tanya Sareen and Mr. Akshay Sharma, Advocates for CTU (I.A. Nos. 3015 and 4099 of 2021), Mr. Daksh Kadian, Advocates for CoC (Applicants in IA 3609/21; IA 3619/21; IA 3620/21; IA 3621/21)Mr. Kairav Trivedi, PCA for SHAARC In IA 2897 of 2021, Mr. Divyam Agarwal and Ms. Geetanjali Shahi Advocates for the Applicant in IA No. 2785/ 2021 for UP Jal Vidyut Nigam Ltd, Mr. Nakul Mohta, Applicant in IA No. 4367 of 2021

ORDER

PER: BHASKARA PANTULA MOHAN, ACTING PRESIDENT

IA No. 2829/2021 has been filed by Ashish Chhawchharia, the Resolution Professional of the Essar Power M.P. Ltd. (hereinafter referred as 'Applicant/ Resolution Professional') for approval of the Resolution plan submitted by the Adani Power Ltd. (hereinafter referred as 'Successful Resolution Applicant').



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2. That the prayers made in the IA No. 2829/2021, which is taken up for consideration, are reproduced below :

(a) Allow the present application;

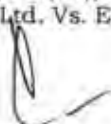
(b) Pass an order approving the Resolution Plan dated 11.05.2021 (read with addendum dated 12.05.2021) submitted by Adani Power Limited (as annexed at Annexure Y) under Section 31(1) of the IBC;

(c) Pass an order granting the reliefs and concessions sought in Section 9 of the Successful Resolution Plan dated 11 May 2021 (read with addendum dated 12 May, 2021) submitted by Adani Power Limited (as annexure Y); and

(d) Pass any such other order or orders it may deem fit and necessary in the interest of equity and justice;

3. To put succinctly, the facts of the case are that the Financial Creditor, ICICI Bank Ltd. filed an Application bearing No. IB-863(PB) 2020 under Section 7 of the I&B Code for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor, Essar Power M.P. Ltd. The said Application was admitted by this Tribunal vide Order dated 29.09.2020 and the Applicant was appointed as the Interim Resolution Professional (IRP). It is added that the Applicant continued as the Resolution Professional of the Corporate Debtor.

4. In terms of the Regulation 6(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the said Interim Resolution Professional made a public announcement in Form-A on 10.10.2020. The public announcement was made in the newspaper namely Business Standard – Delhi- Hindi Edition,



Raj Express- Jabalpur- Hindi Edition and Financial Express- All India English Edition. The copy of the same is also uploaded on the website of Insolvency and Bankruptcy Board of India (IBBI).

5. The Interim Resolution Professional constituted a Committee of Creditors, which comprised of the following financial creditors with voting share given against each Financial Creditor:

| S. No No. | Name of the Creditor | Voting Share%age |
|-----------|--|------------------|
| 1. | ICICI Bank | 29.19 |
| 2. | REC Limited | 24.53 |
| 3. | Power Finance Corporation | 24.26 |
| 4. | Punjab National Bank | 15.98 |
| 5. | Edelweiss Asset Reconstruction Company Limited | 6.04 |

6. That the 'Form-G' was published on 12.11.2020 in the newspapers namely, All India Edition of Financial Express (in English edition), Delhi Edition of Business Standard (English), Mumbai edition. That the last date for submitting EOI was initially decided for 27.11.2020, However the same was extended to 04.12.2020 and then again to 14.12.2020. That the last date for submission of Resolution Plan was fixed for 16.01.2020.

7. It is stated by the Applicant that the following participants in the EOI made it to the Final list of PRA –



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- a) Adani Power Limited;
- b) Vedanta Limited;
- c) Jindal Power Limited and
- d) NTPC Limited.

The same were reflected in the final list submitted by the Applicant dated 27.12.2020, which was in accordance with Regulation 36A (12) of the IBBI (Insolvency Resolution Process for Corporate Persons Regulations, 2016 (hereinafter referred as "CIRP Regulations").

8. It is stated by the Applicant from the above 4 PRA only 2 PRAs i.e Vedanta Limited and Adani Power Limited submitted their Resolution Plan.

9. That both the PRA made changes to their Resolution Plans and finally submitted their revised Resolution Plan alongwith addendum. The voting for the approval of Resolution plan was conducted in the 11th Meeting of CoC held on 21.05.2021.

10. It is stated by the Applicant that the plan of the Adani Power Ltd was approved by the CoC by 100% votes. The scanned copy of the voting sheet is reproduced below



ESSAR POWER M P LIMITED - Under CIRP

Voting Results of the Eleventh Meeting of Committee of Creditors held on 17 May 2021 -adjourned and 21 May 2021

E-voting Conclusion Date & Time: 15 June 2021 at 10:00 PM

| Sl. No. | Name of Financial Creditor | Voting Share (%) | Agenda Item Number (See Notes Below) | | | | | | | |
|---|--|------------------|--------------------------------------|---------|---------|---------|---------|---------|---------|---------|
| | | | B-1(A) | B-1(B) | B-1(C) | B-1(D) | B-1(E) | B-1(F) | B-1(G) | B-1(H) |
| 1 | ICICI Bank Limited | 29.19% | For | Against | For | For | For | For | For | For |
| 2 | Rural Electrification Corporation Limited | 24.53% | For | Against | Against | For | For | Against | Against | For |
| 3 | Power Financial Corporation Limited | 24.26% | For | Against | For | For | For | Against | Against | For |
| 4 | Punjab National Bank | 15.98% | For | Against | Against | Against | Against | Against | Against | For |
| 5 | Edelweiss Asset Reconstruction Company Limited | 6.04% | For | Against | For | For | For | For | For | For |
| TOTAL VOTES | | | | | | | | | | |
| Total Percentage Voting FOR the Resolution(s) | | | 100.00% | 0.00% | 59.49% | 84.02% | 84.02% | 35.23% | 51.22% | 100.00% |
| Total Percentage Voting AGAINST the Resolution(s) | | | 0.00% | 100.00% | 40.51% | 15.98% | 15.98% | 64.77% | 48.78% | 0.00% |
| Total Percentage ABSTAINED from Voting on the Resolution(s) | | | 0.00% | 0.00% | 0.00% | 0.00% | 0.00% | 0.00% | 0.00% | 0.00% |
| | | | Results | Carried | Carried | Carried | Carried | Carried | Carried | Carried |

NOTES:

Item B-1(A): Approval of the Resolution Plan submitted by Adani Power Limited

Item B-1(B): Approval of the Resolution Plan submitted by Vedanta Limited

Item B-1(C): Approval of Liquidation Cost in accordance with Regulation 39B of CIRP Regulations

Item B-1(D): Assessment of sale as a going concern in accordance with Regulation 39C of CIRP Regulations

Item B-1(E): Fee of the Liquidator in accordance with Regulation 39D of CIRP Regulations

Item B-1(F): To approve appointment of legal advisors to the Committee of Creditors

Item B-1(G): To approve authorization of sub-committee on behalf the Committee of Creditors to finalise the pleadings, affidavits, revisions and any other documents

Item B-1(H): To approve appointment of authorized representative of the members of the Committee of Creditors on the Monitoring Committee/ Steering Committee

11. It is further stated by the Applicant that subsequent to the Approval of the Resolution Plan, the Resolution Applicant has submitted Performance Guarantee dated 22.06.2021 worth Rs 150 Crores.

12. That the details of Payments given to the various stakeholders of the Corporate Debtor is given in Form H of the Resolution Plan. The extracts of the same are reproduced overleaf -

7. The amounts provided for the stakeholders under the Resolution Plan is as under.

(Amount in INR)

| Sl. No. | Category of Stakeholder* | Sub-Category of Stakeholder | Amount Claimed | Amount Admitted | Amount Provided under the Plan# | Amount Provided to the Amount Claimed (%) |
|---------|-----------------------------|---|-----------------|-----------------|---------------------------------|---|
| (1) | (2) | (3) | (4) | (5) | (6) | (7) |
| 1 | Secured Financial Creditors | (a) Creditors not having a right to vote under subsection (2) of section 21 | - | - | - | - |
| | | (b) Other than (a) above: | | | | |
| | | (i) who did not vote in favour of the resolution Plan | - | - | - | - |
| | | (ii) who voted in favour of the resolution plan | 124,391,359,685 | 120,129,831,567 | 25,000,000,000 | 20.098% |
| | Total[(a) + (b)] | 124,391,359,685 | 120,129,831,567 | 25,000,000,000 | 20.098% | |


| | | | | | | |
|--------------------|-------------------------------|---|-----------------|-----------------|----------------|--------|
| 2 | Unsecured Financial Creditors | (a) Creditors not having a right to vote under subsection (2) of section 21 | 4,849,451,504 | 419,437,816 | NIL | NIL |
| | | (b) Other than (a) above: | | | | |
| | | (i) who did not vote in favour of the resolution Plan | - | - | - | - |
| | | (ii) who voted in favour of the resolution plan | 126,500,000 | 126,500,000 | NIL | NIL |
| | Total[(a) + (b)] | 4,975,951,504 | 545,937,816 | NIL | NIL | |
| 3 | Operational Creditors | (a) Related Party of Corporate Debtor | 347,055,623 | 346,408,891 | NIL | NIL |
| | | (b) Other than (a) above: | | | | |
| | | (i) Government | 42,494,439,721 | 5,446,721,303 | NIL | NIL |
| | | (ii) Workmen | - | - | - | - |
| | | (iii) Employees | 176,425,856 | 137,393,857 | NIL | NIL |
| | | (iv) Others | 29,504,909,458 | 429,731,129 | NIL | NIL |
| | Total[(a) + (b)] | 72,722,830,658 | 6,560,255,180 | NIL | NIL | |
| 4 | Other debts and dues | - | - | - | - | |
| Grand Total | | | 202,090,141,846 | 127,236,024,563 | 25,000,000,000 | 12.37% |

Amount provided over time under the Resolution Plan and includes estimated value of non-cash components. It is not NPV.

13. That the Liquidation value of the Corporate Debtor is disclosed as Rs1733.4 Crores and the Fair Market Value of the Corporate Debtor is disclosed as Rs 2657.2 Crores in the Form H.

14. That the Resolution Applicant has also enclosed the Affidavit stated that they are not barred under Section 29A of IBC, 2016 to submit the Resolution Plan.

15. With respect to compliances made under the Resolution Plan. The Applicant has stated the following in Form H. The extracts of Form H are reproduced overleaf



9. The compliance of the Resolution Plan is as under:

| Section of the Code / Regulation No. | Requirement with respect to Resolution Plan | Clause of Resolution Plan | Compliance (Yes / No) |
|--------------------------------------|--|--|--|
| 25(2)(h) | Whether the Resolution Applicant meets the criteria approved by the CoC having regard to the complexity and scale of operations of business of the CD? | - | Yes |
| Section 29A | Whether the Resolution Applicant is eligible to submit resolution plan as per final list of Resolution Professional or Order, if any, of the Adjudicating Authority? | Covering Letter | Yes |
| Section 30(1) | Whether the Resolution Applicant has submitted an affidavit stating that it is eligible? | An affidavit dated January 11, 2021 has been submitted | Yes |
| Section 30(2) | Whether the Resolution Plan- | | |
| | (a) provides for the payment of insolvency resolution process costs? | Section 2.1 | Yes |
| | (b) provides for the payment to the operational creditors? | Section 2.2 | Yes |
| | (c) provides for the payment to the financial creditors who did not vote in favour of the resolution plan? | Section 2.3.3 | Yes |
| | (d) provides for the management of the affairs of the corporate debtor? | Section 7 read with Schedule 2 | Yes |
| | (e) provides for the implementation and supervision of the resolution plan? | Section 3, Section 7 and Section 8 | Yes |
| | (f) contravenes any of the provisions of the law for the time being in force? | Clause 5(e) of the Covering Letter | Yes (the resolution plan is in compliance) |

| | | | |
|----------------------|---|--|------------------------------------|
| Section 30(4) | Whether the Resolution Plan (a) is feasible and viable, according to the CoC? (b) has been approved by the CoC with 66% voting share? | Section 5 read with Schedule 2 The Resolution Plan has been approved by the CoC, by a vote of 100% | Yes Yes |
| Section 31(1) | Whether the Resolution Plan has provisions for its effective implementation plan, according to the CoC? | Section 7 | Yes |
| Regulation 35A | Where the resolution professional made a determination if the corporate debtor has been subjected to any transaction of the nature covered under sections 43, 45, 50 or 66, before the one hundred and fiftieth day of the insolvency commencement date, under intimation to the Board? | The determination was made on January 31, 2021 | Yes |
| Regulation 38(1) | Whether the amount due to the operational creditors under the resolution plan has been given priority in payment over financial creditors? | Section 2,2 | Yes |
| Regulation 38(1A) | Whether the resolution plan includes a statement as to how it has dealt with the interests of all stakeholders? | Section 2.14.1 read with Section 2 | Yes |
| Regulation 38(1B) | (i) Whether the Resolution Applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any resolution plan approved under the Code. (ii) If so, whether the Resolution Applicant has submitted the statement giving details of such non- implementation? | Section 1.7.2 - | Yes (complied with) - |
| Regulation 38(2) | Whether the Resolution Plan provides: (a) the terms of the plan and its implementation schedule? (b) for the management and control of the business of the corporate debtor during its term? (c) adequate means for supervising its implementation? | Section 1.6 and Section 9.8 Section 7 read with Schedule 2 Section 7 read with Section 8 | Yes Yes Yes |
| 38(3) | Whether the resolution plan demonstrates that – (a) it addresses the cause of default? (b) it is feasible and viable? (c) it has provisions for its effective implementation? | Schedule 2 Section 5 read with Schedule 2 Section 7 read with Section 8 | Yes Yes Yes |

| | | | |
|---------------------|--|---|----------------|
| | (d) it has provisions for approvals required and the timeline for the same? (e) the resolution applicant has the capability to implement the resolution plan? | Section 8 read with Schedule 4 Section 5 read with Schedule 2 | Yes Yes |
| 39(2) | Whether the RP has filed applications in respect of transactions observed, found or determined by him? | The application has been filed on May 21, 2021 | Yes |
| Regulation 39(4) | Provide details of performance security received, as referred to in sub-regulation (4A) of regulation 36B. | Performance Security in the form of a Bank Guarantee dated June 22, 2021 has been submitted | Yes |

16. That the Applicant has also sought various reliefs and concessions as mentioned under Resolution Plan vide its Section 6. The scanned copy of the waivers sought are reproduced below

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STRICTLY PRIVATE AND CONFIDENTIAL

SECTION 6 : RELIEFS AND WAIVERS

1. Any reliefs requested to be granted by the NCLT to the Resolution Applicant shall not be construed as conditionalities to the implementation of this Resolution Plan. The Resolution Applicant submits that, at the time of seeking approval from the NCLT, the reliefs provided below shall be included, with such modifications as may be considered necessary by the NCLT:
- (i) On and from the NCLT Approval Date, by order of the NCLT sanctioning this Resolution Plan, a restraint on, and prohibition of, all Adverse Actions shall be deemed to be declared until the Effective Date;
 - (ii) On and from the NCLT Approval Date, by order of the NCLT sanctioning this Resolution Plan, all counter-party(ies) to the Company Contracts shall be deemed to have given their approval for change in ownership of the Corporate Debtor (as specified in this Resolution Plan) with effect from the date of the Effective Date.
 - (iii) The Resolution Applicant considers the uninterrupted supply of water and use of land in terms of the Articles of Arrangement signed with Uttar Pradesh Jal Vidyut Nigam Limited ("UPJVNL") on December 23, 2009 ("UPJVNL Agreement") for permission for use of land and water draw, to be critical to preserve the value of the Corporate Debtor and to maintain its status as a going concern. Accordingly, the UPJVNL Agreement shall renew for a period of 12 months from the Effective Date in terms of this Resolution Plan and continue in full force and effect and shall remain valid and binding against the Corporate Debtor and UPJVNL.
 - (iv) On and from the NCLT Approval Date, by order of the NCLT sanctioning this Resolution Plan, the Township Lease Agreement dated May 16, 2011 entered with Trikaya Township Limited shall be deemed to be terminated, with such termination being effective from the NCLT Approval Date. Any claims or liabilities arising as a consequence of such termination shall be deemed to be relinquished, cancelled and written-off on the NCLT Approval Date.
 - (v) On and from the NCLT Approval Date, by order of the NCLT sanctioning this Resolution Plan, all Related Party contractual arrangements entered into by the Corporate Debtor shall be deemed to be terminated, with such termination being effective from the NCLT Approval Date. Any claims or liabilities arising as a consequence of such termination shall be deemed to be relinquished, cancelled and written-off on the NCLT Approval Date.
 - (vi) As the Resolution Applicant is required to take over the Corporate Debtor's Business on a 'going concern' basis, all consents, licenses, approvals, clearances, rights, entitlements, benefits and privileges whether under law, contract, lease or license, granted in favour of the Corporate Debtor or to which the Corporate Debtor is entitled or accustomed to, shall continue to remain valid, notwithstanding any provision to the contrary in their terms, and provided that in case of consents, licenses, approvals, rights, entitlements, benefits and privileges that have expired or lapsed, notwithstanding that they may have already lapsed or expired due to any breach, non-compliance or efflux of time, be deemed to continue without disruption for the benefit of the Corporate Debtor, for a period of 12 (twelve) months from the Effective Date or such other period

5047177

Tel +91 79 2555 6666

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STRICTLY PRIVATE AND CONFIDENTIAL

as required under Applicable Law. Further, no coercive actions shall be taken against Resolution Applicant or Corporate Debtor post NCLT Approval Date towards lapse of any consents, licenses, approvals, clearances etc. under the Applicable Law during the CIRP Period.

- (vii) The Resolution Applicant in the event of being declared successful shall be given an exemption of three (3) years from the Effective Date to correct, amend and remedy for (i) 100% utilization of fly ash; (ii) CSR Expenses, as required under the Environmental Clearance issued by the relevant Government and Statutory Authorities.
- (viii) The time period provided to Corporate Debtor to install flue gas desulfurization system (FGD) for Unit 1 and Unit 2 shall be extended to 31 March 2023 and no coercive action be taken against the Corporate Debtor or Resolution Applicant for non-compliance during such period.
- (ix) The Resolution Applicant and the Corporate shall be deemed to have received a waiver from all actions, Proceedings or penalties under any applicable Law for any Non-Compliance, including in connection with any prior transfer of assets, contracts or business by the Corporate Debtor.
- (x) All Asset whether leased or owned by the erstwhile Promoters, other individuals, Related Parties or affiliates of the erstwhile Promoters, which are integral to the operations of the Project shall vest with the Corporate Debtor.
- (xi) The implementation of the Resolution Plan by the Resolution Applicant and any change in control occurring pursuant thereto shall not impact or breach the validity of any such agreements, contracts (including but not limited to PPAs and FSAs) etc. to which the Corporate Debtor is a party to.
- (xii) The Ministry of Environment and Forest to waive all past non-compliances of the Corporate Debtor and an additional period of 36 months from the Effective Date to be provided for complying with all the emission norms for installation of FGD.
- (xiii) All permits, clearances and necessary approvals for transportation of coal by road which have been obtained by the Corporate Debtor shall be extended for 36 months from the Effective Date.
- (xiv) Any stamp duty liabilities or Tax liability arising pursuant to the transactions contemplated under this Resolution Plan shall be exempted or waived off.

It is hereby clarified that the non-grant of any of the aforementioned reliefs shall not be considered as modification of any of the other terms contained in this Resolution Plan, which shall continue to have the binding effect in terms of this Resolution Plan

17 That before giving any observations on the Resolution Plan placed before this Adjudicating Authority, it is pertinent to mention that the Resolution Plan and objections were heard at length on 21.09.2021 and 25.09.2021. That all the counsels who appeared for the parties which objected the Resolution Plan, were present and have marked their presence. However inadvertently in the order dated 28.09.2021, it is mentioned that only IA 2829/2021 is reserved but the non mentioning of other IAs as

'reserved' was a clerical mistake. It is also pertinent to mention that no next date of hearing was given in any of the IAs listed on 28.09.2021. Further neither the matter was mentioned on any subsequent date, nor any fresh IA was filed after 28.09.2021 application. Even when matter was reserved on 28.09.2021 there was no objection whatsoever made by any of the parties asking time for further arguments because the matters were completely heard.

18 That in all the IAs filed as an objection, the pleadings are complete and even Written Submissions are filed in most of the IAs. Therefore all the objections are decided on the basis of the material available on record.

IA 3286, IA 3293, IA 3318, IA 3396, IA 3614, IA 3862 , IA 3869, IA 4099 of 2021

19. That the Resolution Plan is objected by the Operational Creditors and other entities. Therefore before adjudicating the resolution plan it is necessary to go through the objections made against the Resolution Plan. That **IA 3286, IA 3293, IA 3318, IA 3396, IA 3614, IA 3862 , IA 3869, IA 4099 of 2021** are filed by the Operational Creditors. Their main grievance is that the Operational Creditors are being paid 'NIL' value in the Resolution Plan.

20. It is further stated by the Applicants of these IAs that the Resolution Plan contravenes the provision of Section 30(2)(b) of IBC, 2016 and Regulation 38 of the CIRP Regulations. They further placed reliance on the **Judgement of Hon'ble Supreme Court passed in the matter of Essar**



Steel India Ltd. Committee of Creditors Vs Satish Kumar Gupta to submit that although the decision vests with the CoC to approve a resolution plan, however if the plan does not confirm to the mandatory contents which must be provided for in a resolution plan. The extracts of the Judgement are reproduced below –

44. The minimum value that is required to be paid to operational creditors under a resolution plan is set out under Section 30(2)(b) of the Code as being the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under Section 53. The Insolvency Committee constituted by the Government in 2018 was tasked with studying the major issues that arise in the working of the Code and to recommend changes, if any, required to be made to the Code. The Insolvency Committee Report, 2018 (hereinafter referred to as "The Committee Report, 2018"), inter alia, deliberated upon the objections to Section 30(2)(b) of the Code, inasmuch as it provided for a minimum payment of a "liquidation value" to the operational creditors and nothing more, and concluded as follows:"

21. That in response to these objections it is stated by the RP and CoC that the Approved Resolution Plan complies with the provisions of the Code read with CIRP Regulations. It is stated that the approved resolution plan provides for the total payment of Rs 2500 Crores. It is added that that the total admitted claim received in regard to the Financial Creditors comes to the tune of Rs 12067,57,69,383 and the Total claim of the Operational Creditors comes to the tune of Rs 97,04,70,865. That the Liquidation value of the Corporate Debtor is around 1733 Crores. It is emphasized by the Applicant and the CoC that the Liquidation value of the Operational



Creditors in the Resolution Plan in "NIL". Therefore there is no illegality in the approved Resolution Plan.

22 That the Applicant has placed reliance on the Para 55 of the Judgement of **Hon'ble Supreme Court passed in the matter of Essar Steel India Ltd. Committee of Creditors Vs Satish Kumar Gupta that-**

"56. By reading paragraph 77 de hors the earlier paragraphs, the Appellate Tribunal has fallen into grave error. Paragraph 76 clearly refers to the UNCITRAL Legislative Guide which makes it clear beyond any doubt that equitable treatment is only of similarly situated creditors. This being so, the observation in paragraph 77 cannot be read to mean that financial and operational creditors must be paid the same amounts in any resolution plan before it can pass muster. On the contrary, paragraph 77 itself makes it clear that there is a difference in payment of the debts of financial and operational creditors, operational creditors having to receive a minimum payment, being not less than liquidation value, which does not apply to financial creditors. The amended Regulation 38 set out in paragraph 77 again does not lead to the conclusion that financial and operational creditors, or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster. Fair and equitable dealing of operational creditors rights under the said Regulation involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately.



Also, the fact that the operational creditors are given priority in payment over all financial creditors does not lead to the conclusion that such payment must necessarily be the same recovery percentage as financial creditors. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors."

23 That the RP has further placed reliance on the Judgement of Hon'ble NCLAT in the matter of The Asst. Commissioner of **CGST & Central Excise Vs Kuresh Hatim Khambati, Company Appeal (AT) (Insolvency) No. 174/2021**

4....The Resolution Professional is pointing out that according to the Valuation Report it was clear that the amounts payable to the Appellant would be Nil in case of Liquidation and as has been set out in the approved Resolution Plan and when the Amounts payable to the Appellant as Operational Creditor were determined to be Nil, Regulation 38 of CIRP Regulations, 2016 to pay on priority would not be relevant. It is argued that the Resolution Plan was in compliance with Section 30(2) of the IBC read with Regulation 38 of CIRP, Regulations and thus it was placed before the CoC. Workmen and Employees as Operational



Creditors were the continuing stakeholders and on humanitarian grounds it was required that their dues should be paid to the fullest extent and hence Resolution Plan contains corresponding allocation to them. Other Operational Creditors (Other than Workman and Employees and Statutory Dues) who provide continuous support to the Corporate Debtor to ensure that in the future also their support is received to run the Corporate Debtor, the Resolution Plan provided for allocation ex gratia to such Operational Creditors. It is argued that although if the Company was to go in Liquidation the Operational Creditors would have got Nil, still the Resolution Plan made provisions for Workman and Employees and other Operational Creditors (Other than Workman and Employees and Statutory Dues) and thus the Resolution Plan was not bad in law. It is argued that the CoC has considered the Resolution Plan and approved the same in commercial wisdom and may not be interfered with. The Resolution Professional has also argued that Annexure 5 filed with the Resolution Plan gives a list of various litigations with regard to the claim made by the Appellant and in such factual background the claim made by the Appellant was admitted only on contingent basis and now with the Approval of Resolution Plan, the claim would not be enforceable. The claim made by the Appellant was less than 10 % of the aggregate debt of Corporate Debtor and thus the Appellant was not entitled to even notice under Section 24(3) of IBC.

8. Adjudicating Authority has considered the Revised Position of claims received as on 28th October, 2020 (Paragraph 4 of the Impugned Order) which showed that the amounts claimed by the Financial Creditors



admitted were Rs. 20,904,644,307/- and that the dues of Operational Creditors (Workman and Employees) admitted were of Rs. 82,253,253/-. It is recorded that amounts claimed by Operational Creditors (Statutory Dues, Liabilities including outstanding government authority dues, taxes, etc.) were Rs. 4,827,297,551/- (which includes amounts admitted on provisional as well as contingent basis). Then there are dues which were admitted by Operational Creditors (Other than Workmen and Employees and statutory dues) which were of R. 213,192,038/- (including amount admitted on/contingent basis). **Considering these amounts and the Liquidation Value, it is difficult to find fault with the Resolution Plan as has been approved. There is substance in the submissions made by the Resolution Professional that if the Corporate Debtor was to go in Liquidation, the Appellant would get Nil amount.**

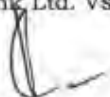
(Emphasis Supplied)

REASONING

24 That after going through the objections made by the Operational Creditors, and examining the reply given by the RP and CoC, this bench observes that as per Section 30(2)(b) of IBC, 2016, the higher of the following amount is required to be paid to the Operational Creditors i.e the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53.



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25 Since the Liquidation value of the Operational Creditors is 'Nil' and the amount which shall be distributed to the Corporate Debtor in accordance with Section 53(1) would have been the Nil as well. Therefore we are of the considered view that the Resolution Plan is not in violation of Section 30(2)(b) of IBC, 2016.

26 Since the plan is approved by the 100% votes by the CoC. Therefore this bench cannot interfere in the Commercial Wisdom of the CoC, in absence of any contravention of any provision of law. Therefore we dismiss IA 3286, IA 3293, IA 3318, IA 3396, IA 3614, IA 3862 ,IA 3869 Of 2021, IA 4099 filed by the Operational Creditors.

27 That IA 3608, IA 3619, IA 3620, IA 3621 were the Applications filed by the CoC to intervene in the Applications filed by the Operational Creditors. Since the objections of the operational Creditors are already decided, therefore these IAs are dismissed as infructuous.

IA 3015/2021

28. That IA 3015/ 2021 has been filed by Central Transmission Utility of India Limited, claiming to be an Operational Creditor against the RP. That through this IA Central Transmission Utility of india Limited has sought admission of Rs 26,325,400,000 as an Operational Debt.

29. That the necessary of adjudicating the claim of the Operational Creditor in **IA 3015/2021** is not required since the all the Operational



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Creditors, irrespective of their claim amount, are awarded with 'Nil' amount in the Resolution Plan,. Therefore IA 3015/2021 is dismissed as infructuous.

IA 2897/2021

30. That IA 2897/2021 is also an objection the Resolution to the Resolution Plan filed by SHAARC Projects Ltd (hereinafter referred as SHHARC). That the SHAARC has made the following prayer in its application

- a. The Resolution Professional be directed to Include the balance portion of expenses of Rs 1,85,01,466.12*
- b. Alternatively, the Resolution Professional be directed to make this payment of Rs. Rs 1,85,01,466.12*
- c. Order cost of Rs 1 Lacs to the MSME unit for filing and defending this matter.*
- d. Since this matter is for objection to a proposed Resolution Plan, the same may be taken on Priority along with the hearings for Approval / Rejections of the proposed Resolution Plan.*
- e. Pass such other order / directions as this Hon'ble Bench may deem fit and proper in the facts and circumstances of the case*

31 That the main grievance of the SHAARC is that the Resolution Plan is in violation of Section 30(2)(a) of IBC, 2016 since the Resolution does not takes account the full expenses which were made during the CIRP as a part of the CIRP cost.

32 It is stated by the SHAARC that it had continued to supply goods/services after the date of CIRP i.e from 1.10.2020 till 30.04.2021. It is



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added that the value of goods/services provided during the CIRP was of Rs 6,77,11,154.37.

33 It is further stated by the Applicant that The following amounts have been adjusted from this outstanding during CIRP of Rs. 6,77,11,154.37 to arrive at the Net Principal Outstanding balance of Rs 1,80,58,879.12 as follows:

- a. An amount of Rs. 8,84,748 has been deducted as TDS on the supplies made,
- b. Diesel Recovery of Rs. 57,70,462 has been recovered
- c. Rent Recovery Rs 96,000
- d. Part Payments received Rs 3,00,54,205
- e. The opening Credit balance of Rs1,28,46,060.25 payable to Essar Power MP Limited has also been adjusted
- f. An excel summary of all these workings have been enclosed for easy reference as separate Annexure

34 It is stated by the SHAARC that, the Bills under contentions in this application are leading to a net Principal Outstanding Amount of Rs 1,80,58,879 and these have been raised from 1st October 2020 till 30th April 2021, after the date of the Initiation of CIRP as per the above CIRP Order dated 29 September 2020.

35 It is further stated by the SHAARC that since it is a MSME, therefore MSME Interest of Rs 4,42,587 has been considered on the balance



outstanding, calculated 45 days from the bill dated. 28/02/2021 as per MSMDE Act.

36 That the RP has filed its reply and has stated that that consequent to the Public Announcement, the SHAARC vide its Form-B dated 20.10.2020 and submitted its claim for an amount of INR 2,71,53,207 (Indian Rupees Two Crores Seventy-One Lakhs Fifty-Three Thousand Two Hundred and Seven), claiming to be due and payable by the Corporate Debtor in consideration for the Job undertaken by the SHAARC ("Erstwhile Claim"). It is stated that that out of the total Erstwhile Claim, an amount of INR 2,66,08,356 (Indian Rupces Two Crores Sixty-Six Lakhs Eight Thousand Three Hundred and Fifty-Six) was admitted ("Admitted Claim) and hence, the SHAARC was duly admitted as the operational creditor of the Corporate Debtor.

37 It is stated by the RP that Since, the Applicant continued providing its services during the CIRP as per the Work Orders, it was incumbent upon it to complete the work as per the agreed schedule.

38 It is submitted by the RP that based on these discussions. RP Understood that despite sending several requests to the SHAARC for expediting the work process at the Plant by mobilizing and deploying additional resources, SHAARC maintained a lackadaisical attitude which put the ash dyke cells at the Plant in jeopardy. In view of the above position, the Corporate Debtor. vide its emails dated 08.10.2020 and 12.10.2020 once again requested the SHAARC to adhere to the completion schedule as per the



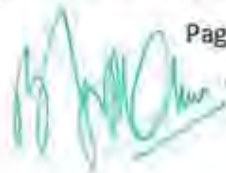
Work Order(s), for carrying out and completing the Job. However, SHAARC not only failed to do the needful, but also failed to even respond to the said emails. The copy of the emails dated 8 October 2020 and 12 October 2020 have been placed on record.

39 It is stated by the RP that various rounds of discussions were conducted with officials of the Applicant, wherein the company personnels informed about unsatisfactory work progress and also regarding its payment obligations towards the Corporate Debtor to the tune of INR 3,97,83,375.55 (Indian Rupees Three Crores Ninety-Seven Lakhs Eighty-Three Thousand Three Hundred Seventy-Five and Fifty-Five Paise only) under the Scrap Sale Agreement as on 29.09.2020.

40 It is added by the RP that In relation to the above mentioned dues, SHAARC vide its letter dated 11 January 2021 requested the Corporate Debtor to recover @35,00,000/ (approx.) per month against the amount payable by it.

41 It is stated by the RP Subsequently, based on mutual verbal discussions amongst the parties, a consensus was arrived that the SHAARC would discharge its dues towards the Corporate Debtor in a periodic manner by agreeing for an adjustment of INR 35.00.000 (approx.) per month against the invoices for work carried out under the Work Orders.

42 It is submitted by the RP While the dues of the Applicant under the Scrap Sale Agreement were agreed to be adjusted at the rate of INR



35,00,000 (approx) per months and thus, were likely to be resolved in a periodic manner, however, another issue arose qua Applicant's failure in making timely payment to the sub contractors and workmen/labourers engaged by it at the Plant. It is submitted that in view of the same. The Corporate Debtor also faced with the said unpaid claims of the sub contractors and workmen/labourers, who demanded immediate payment of their dues from the Corporate Debtor and further threatened to stall the ongoing work at the Plant by initiating a strike.

43 It is added by the RP that certain local vendors/ workmen engaged by the Applicant at the site ("Obstructors) continuously caused disruptions at the plant of the Corporate Debtor by way of inter-alia, forceful blockage of the Ash Dyke gate on account of non-payment of their dues by the Applicant. It is submitted that the smooth functioning and operation of the Plant is quintessential to continue the Corporate Debtor as a 'going concern'. Accordingly, considering that it was extremely necessary that all obstructions for the smooth functioning of the plant were removed, which were severely impacting the operations of the Corporate Debtor, RP made direct payments to the workmen (through the local vendors) engaged by the Applicant at the plant so that they may be persuaded to terminate their strike at the earliest and resume work. It is further submit that the Applicant vide its emails dated 06.05.2021 and 14.05.2021 expressed its inability to pay the dues of workmen and labourer engaged by it for the completion of the Job and requested the Corporate Debtor to make direct payments to the workmen and labourer..

44 It is submitted by the RP that during the course of the CIRP of the Corporate Debtor, the Applicant has raised invoices aggregating to a sum of INR 6.77.87,380 towards the Work Orders issued by the Corporate Debtor, which was further reduced to INR 6.69.25.676 after adjusting TDS towards this amount, the Corporate Debtor has made payment aggregating to a sum of INR 6,69,18,062 in the following manner:

(i.) an amount of INR 3,52,89,228 paid (to the Applicant as well as to its sub-contractors directly on Applicant's request);

(ii.) an amount of INR 2,44,76.462 withheld as part of the Adjustment of Applicant's dues against purchase of metal scrap from Corporate Debtor in terms of the mutual consensus; and

(iii.) an amount of INR 71,52,372, adjustment to the payables on account of High Speed Diesel supplied to the Applicant as per work order.

45 It Is further stated by the RP that so far only an amount of INR 2,44,76,462 has been adjusted as per mutual consensus, out of total dues of INR 3.97.83.375.55 (Indian Rupees Three Crores Ninety -Seven Lakhs Eight Three Thousand Three Hundred Seventy-Five and Fifty-Five Paise) under the Scrap Sale Agreement, the Applicant is still liable to make payment of an amount of 1,53,06,913 (Indian Rupees One Crore Fifty-Three Lakhs Six Thousand Nine Hundred and Thirteen Only).

46 Therefore, the Corporate Debtor does not have any outstanding amounts due and payable to the Applicant for the period during the CIRP, and in fact there is a receivable position. It is added that in view of the above, a total amount of INR 1,53,06,913.55 is due and pending to be received from the Applicant, after netting the during CIRP payables to with the receivables of the Corporate Debtor. I submit that as per the books of accounts of the Corporate Debtor, after due adjustments and set off, the Applicant is still liable to pay to the Corporate Debtor an amount of INR 1.53,06,913.55. Hence, it is evident that the present Application through which the Applicant seeks direction from this Hon'ble Tribunal for the admission of its claim is baseless and devoid of merit Further, any prayer that has been sought against the Resolution Professional has no basis in law, as the Resolution Plan voted for by the COC is already Sub judice before this Hon'ble Tribunal, which would ultimately decide the manner of payments.

47 After hearing submissions of both the parties this bench observes that the RP has given justification that the claim of the Corporate Debtor is higher in comparison to what SAARC has to recover form the RP during the CIRP period. It has been emphasized by the RP that the SHAARC has not paid its dues towards the purchase of scrap. That SHAARC has admitted its liability in its letter dated 11.01.2021 where they submitted that they shall pay Rs 25,00,000 per month. The scanned copy of the same is reproduced below



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SHAARC PROJECTS LIMITED

Regd. & Head Office : 309-C, 3rd Floor, Megh Malhar Complex, Sector-11, Gandhinagar - 382 011, Guwahati, INDIA.
284, 2nd Floor, Megh Malhar Complex, Sector-11, Gandhinagar - 382 011, Guwahati, INDIA.
Email : info@shaarc.com, sptnagar@gmail.com
Phone : 079 - 232 48393.
Website : www.shaarc.co.in
CIN : U45201GJ2011PLC005822

SPL/GNR/ACS/2020-21/076
Date : 11.03.2021

To,
The Project Manager
Essar Power MP Limited,
Vill. Bhandara, PO- Kalsualal,
Tal- Wardhan,
Dist. Singraoli,
Madhya Pradesh.

Subject : Payment of our dues for Ash Dyle work at EPMPPL Mahan, M.P.

Dear Sir,

With reference to above subject, we wish to bring to your knowledge that we are working at Mahan site for Ash Dyle work.

We wish to bring to your kind attention that PRE-IRP our receivable from EPMPPL was 2.76 Crores and at the same time we have to pay Rs. 3.97 crores to EPMPPL.

We request you to release @ Rs. 25,00,000/- per month against the amount payable by us.

We request you to kindly confirm the same so that we can get our payment regularly & timely and continue to work simultaneously.

Having for your co-operation in this regard.

Thanking you.

For Shaarc Projects Limited



Authorized Signatory

48 Further, it is apprised by the RP that the dues under the Scrap Sale Agreement were agreed to be adjusted at the rate of INR 35,00,000 (approx) per month and thus were likely to be resold in a periodic manner, however since the SHAARC failed to make payment to sub contractor/workmen labor. The Corporate Debtor was burdened with unpaid claims. The copy of the mail dates 06.05.2021 and 14.05.2021 has been placed by the RP which depicts inability of the Shaarc to Pay the dues of Sub Contractor, Labor. The mails further depicts that the SHAARC had requested the Corporate Debtor to clear their dues. The scanned copy of the mail dated 14.05.2021 is reproduced below

From: M.K.Mishra [mailto:mkmishra@shaarc.co.in]

Sent: 14 May 2021 12:01

To: Singh, Lallan - EPMP - Maintenance (HAZ)

Cc: Sinha, Ajay K. - EPMP - Waidhan; Sanyal, Sukanta - EPMP - Mechanical - Mahan; Singh, Rajesh -

EPMP - Head - HR, IR, Admin, R&R & CSR - Mahan; Thite, Anand - EPMP - Mahan; R MISHRA

Subject: Re: FW: Payment of local vendor

Dear sir,

Further to the trailing mails and our discussion in this connection.

Please find enclosed revised list of PRW Contractors and Local workers of Mahan site who are chasing for their payments to us as well as to you too and are creating nuisance at Mahan site.

You are requested to kindly look into the same and arrange to make direct payment to them on our behalf out of the net amount payable to us.

Thanks & Regards,

M. K. Mishra

Shaarc Projects Ltd.

309-C, Third floor, Megh Malhar Commercial Complex,

49 That the RP has adjusted the amount of Rs 6,77,87,380 towards the work orders issued by the Corporate Debtor, which was further reduced to Rs 6,69,25,676 after adjusting TDS. That the RP in its reply has stated that it has adjusted RS. 6,69,18,062 in following manner

(i.) an amount of INR 3,52,89,228 paid (to the Applicant as well as to its sub-contractors directly on Applicant's request);

(ii.) an amount of INR 2,44,76,462 withheld as part of the Adjustment of Applicant's dues against purchase of metal scrap from Corporate Debtor in terms of the mutual consensus; and

(iii.) an amount of INR 71,52,372, adjustment to the payables on account of High Speed Diesel supplied to the Applicant as per work order.

50 It is further pleaded by RP that an amount of INR 2,44,76,462 has been adjusted as per mutual consensus, out of total dues of INR 3,97,83,375.55 (Indian Rupees Three Crores Ninety -Seven Lakhs Eight Three Thousand Three Hundred Seventy-Five and Fifty-Five Paise) under the Scrap Sale Agreement, SHAARC is still liable to make payment of an amount of Rs. 1,53,06,913.

51 Therefore, in light of the events which happened during the CIR Process between SAARC and the Corporate Debtor and while note of the dues paid by the Corporate Debtor on behalf of SHAARC and liability of SAARC under Scrap Sale Agreement, we find no illegality in the actions of the RP. **Accordingly we are of the considered view that the SHAARC has no valid claim arising out of the CIR Process which is required to be paid as a part of the CIRP Cost. Hence IA 3015 is devoid of any merit. Hence the same is dismissed.**

IA 2785 of 2021

52. Now it is necessary to examine other IAs which have challenged the Resolution Plan. That **IA 2785 of 2021** is filed by one more Operational Creditor i.e U.P Jal Vidyut Nagar Limited.



53. That the U.P Jal Vidyut Nagar Limited has sought the following reliefs-

(i) *Direct the Resolution Professional of the Corporate Debtor to admit the entire amount claimed by the Applicant i.e. an amount of INR 12,08,64,637 (Rupees Twelve Crore Eight Lac Sixty Four Thousand Six Hundred Thirty Seven Only), being the total outstanding amount payable till September 29, 2020 i.e, the date of commencement of CIRP;*

(ii) *Direct the Resolution Professional to revise and update the list of creditors uploaded on the website of the Corporate Debtor as per Form B submitted to the Respondent; and*

(iii) *Direct the Resolution Professional to admit the outstanding claim amount of Rs. 5,17,21,063 (Rupees Five Crore Seventeen Lakhs Twenty One Thousand Sixty Three Only) for the period of October 2020 to May 2021 and immediately release payments for the same.*

(iv) *Direct the Resolution Professional of the Corporate Debtor to pay month to month charges to the Applicant towards the drawl of water; and*

(v) *Pass any other or further order(s) as this Hon'ble Tribunal may deem fit and necessary in the facts and circumstances of the given case.*

54. That the necessary of going into the Prayer (i) and (ii) made by U.P Jal Vidyut Nagar Limited is not required since undisputedly the U.P Jal Vidyut Nagar Limited, is falling under the category of the Operational Creditor, That irrespective of the claim amount the Operational Creditor are awarded 'nil' value in the resolution plan.



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55 That with respect to Prayer (iii) and (iv) the U.P Jal Vidyut Nagar Limited has raised its claim which as per it is arising during the CIRP Period.

56 That the RP in response to the same has stated that the Corporate Debtor was allocated 0.058 MAF per annum of water by Madhya Pradesh Water Resource Department ("MPWRD") from Rihand Reservoir on 27 July 2006, against Government of Madhya Pradesh's share of water in Rihand reservoir which is under the control of the Applicant. Therefore, in order to permit the Corporate Debtor to draw water from the reservoir by building an intake pump house in Uttar Pradesh, an Agreement dated 23 October 2009 was entered into by and between the Corporate Debtor and the U.P Jal Vidyut Nagar Limited.

57 It is added that UPJVNL started raising invoices for the water drawn by the Corporate Debtor, purportedly exercising its rights under the 23 October Agreement. Additionally, MPWRD also started levying charges on the water drawn from Rihand Reservoir, under the terms of the Agreement For Supply of Water, To Industrial /Power Plant dated 16 February 2010 on the ground that the water drawn is from the share of the state of Madhya Pradesh

58 It is further stated by the RP that On 20 June 2013, the Corporate Debtor addressed a letter to the Applicant intimating that both the Applicant and the MPWRD have been raising invoices on the Corporate Debtor for the



same quantum of water drawn from the Rihand reservoir. Accordingly, the Corporate Debtor requested the UPJVNL to cancel the invoices raised on the Corporate Debtor in relation to the water drawn from the Rihand reservoir. Additionally, on 21 September 2013, the Corporate Debtor addressed a letter to the Applicant intimating that the Corporate Debtor has raised the same issue with MPWRD.

59 The Corporate Debtor filed Writ Petition No. 1724 of 2015 ("First Writ Petition") before the Hon'ble Madhya Pradesh High Court on 2 February 2015 challenging the UPJVNL right to levy water charges since the water is allocated from the share of the State of Madhya Pradesh and the charge for the same is also levied by the Government of Madhya Pradesh. The Hon'ble Madhya Pradesh High Court vide an order dated 30 March 2015 restrained the Applicant from taking any coercive steps pending the final hearing of the said Writ Petition. Subsequently, on 27 February 2020, the First Writ Petition was dismissed for lack of jurisdiction. Thereafter, the Corporate Debtor filed Writ Petition being WP No. 12331/2020 on 22 July 2020 before the Hon'ble High Court of Allahabad ("Second Writ Petition") challenging the Applicant's right to levy charges for supplying water. The Second Writ Petition is currently pending before the Hon'ble Allahabad High Court and has not been taken up for hearing.

60 With regard to the payment of month to month charge sought by UPJVNL for drawing of water it is stated by the Applicant that The Corporate Debtor has been drawing water from the state of Madhya Pradesh's share of the upstream of Rihand lake and has accordingly been making payments to



MPWRD since 2013 towards water usage charges, including during the CIRP period.

61 It is further stated by the RP that . It is an expressly admitted position of the Applicant that even after the expiry of the term of the 23 October Agreement, the arrangement by which the Corporate Debtor has been drawing water from the state of Madhya Pradesh's share of water from the Rihand reservoir and by utilising the pump house located under the control of the Applicant in Uttar Pradesh is continuing. In this regard, the Corporate Debtor has been duly making payments towards the lease rentals of the pump house to the Applicant. In fact, the claim of the Applicant in the present IA is in itself limited only to drawl of water.

62 In respect of the claim of the UPJVNL arising during the CIRP period it is stated by the RP that the In the Second Writ Petition, the Corporate Debtor has inter-alia challenged the right of the Applicant to levy and recover, charges for drawl of water and, costs for loss of power generation from the Corporate Debtor under the 23 October Agreement. Therefore, the question as to whether the charges for drawl of water are to be paid to the Applicant or to MPWRD is also pending consideration of the Hon'ble Allahabad High Court.

63 Per Contra the UPJVNL in response to the contention raised by the RP that it had paid the charges to the Madhya Pradesh Government, therefore it is not required to pay charges to UPJVNL has stated charges payable to it



are over and other than what was required to be paid to UPJVNL. That reliance has been placed on Clause 6 and Clause 8 of the Agreement which are reproduced overleaf -

"6. MAXIMUM DEMAND AND UTILIZATION OF WATER

- a. Pursuant to the permission granted by state of Madhya Pradesh vide its letter no.4887/13/2006 dated 27.07.2006, maximum quantity of water to be drawn from the upstream of the Lake by the Consumer is limited to 0.058 MAF/annum (i.e. 15714.59904 million imperial Gallon per annum) ("Entitlement").

In case of non-observance of this clause by the Consumer, the Consumer as and when called upon by the notice from the Supplier, forthwith take all steps to reduce the intake to the above-mentioned quantity. The quantity of water drawn in excess of the above quantity shall be paid for by the Consumer with a surcharge of 50% calculated on the rate provided in clause 8 of this agreement. The right of the Supplier to disconnect the supply of water will not, however, in any case extinguish.

- b. *The Consumer shall utilize the water obtained under this agreement solely for the purpose of running its works and its appurtenant works and for distribution in their colony to their people employed or engaged on its works and shall neither utilize the same for any*



other purpose nor sell the same to any party, whatsoever, without the prior permission of the supplier. Any breach of these stipulations shall automatically entitle the Supplier to determine the agreement and to disconnect the supply and forfeit the security deposited by the Consumer.

"8. RATES

- a. The Consumer shall pay to the Supplier for the permission granted to it for pumping water from upstream of the Lake for the purposes mentioned in Clause 6 (b) at the rate specified in the O.M. No.186/JNL/CMD/03-(WC)/2001 dated February 3, 2001 issued by Deputy General Manager (HQ) based on the minutes of the meeting chaired by Hon'ble Minister of Energy, U.P. and participated by Secretary (Energy), Govt. of U.P., Chairman UPSEB and CMD, NTPC at Lucknow on April 03, 1999 to formulate "Principles for consumptive power charges for future" (The rate being 189.256198 Gallons per rupee for the period January 01, 2009 to December 31, 2013 to be revised upwards by 10% after every five years.)
- b. *No discharge will be made by the consumer in the Rihand reservoir. Consumer will have to follow pollution norms strictly."*

64 That in our view the dispute with regard to the charges levied by UPJVNL existed between the Corporate Debtor, UPJVNL and State of Madhya Pradesh, much prior to the initiation of CIRP. Further the litigation went to the Hon'ble High Court of Madhya Pradesh, by filing Writ Petition, which got dismissed on the jurisdictional ground. Further the Writ Petition was filed before the Hon'ble Allahabad High before the commencement of the CIRP.



65 Here it is not the case where no payment, whatsoever made by the Corporate Debtor during the CIR Process for using the water, as the payment has been made to the Madhya Pradesh Government. Since the right of UPJVNL to levy charges for supplying water to the Corporate Debtor is already under challenge, prior to the initiation of the CIRP before the Hon'ble Allahabad High Court, therefore we are of the considered view that this Adjudicating Authority has no jurisdiction to adjudicate the dispute or any claim arising out of such transaction which is subject matter of Writ Petition before the Hon'ble Allahabad High Court.

66 That Accordingly we are of the view that Prayer (iii) and (iv) made in IA 2785 of 2021 requires no consideration. Hence IA 2785 of 2021 is dismissed.

67 That the UPJVNL has further objected towards the following concession sought in the Resolution Plan

"(iii) The Resolution Applicant considers the uninterrupted supply of water and use of land in terms of the Articles of Arrangement signed with Uttar Pradesh Jal Vidyut Nigam Limited ("UPJVNL") on December 23, 2009 ("UPJVNL Agreement") for permission for use of land and water drawl, to be critical to preserve the value of the Corporate Debtor and to maintain its status as a going concern. Accordingly, the UPJVNL Agreement shall renew for a period of 12 months from the Effective Date in terms of the Resolution Plan against the Corporate Debtor and UPJVNL."

68 It is stated by UPJVNL that a new contract or terms and conditions of the contract cannot be created by this Adjudicating Authority between the Corporate Debtor and the Applicant. That the UPJVNL placed reliance on the Judgement of Hon'ble Supreme Court in Jaypee Kensington Boulevard Apartments Welfare Association & Ors V NBCC (India) Ltd. Civil Appeal no. 3395 of 2020 to support its contentions.



69 On the other hand the Resolution Professional has stated in order to revive the Corporate Debtor and to keep the status of Corporate Debtor as going concern it is necessary to incorporate such clause.

70 After hearing submissions of the RP and UPJVNL on the concession sought in Section 6 of the Resolution Plan this bench observes that, it has been admitted by the UPJVNL in its written submissions that prior to initiation of CIRP, even after the date of expiry of the agreement on 22.10.2019. The UPJVNL has allowed the Corporate Debtor to continue to draw water, even when there was no agreement existed between the parties. Further the UPJVNL had allowed the Corporate Debtor during the moratorium.

71 That the revival of the Company depends upon this permission, if such relief is not granted then revival of the Corporate Debtor could be under threat which could also lead to Liquidation of the Corporate Debtor. That the Hon'ble Supreme Court in **Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. in Writ Petition (Civil) No. 99 of 2018**' by its judgment dated 25th January, 2019, has observed that

"11.What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern."

72 Since the permission of UPJVNL to draw water and use its land pays a vital role in the revival of the Corporate Debtor, therefore, we



are of the view that in order to revive the Corporate Debtor and to keep it as going concern, it is necessary that UPJVNL shall allow the Corporate Debtor to draw the water and use its land, in terms of the arrangement followed during the moratorium period for a period of 12 Months or till the time any decision is taken by Hon'ble Allahabad High Court, whichever is earlier.

IA 4367 of 2021

73 That one more IA 4367 has been filed by Trikaya Township Pvt. Ltd as an objection to the concessions sought in Section 6 of the Resolution Plan.

74 That the by Trikaya Township Pvt. Ltd has presented its objection towards the proposal to unilaterally terminate and extinguish the 20 years lease deed entered between Trikaya Township Pvt. Ltd and the Corporate Debtor.

75 It is stated by Trikaya Township Pvt. Ltd (hereinafter referred as TTPL) that the lease deed is valid and subsisting till 31.12.2031

76 it is further submitted by TTPL there is no provision of unilateral termination of Contract under IBC 2016. Therefore the Resolution plan contravenes Section 30(2)(e) of IBC, 2016.

77 It is further stated by the TTPL that .the statement made in the Resolution Plan to the extent that the lease deed entered between the Applicant Trikaya and Corporate Debtor already stood terminated is misleading, false, and bereft of truth. It is submitted that as per letter dt. 29.12.2020, TTPL merely sought payment of the lease rent from the RP of the Corporate Debtor. In the said letter, TTPL had merely stated that in

absence of the payment of rent by the Corporate Debtor, it will have the right to terminate the said lease deed however the termination was never effected. It is submitted that even till date the Corporate Debtor has been making payment of the outstanding monthly rent in terms of the lease deed and the Corporate Debtor and its employees continues to occupy the leased property.

78 That the Resolution Professional filed to reply to the objections raised by TTPL. It is stated by the RP that the TTPL is related party to the Corporate Debtor.

79 It is further stated by the RP that The TTPL is seeking to rely upon purported Lease Deed dated. 16.5.2011, Supplementary Lease. Deed dated 10.2.2012 and Supplementary Lease Deed dated 1.6.2016 (together referred to as the "Lease Deeds") to contend that the said Lease Deeds cannot be terminated under the Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP"). I state that all the aforesaid Lease Deeds are stated to have been executed in the State of Maharashtra in respect of the properties situated in the State of Madhya Pradesh. It is stated that no adequate stamp duty is paid on the purported Lease Deeds. Thus, under Section 35 of the Indian Stamp Act, 1899, as applicable in the State of Madhya Pradesh, the aforesaid Lease Deeds are inadmissible in evidence and are liable to be impounded by this Tribunal.

80 It is further stated by the RP that, any lease of immovable property for any term exceeding one year has to be compulsorily registered under the

provisions of Section 107 of the Transfer of Property Act, 1882 read with Section 17 of the Registration Act, 1908. As the purported Lease Deeds are not registered, it is submitted that the said Lease Deeds cannot be received in evidence under Section 49 of the Registration Act, 1908. Hence, it is submitted that, no valid lease has been created in favour of the Corporate Debtor and that the Corporate Debtor is not a lessee by virtue of the purported Lease Deeds. It is further submit that this Tribunal is disabled from using the purported Lease Deeds as evidence. It is further submitted that since the purported Lease Deeds does not and cannot be termed or seen as a valid and subsisting lease in the eye of law, therefore, any attempt to enforce the same cannot hold any ground.

81 It is further stated by the RP that Even otherwise, the purported arrangement between the Applicant and the Corporate Debtor is one sided, exorbitant, not in ordinary course of business and has been made to enable the Applicant to have a windfall gain at the expense of the other stakeholders of the Corporate Debtor. It is stated that as per the Annual Reports of the Applicant available on the portal of the Ministry of Corporate Affairs, the gross block of the township asset is about Rs. 110 Crores. Under the purported arrangement between the Applicant and the Corporate Debtor, the Applicant, till Financial Year 2019-20, has already received more than Rs. 119 Crores from the Corporate Debtor. From the aforesaid, it is evident that the Applicant, who is a related party, has made windfall gain from the purported arrangement.

82 That the contents of the concession to which TTPL is objecting is reproduced below-

"On and from the NCLT Approval Date, by order of the NCLT sanctioning this Resolution Plan, the Township Lease Agreement dated May 16, 2011 entered with Trikaya Township Limited shall be deemed to be terminated, with such termination being effective from NCLT Approval Date. Any claims or liabilities arising as a consequence of such termination shall be deemed to be relinquished, cancelled and written-off on the NCLT Approval Date".

83 After hearing objections of TTPL and by perusing the reply of the RP this bench observes in regard to the concession sought by the Applicant in Section 6.1 (iv) of the Resolution Plan seeking termination of lease deed dated 16.5.2011, executed between the TTPL and the Corporate Debtor was for 20 years. It is observed that the Lease Deed annexed with the Application is an unregistered Deed. That leases of immovable property from year to year, or for any term exceeding one year requires compulsory registration to be held as valid. In our considered view the lease Deed having tenure of 20 years is in contravention of Section 107 of Transfer of Property Act 1882 and Section 17 of the Registration Act, 1908.

84 The Deemed termination which has been sought as a concession in Resolution Plan has to be considered positively, Infact, its within the domain of civil law, the aspects of the termination can be decided, if at all TTPL has any right.

85 Hence we dismiss the objections made vide IA 4367 of 2021.

ORDER

86 In the absence of any tenable objection made against the Resolution and keeping note that the Resolution Plan is passed by 100% votes of CoC. Therefore, this bench finds no impediment in allowing the Resolution Plan.

87 The order of the moratorium passed by this Adjudicating Authority under Section 14 of the IBC,2016 shall cease to have effect from the date of passing of this Order.

88 The Resolution Professional shall forward all the records relating to the conduct of the CIRP and the Resolution Plan to the IBBI for its record and database.

89. The approved Resolution Plans shall become effective from the date of passing of this Order.

90. The monitoring Committee shall be setup and shall take necessary steps for the implementation of the plan.

91. That in regard to the concessions sought in Section 6 of the Resolution Plan it is directed that there shall be uninterrupted supply of water and use of land in terms of Arrangement which was followed during the period of moratorium, for a period of 12 months or till the time any decision is taken by Hon'ble Allahabad High Court, whichever is earlier.



92 That all concessions asked in Section 6 of the Resolution Plan as mentioned in Para 16 of this order shall also be granted to the Corporate Debtor.

93. The Resolution Professional shall forthwith send a copy of this Order to the CoC and the Resolution Applicant.

94. IA-2829 of 2021 is **allowed** accordingly.



BHASKARA PANTULA MOHAN
ACTG. PRESIDENT



HEMANT KUMAR SARANGI
MEMBER (TECHNICAL)

Annexure 8: Order of Customs, Excise & Service Tax Appellate Tribunal (CESTAT)
dated 25th August 2022

Tel : 022-23754933
Fax : 022-23754910

OUTWARD NO. : A-488
REGISTERED / AD / SPEED POST

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH : MUMBAI
3RD, 4TH, & 5TH FLOOR, JAI CENTRE, 34 P. D'MELLO ROAD,
POONA STREET, MASJID BUNDER (E), MUMBAI- 400 009.

15

From : The Assistant Registrar, CESTAT, MUMBAI.

Dated: 25/08/2022

File No.: -C/85476/2018

In the matter of :-

COMMISSIONER OF CUSTOMS
NHAVASHEVA III


(Appellant)

Vs

MS MAHARASHTRA EASTERN GRID
POWER TRANSMISSION CO LTD
ADANI HOUSE,
MITHAKHALI SIXS ROADS,
NAVRANGPURA,
AHMEDABAD
380009

(Respondent)

I am directed to transmit herewith a certified copy of Order No. : A/85692/2022 dated : 11/08/2022 passed by the Tribunal under section 129-A(4) of the Customs Act, 1962.


Assistant/ Deputy Registrar,
Customs Appeal Branch
CESTAT - MUMBAI

Copy To :-

1. Commissioner Customs & Central Excise (Appeal) : COMMISSIONER OF CUSTOMS NHAVASHEVA III
2. Master File
3. Additional Party's Name & Address :
4. Advocate^(s) / Consultant^(s) / Representative:-

J. C. Patel

801, Raheja Chambers, 213, Free Press Journal Marg,
Nariman Point Mumbai - 400021


jydpptl@yahoo.com

Economic Laws Practices

9th Floor mafatlal Centre Vidhan Bhavan Marg
Nariman Point Mumbai - 400021

JitendraMotwani@elp-in.com

2-D

Prepared By :- 

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

WEST ZONAL BENCH - COURT NO. 1

CUSTOMS APPEAL NO. 85476 OF 2018

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

Commissioner of Customs (Import),

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

...Appellant

VERSUS

**(1) M/s. Maharashtra Eastern Grid Power
Transmission Company Limited (MEGPTCL)**

Adani House, Mithakhali Circle, Navrangpura,
Ahmedabad-380009.

(2) M/s. PMC Projects (India) Private Limited,

Registered Office: AIIM,
At Shantigram, Near Vaishnodevi Circle,
SG Highway, Ahmedabad-382421

(3) M/s. Electrogen Infra FZE,

SAIF Plus, R4, 38/A, SAIF Zone,
P.O.Box 122528, Sharjah, United Arab Emirates.

**(4) Shri Vinod Shantilal Shah alias
Vinod Shantilal Adani,**

Adani House, Nr Mithakhali Circle,
Navrangpura, Ahmedabad-380009
Gujarat

(5) Shri Jatin Shah,

SAIF Plus, R4, 38/A, SAIF Zone,
P.O.Box 122528, Sharjah, United Arab Emirates.

(6) Shri Mitesh Dani,

SAIF Plus, R4, 38/A, SAIF Zone,
P.O.Box 122528, Sharjah, United Arab Emirates.

(7) Shri Mehul Jani,

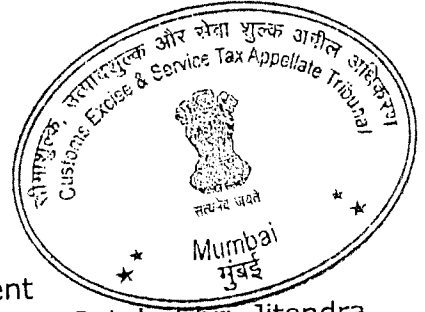
SAIF Plus, R4, 38/A, SAIF Zone,
P.O.Box 122528, Sharjah, United Arab Emirates.

(8) Shri Jaydev Mishra,

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

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

...Respondents



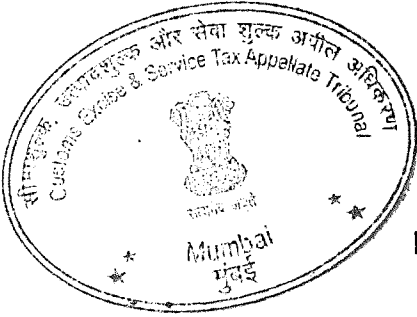
APPEARANCE:

Shri PRV Ramanan, Special Counsel of the Department
Shri Vikram Nankani, Senior Advocate, Shri Jaydeep Patel, Shri Jitendra
Motwani and Ms. Shilpi Jain, Advocates for the Respondent

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

Date of Hearing: 04.03.2022
Date of Decision: 11.08.2022



FINAL ORDER NO. A/85692/2022

JUSTICE DILIP GUPTA:

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

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

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

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

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

FACTS

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

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

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

5. MEGPTCL made an application dated 17.02.2010 to the Maharashtra Electricity Regulatory Commission¹¹ under section 14 of The Electricity Act, 2003. AEL, by its letter dated 01.07.2010, requested MSETCL to convey its no objection to MERC in favour of the proposed Joint Venture, so as to enable MEGPTCL to complete the regulatory process and initiate implementation activity, including the International Competitive Bidding process. The said letter made it clear that on receipt of approval from Government of Maharashtra, MSETCL will take 26% equity in MEGPTCL. MSETCL provided the no objection certificate to MEGPTCL on 02.07.2010, which thereafter opted for the International Competitive Bidding route and issued two separate tenders for the appointment of engineering, procurement and construction¹² contractors for Transmission Line and Substation packages. A Notice Inviting Tender was issued for Supply, Erection and Testing, and Commissioning of Tiroda-Koradi-III-Akola II-Aurangabad Transmission Line and another Notice Inviting Tender was issued for Design, Supply, Erection and Testing, and Commissioning of Substations, including Auto Transformers and Shunt Reactors associated with Substations at Tiroda, Koradi, Akola and Aurangabad. The tenders were published in the newspapers on 05.08.2010. To

10. AEL
11. MERC
12. EPC

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

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

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

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

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

13. EIF

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

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

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

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

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

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

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

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

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

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

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

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

14. the Customs Act
15. the Tariff Act
16. PIR

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

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

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

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

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

SHOW CAUSE NOTICE

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

A

Goods imported through Mundra Port (55 consignments)

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

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

17. the Valuation Rules

18. the Customs Act

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

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

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

- (iv) Penalty under section 114AA of the Customs Act should not be imposed on them.
- (II) EIF, Vinod Shantilal Adani, Jatin Shah, Mitesh Dani, Mehul Jani should show cause as to why penalty under section 112 (a) and (b) and section 114 AA of the Customs Act should not be imposed on each one of them in relation to the goods imported under the 2 Bills of Entry; and
- (III) Jaydev Mishra, Associate General Manager, and Dharmesh Parekh, Senior Manager (both employees of PMC) should show cause as to why penalty under section 112 (a) and (b) and section 114AA of the Customs Act should not be imposed on each one of them in relation to above goods imported under the 2 Bills of Entry.
21. The gist of the allegations contained in the show cause notice are as follows:
- (i) The respondents had conspired to siphon off money abroad by resorting to over-valuation of goods imported for projects subject to low or nil rate of customs duty, so that the burden of duty on the over-valued amount i.e. cost of fund transfer is minimal;
 - (ii) MEGPTCL engaged the services of a closely related party EIF to arrange for procurement from various Original Equipment Manufactures for eventual supply to PMC (another firm controlled by Adani Group);
 - (iii) EIF, a front for PMC and MEGPTCL, acted as an intermediary invoicing agent to inflate the invoice value in

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

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

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

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

REPLY TO SHOW CAUSE NOTICE

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

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

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

19. DTAA

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

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

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

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

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

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

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

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

ORDER

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

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

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

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

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

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

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

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

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

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

(ii) all the payments made as a condition of sale of the imported goods by the importer to the seller are

includable in the assessable value since the goods were imported under PIR against EPC contract.

Thus, I find that the value declared by the noticees is correct and proper."

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

SUMMISSIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DISCUSSION

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

WHO IS THE IMPORTER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DOCUMENTS ADMISSIBLE AS EVIDENCE

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

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

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

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

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

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

50. The respondents had disputed these documents before the adjudicating authority on the ground that the same had been obtained contrary to the Trade Agreement signed between UAE and India on 22.09.1993 and, therefore, could not be admitted as evidence. The admissibility of the said documents was also questioned in terms of the provisions of sections 138C (4) and 139 (ii) of the Customs Act.

51. A bare perusal of section 138C of the Customs Act reveals that a computer print-out is admissible as direct evidence under the Customs Act if the condition mentioned in sub-section (2) is satisfied. Section 138 C (4) deals with cases where any document is required to be produced as an evidence in proceedings under the Customs Act and the Rules framed thereunder. It specifically mandates production of a certificate containing the following:

- (i) Identifying the document containing the statement and describing the manner in which it was produced;
 - (ii) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer,
 - (iii) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,
- to be provided by a person occupying a responsible position in relation to the operation of the device in question or the management of the relevant activities shall be evidence of any matter which is stated therein.

52. The Customs Act contains a specific provision that describes the manner in which the admissibility of computer print outs will be accepted as evidence in proceedings initiated under the Customs Act. When law requires a thing to be done in a particular manner it should be done in that manner alone. The Directorate of Revenue Intelligence had obtained the documents from foreign branches of the Indian banks, but the conditions prescribed under section 138 C (4) of the Customs Act were not fulfilled as the certificate giving the details was not produced.

53. Thus, as the provisions of section 138C (4) of the Customs Act have not been satisfied for the reason that the certificate prescribed therein has not been furnished, the documents obtained by Directorate of Revenue Intelligence from various banks outside India cannot be admitted as evidence. Reliance cannot, therefore, be placed on these documents for this reason.

54. The learned senior counsel for the respondents also made submissions with regard to non-fulfillment of the provisions of section 139 (ii) of the Customs Act. It is the case of the respondents that the presumption under section 139 (ii) of the Customs Act would not be available as the authenticity of documents have been challenged. Under section 139 (ii) of the Customs Act, where any document has been received from any place outside India during the course of investigation under the Customs Act and such document is tendered as evidence, then unless it is proved to the contrary, the contents of the documents will be taken to be true, basis the signature in the case of the document executed or attested. In the present case it is seen that the documents which form the basis of redetermination of the transaction value have not been signed or attested. The documents that are neither signed nor authenticated cannot be admitted as evidence.

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

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

RELATIONSHIP

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PMC Projects – An Overview

3.1 Project Reference

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

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

| | | | | | |
|-----|----------------|------------------------|----|----|----|
| | | since 2008 | | | |
| 5.2 | Steel Terminal | Operational since 2010 | 75 | 15 | 16 |

3.2 Project Landmark

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

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

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

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

EPC CONTRACT

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

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

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

For Transmission Line

Scope of Work:

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

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

Line I

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

Transmission Line-630 KMs

Line II

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

Transmission Line-630 KMs

400KV D/C Transmission Line:

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

For Substations

Scope of Work:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This payment shall be subject to submission of supporting documents.

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

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

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

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

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

VALUATION

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

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

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

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

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

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

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

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

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

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

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

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

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

Transmission Lines : Supply Contract

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

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

Transmission Line : Service Contract

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

Substation : Supply Contract

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

Substation : Service Contract

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

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

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

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

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

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

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

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

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

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

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

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

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

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

95. Section 14 of the Customs Act, deals with valuation of goods. It was amended on 10 October 2007, and the amended section is as follows:

"Section 14. Valuation of goods. - (1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf:

Provided that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf:"

96. The Supreme Court in **Wipro Ltd. vs. Assistant Collector of Customs**²⁷ noticed that under the unamended provisions of section 14 of the Customs Act, the principle was to find out the valuation of goods "by reference to the value" and it introduced a determining / fictional provision by stipulating that the value of all the goods would be the price at which such or like goods are "ordinarily sold". However, under the amended provisions, the valuation is based on the "transaction" price namely, the price "actually paid or payable for the goods". It is in this context, that the Supreme Court observed:

"26) On the aforesaid examination of the scheme contained in the Act as well as in the Rules to arrive at the valuation of the goods, it becomes clear that wherever actual cost of the goods or the services is available, that would be the determinative factor. Only in the absence of actual cost, fictionalised cost is to be adopted. Here again, the scheme gives an ample message that an attempt is to arrive at value of goods or services as well as costs and services which bear almost near resemblance to the actual price of the goods or actual price of costs and services. That is why the sequence goes from the price of identical goods to similar goods and then to deductive value and the best judgment assessment, as a last resort.

27) In the present case, we are concerned with the amount payable for costs and services. Rule 9 which is incorporated in the Valuation Rules and pertains to costs and services also contains the underlying principle which runs through in the length and breadth of the scheme so eloquently. It categorically mentions the exact nature of those costs and services which

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have to be included like commission and brokerage, costs of containers, cost of packing for labour or material etc. Significantly, Clause (a) of sub-rule (1) of Rule 9 which specifies the aforesaid heads, cost whereof is to be added to the price, again mandates that it is to be "to the extent they are incurred by the buyer". That would clearly mean the actual cost incurred. Likewise, Clause (e) of sub-rule (1) of Rule 9 which deals with other payments again uses the expression "all other payments actually made or to be made as the condition of the sale of imported goods".

31) In contrast, however, the impugned amendment dated 05.07.1990 has changed the entire basis of inclusion of loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation. Whereas fundamental principle or basis remains unaltered insofar as other two costs, viz., the cost of transportation and the cost of insurance stipulated in clauses (a) and (c) of sub-rule (2) are concerned. In respect of these two costs, provision is retained by specifying that they would be applicable only if the actual cost is not ascertainable. In contrast, there is a complete deviation and departure insofar as loading, unloading and handling charges are concerned. The proviso now stipulates 1% of the free on board value of the goods irrespective of the fact whether actual cost is ascertainable or not. Having referred to the scheme of Section 14 of the Rules in detail above, this cannot be countenanced. This proviso, introduces fiction as far as addition of cost of loading, unloading and handling charges is concerned even in those cases where actual cost paid on such an account is available and ascertainable. Obviously, it is contrary to the provisions of Section 14 and would clearly be ultravires this provision. We are also of the opinion that when the actual charges paid are available and ascertainable, introducing a fiction for arriving at the purported cost of loading, unloading and handling charges is clearly arbitrary with no nexus with the objectives sought to be achieved. On the contrary, it goes against the objective behind Section 14 namely to accept the actual cost paid or payable and even in the absence thereof to arrive at the cost which is most proximate to the actual cost. Addition of 1% of free on board value is thus, in the circumstance, clearly arbitrary and irrational and would be violative of Article 14 of the Constitution.

34) In the present case before us, the only justification for stipulating 1% of the F.O.B. value as the cost of loading, unloading and handling charges is that it would help customs authorities to apply the aforesaid rate uniformly. This can be a justification only if the loading, unloading and handling charges are not ascertainable. Where such charges are known and determinable, there is no reason to have such a yardstick. We, therefore, are not impressed with the reason given by the authorities to have such a provision and are of the opinion that the authorities have not been able to satisfy as to how such a provision helps in achieving the object of Section 14 of the Act. It cannot be ignored that this provision as well as Valuation Rules are enacted on the lines of GATT guidelines and the golden thread which runs through is the actual cost principle. Further, the loading, unloading and handling charges are fixed by International Airport Authority.

36) We are, therefore, of the opinion that impugned amendment, namely, proviso (ii) to sub-rule (2) of Rule 9 introduced vide Notification dated 05.07.1990 is unsustainable and bad in law as it exists in the present form and it has to be read down to mean that this clause would apply only when actual charges referred to in Clause (b) are not ascertainable."

97. The Supreme Court also noticed the change in the principle that had been brought about in section 14(1) of the Customs Act in paragraph 22 judgment and they are as follows:

"22) The underlying principle contained in amended sub-section (1) of Section 14 is to consider transaction value of the goods imported or exported for the purpose of customs duty. Transaction value is stated to be a price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation. Therefore, it is the price which is actually paid or payable for delivery at the time and place of importation, which is to be treated as transaction value. However, this sub-section (1) further makes it clear that the price actually paid or payable for the goods will not be treated as transaction value where the buyer and the seller are related with each other. In such cases, there can be a presumption that the actual price which is paid or payable for

such goods is not the true reflection of the value of the goods. This Section also provides that normal price would be the sole consideration for the sale. However, this may be subject to such other conditions which can be specified in the form of Rules made in this behalf.

23) As per the first proviso of the amended Section 14(1), in the transaction value of the imported goods, certain charges are to be added which are in the form of amount paid or payable for costs and services including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner which can be prescribed in the rules. Sub-section (2) of Section 14, which remains the same, is an over-riding provision which empowers the Board to fix tariff values for any class of imported goods or export goods under certain circumstances. We are not concerned with this aspect in the instant case."

98. Thus, what has to be seen under section 14(1) of the Customs Act, as amended in 2007, is the transaction value of the goods imported or exported for the purpose of customs duty and transaction value is stated to be the price actually paid or payable for the goods when sold for export to India for delivery at that time and place of importation. Sub-section (1) of section 14 also makes it clear that the price actually paid or payable for the goods will not be treated as "transactional value" where the buyer and the seller are related to each other. As per the first proviso to the amended section 14 (1), certain charges are to be added in the transaction value of the imported goods.

99. It would now be appropriate to examine the relevant provisions of the Valuation Rules. In terms of rule 3, the valuation of the imported goods should be the transaction value adjusted in accordance with provisions of rule 10. Rule 3 further provides for certain cases

where the transaction value declared by the importer should not be accepted. Rule 4 states that the transaction value of the imported goods is the value of identical goods. Rule 5 provides that the value of imported goods shall be the transaction value of the similar goods. Rule 6 states that when the value cannot be determined under rules 3, 4 and 5, the value should be determined under rule 7. Rule 7 provides for deductive method of valuation. In terms of rule 8, when value cannot be determined under any of the above rules, the value should be determined basis the computed value. Rule 9 is a residual rule made applicable if the value cannot be determined under the provisions of the preceding rules. Rule 10 deals with certain cost and services which have to be added to the price actually paid or payable for the imported goods. Rule 12 gives power to department to reject the value. Thus, rules 3 to 9 are the rules under which the value of the goods can be redetermined.

100. While rule 3 is a general rule, as the same states that the value of the imported goods shall be treated as transaction value, rule 9 is a residual rule which can be resorted to only if the other rules cannot be applied. It is also important to note that rules 4 to 9 are subject to the provisions of rule 3. This means that if the transaction value of the goods is not doubted, the same will have to be treated as the transaction value under rule 3 read with section 14 of the Customs Act and the provisions of rules 4 to 9 will not be available for the purpose of redetermination.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WHOLE EFFECT OF CONTRACT/EFFECT OF REGISTRATION UNDER PIR

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

111. The learned special counsel for the appellant challenged the said finding and submitted that even if the imports are covered by a single contract, the assessment thereof is required to be carried out against individual imports, with the only difference being that all the imports are housed under Tariff Heading 98.01 of the Tariff Act. Learned

special counsel also submitted that it may not be necessary to carry out an assessment in respect of classification of each and every product but there is no bar to ascertain the transaction value of each individual import consignment in terms of the Valuation Rules, even though the contract may have been registered under PIR.

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

"A conjoint reading the aforesaid provisions makes it is clear that Heading 98.01 of the Tariff Act shall be available to the goods which are imported under a specific contract registered with the appropriate Customs House under PIR. What is evident from the provisions and requirements of PIR is that it recognises contracts of the nature that APML/APRL had executed with EIF and the other consortium members. Infact, PIR ensures that large infrastructure projects benefit from the duty exemption. As such, it is clear that what is registered is the contract as a whole. When considered in this light, the goods imported for the project become a subject matter of assessment as whole and individual consignments are not required to be separately assessed. It is, therefore, clear that PIR does not deal with import of individual consignment and the assessment of the goods imported for the project have to be dealt with together."

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

CONFISCATION

114. Another important issue that arises for consideration in this appeal is as to whether the goods can be held liable for confiscation

under section 111 (d) and (m) of the Customs Act when there is no case of short levy of duty and assertion that the goods were prohibited in nature. The respondents have relied upon the decision of the Tribunal in **Knowledge Infrastructure**, wherein Tribunal held as follows:

"Confiscation under Section 111 of Customs Act is not an end in itself but has to be in respect of dutiable or prohibited goods barring a few exceptions. Even in case of exception to prohibited/dutiable goods, it is breach of Customs Act which attract confiscation. For confiscation under Section 111(m) ibid there is no judicial approval of proposition that goods be held liable for confiscation without nexus with collection of duty and enforcement of prohibitions or without breach of the machinery provisions for safeguard of revenue and prevention of smuggling."

115. Learned special counsel for the appellant submitted that the decision of the Tribunal in **Knowledge Infrastructure** was delivered without considering the past decisions and properly appreciating the provisions of the Customs Act and this decision is also under challenge before the Supreme Court. It needs to be noted that in early hearing application, the department opposed the prayer for an early hearing for the reason the decision of the Tribunal in **Knowledge Infrastructure** is applicable to the facts of this case.

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

117. Thus, as the contentions advanced by the learned special counsel for the appellant do not have force, the order dated 17.10.2017 passed by the adjudicating authority dropping the proceedings that were initiated by issuance of a show cause notice

dated 15.05.2014 does not call for any interference in this appeal. The appeal is, accordingly, dismissed.

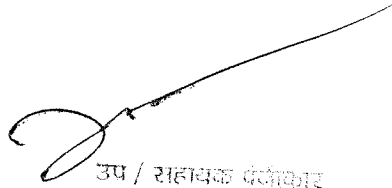
(Order Pronounced on **11.08.2022**)

**(JUSTICE DILIP GUPTA)
PRESIDENT**

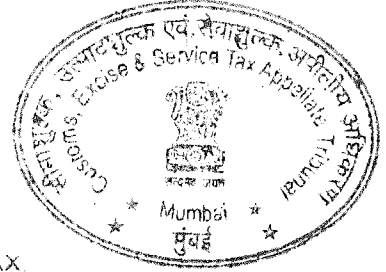
**(P. ANJANI KUMAR)
MEMBER (TECHNICAL)**

Shreya

“वेबसाईट से डाउनलोड के रूप में प्रमाणित”
"Certified as downloaded from the website"



उप / सहायक पंजीकार
Deputy / Asstt. Registrar
सीमा शुल्क, उत्पाद शुल्क एवं सेवा कर,
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अपीलीय अधिकरण, मुंबई.
APPELLATE TRIBUNAL, MUMBAI.



26 AUG 2022

Annexure 9: Order of the High Court of Gujarat approving scheme of amalgamation of Growmore Trade and Investment Private Limited with Adani Power Limited dated 11th April 2012

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**COMPANY PETITION No. 135 of 2011****In****COMPANY APPLICATION No. 400 of 2011****For Approval and Signature:****HONOURABLE MR.JUSTICE K.M.THAKER**=====
ADANI POWER LIMITED - Petitioner(s)**Versus****. - Respondent(s)**
=====**Appearance :**

MRS SWATI SOPARKAR for Petitioner(s) : 1,

MR PS CHAMPANERI for Respondent(s) : 1,
=====**CORAM : HONOURABLE MR.JUSTICE K.M.THAKER****Date : 11/04/2012****CAV ORDER**

1. Present petition is taken out under the provisions of Section 391 to Section 394 of the Companies Act, 1956, hereinafter referred to as the Act) with a prayer to sanction the proposed Scheme of Arrangement in nature of amalgamation of the Transferor Company with the Transferee Company.

2. The petitioner is the Transferee Company while the proposed Transferor Company is a company incorporated and registered in Mauritius and its registered office, as claimed by the petitioner is situate at C/o. Trust Link International Limited, Suite 501, St. James

Court, St. Denis Street, Port Louis, Mauritius.

2.1. Before taking out present petition the petitioner company had taken out Company Application No.400 of 2011 wherein under order dated 1st August 2011 the petitioner company was directed to convene meeting of Equity Shareholders. It is claimed that the directions requiring the company to follow the procedure to convene meeting of the Equity Shareholders was duly followed and the meeting was convened on 12th September 2011 as directed by the Court. The petitioner has claimed that the affidavit of compliance of publication of notice and other procedure has been filed on the record of the said application. It is also claimed that the resolution approving the proposed Scheme came to be passed by requisite majority of 95.76% in number and 99.99% in value by the Equity Shareholders present and voting at the meeting. It is also claimed that the Chairman of the meeting has filed his report with supporting affidavit dated 17th September 2011. On perusal of the said report it comes out that the Chairman has reported that:

"1. The meeting of Equity Shareholders was attended either personally or through proxy by 132 (One Hundred and Thirty Two) Equity Shareholders of the Company representing 170,80,12,463 (One Hundred and Seventy Crores Eighty Lacs Twelve Thousand Four Hundred and Sixty Three) Equity Shares aggregating to Rs.17,08,01,24,630/- (Rupees Seventeen Hundred and Eight Crores One Lac Twenty Four thousand Six Hundred and Thirty only) comprising of 53 (Fifty Three) Equity Shareholders in person, 2 (Two) through the Authorised Representatives and 77 (Seventy Seven) Equity Shareholders through proxy.

3. The result of the voting upon the said question was as follows:

(i) Out of 132 shareholders who have attended the meeting (either in person or by proxy or through Authorised

representatives), 124 shareholders representing Rs.1708,00,37,700/- as the aggregate value of their shares, had cast their votes and 8 shareholders representing Rs.86,930/- as the value of their shares, abstained from voting. Out of 124 votes, 6 votes collectively representing Rs.7,530/- were declared invalid. The reasons for treating them invalid were: three of them had not marked their vote in favour or against the proposed scheme. In case of two shareholders, the signatures did not tally with the records of the company and in case of one ballot, the person was not a shareholder as per the records of the company. The votes cast by 118 shareholders representing the aggregate value of Rs.1708,00,30,170/- were found to be valid votes. Five ballots being in duplicate were cancelled and not taken into account.

(ii) Out of the said 118 valid votes cast, 113 (One Hundred and Thirteen) shareholders holding representing value of shares at Rs.1708,00,22,440/- voted in favour of the proposed scheme, whereas 05 shareholders having the collective value of shares at Rs.7,730/- voted against the proposed scheme. Hence, the said meeting, by requisite statutory majority, was of the opinion that the Scheme of amalgamation should be approved and agreed to.

(v) Thus, the resolution approving the proposed scheme was carried by requisite majority i.e. by 95.76% in number and 99.99% in value by the Equity Shareholders of the Company, present and voting at the said meeting. “

2.2. The Chairman of the meeting has also placed on record copy of the scrutinizer's report which, inter alia, reads thus:

“Poll was taken at the Meeting Place at Ahmedabad Textile Mills Association (ATMA) Hall, Ashram Road, Navrangpura, Ahmedabad-380 009 in the State of Gujarat at 11.00 a.m. and concluded at 12 noon. We have scrutinized the votes and have to report as under.

| Particulars | Total % Number | Value (in Rs.) | % |
|---|-------------------|-------------------|-------------|
| 1. Number of Equity Shareholders present at meeting (either in person or through proxy) | 132 | - | 17080124630 |
| 2. Ballot Paper issued (including 5 duplicate issued against 5 cancelled) | 137 | -17080124630 | - |
| 3. Ballot Paper received | 124 | -17080124630 | - |
| 4. Members Abstained from Voting, if any | 8 | - | 86930 |
| 5. Invalid Votes, if any | 6 | - | 7530 |
| 6. Valid Votes Cast | 118 | 100.00 | 17080030170 |
| (a) Votes cast in favour of Resolution | 113 | 95.76 | 17080022440 |
| | | | 99.99 |

| | | | |
|---------------------------------------|---|------|------------|
| (b) Votes cast against the Resolution | 5 | 4.24 | 7730 0.01" |
|---------------------------------------|---|------|------------|

2.3. The petitioner company has also claimed that necessary approval and permission from concerned Stock Exchange i.e. Bombay Stock Exchange Limited and National Stock Exchange of India Limited have been obtained.

2.4. Upon completion of the prescribed procedure the petitioner company submitted present petition. After hearing the petitioner and upon considering the details mentioned in the petition, the petition came to be admitted by order dated 22.09.2011 and the petitioner company was directed to serve notice of admission of petition to Central Government through Regional Director and to also publish the advertisement in Daily Newspaper in English language and in Gujarati language. The petitioner has filed affidavit of compliance i.e. affidavit dated 9th November 2011 declaring that the advertisement as per the direction by the Court were published on 16th October 2011 and 17th October 2011 in Daily Newspapers "Sandesh" and "Indian Express" (Ahmedabad Edition).

2.5. The record shows that in response to the advertisement two Shareholders viz. Mr. Bhupendra Gandhi and Mr. Rupesh S. Shah have filed objection in the office of Registrar of Companies/Regional Director. So far as the objections raised by the two shareholders are

concerned, it is relevant to mention that out of the two shareholders who raised objections during the meeting convened by the company, only one shareholder i.e. Mr.B.C.Gandhi appeared before the Court and submitted his objections and the second shareholder seems to have opted - out and has not appeared before the Court and has not submitted any objection. It is claimed by the learned Senior Counsel appearing for the petitioner that the office of petitioner's Advocate has not received any other objections. The record of the petition also does not disclose that any other objection has been received by the Registry of the Court.

2.6. In response to the notice served to the Central Government it has filed, through the Regional Director (In-charge) North-Western Region, the observations and objections and for that purpose the Regional Director has filed an affidavit dated 25th October 2011. One of the two objectors i.e. Mr. Bhupendra C. Gandhi also appeared before the Court. He was granted opportunity to file his objections and he was also granted opportunity to file written objections. The written objections dated 18th January 2012 by said Mr. Gandhi have been received on record and taken into consideration.

2.7. The Memorandum and Article of Association of the petitioner company are placed on record and the constitution of the Transferor Company is placed on record. A copy of the annual report for the period from 1st

April 2010 to 31st March 2011 (of the petitioner company) and Audited Financial Statements of the Transferor Company for the period from 15th September 2010 to 31st March 2011 are placed on record. A copy of the Resolution passed by the Merger Committee of the Board of Directors approving the valuation report and to take necessary actions in furtherance of the proposed Scheme is also placed on record. In this background the petitioner has requested the Court to sanction the scheme.

3. The Regional Director has filed affidavit dated 25th October 2011 making below mentioned observations and raising certain objections which read thus:

“2(a) That, the Transferor company namely M/s. Growmore Trade and Investment Pvt. Ltd. is a company registered under the provisions of Companies Act, of Mauritius. From the list of members of the Transferee Company, provided by the Transferee Company, it has been observed that the said Transferor company is subsidiary of M/s. Opal Investments Pvt. Ltd., a foreign Company holding 100% shares in the said Transferor Company. Since shares are to be issued by the Petitioner Transferee Company to the said foreign Company, towards the consideration as per the exchange ratio of shares as provided in the Scheme, the Hon’ble Court may be pleased to direct the Petitioner Transferee Company to comply with the requirements of the FEMA and/or the approval of the Reserve Bank of India, if any, prior to the allotment of shares to such foreign/NRI shareholders.

(b) That, the office of the Deponent has received two complaints from the Shareholders namely Mr. Rupesh S. Shah and Bhupendra Gandhi opposing the Scheme. The matter of the complaint of Mr. Rupesh Shah was taken up by the Registrar of Companies, Gujarat with the Transferee Company vide his letter dated 11.10.2011. The said company furnished its explanation/comments vide its letter dated 13.10.2011.....the Complainants have right to raise any objection before this Hon’ble Court in pursuance to the notice of petition published in newspapers by the company. The Hon’ble Court may therefore, be pleased to issue appropriate directions to the complainants, if considered fit by this Hon’ble Court, to raise their objections if any, before

this Hon'ble Court by filing appropriate affidavit/application in the present proceedings of the Scheme presented by the Petitioner company.

- (c)However, the meeting of the Creditors of the Transferee company have not been directed by this Hon'ble Court. This Hon'ble Court may, however, pass such orders as may be deemed fit and proper in the circumstances.
- (d)the Transferor Company namely M/s. Growmore Trade and Investment Private Limited is registered under the Law of Mauritius, is not liable to be dissolved without winding up by this Hon'ble Court. The Hon'ble Court, may, therefore be pleased to direct the Transferee company namely Adani Power Limited to ensure the striking off/removal of the name of said Transferor Company situated in Mauritius upon sanctioning of the scheme of amalgamation/arrangement by this Hon'ble Court."

3.1. Having made the aforesaid observations the Regional Director has then also made reference of the report received in his office from the Registrar of Companies. The Regional Director has, citing the said report of Registrar of Companies, mentioned that except the two complaints received from the two Shareholders, the office of Registrar of Companies has not received any compliant and/or representation against the proposed Scheme.

3.2. In the background of such observations, the Regional Director has, then, observed that:

- "2(f)there appears no other objection to the proposed scheme of amalgamation of M/s. Growmore Trade and Investment Private United (Mauritius) with the Petitioner Transferee company here in this present Petition and registered in India and the scheme does not, prima facie appear to be prejudicial to the interest of the shareholders of the Petitioner Transferee Company and the public at large."

3.3. In response to the observations made and objections raised by the Regional Director, the petitioner company has, through its Company Secretary and Authorized Signatory Mr. Rahul Shah filed an affidavit dated 21.01.2012 wherein it is clarified and asserted that:

"2(i)Since the Transferor company is subsidiary of one Opal Investments Limited which is a foreign company, the Regional Director has observed that directions should be issued for compliance of the requirements of FEMA and/or approval of the Reserve Bank of India, prior to the allotment of such shares to such foreign/NRI shareholders. It is hereby respectfully submitted that clause 10.4 of the Scheme has already provided for the said compliance and it reads as under:

"10.4. For the purpose of issue of equity shares to the shareholders of the Transferor Company, the Transferee Company shall, if and to the extent required, apply for and obtain the required statutory approvals and other concerned regulatory authorities for the issue and allotment by the Transferee Company of such equity shares."

However, the petitioner Transferee Company hereby undertakes to comply with the applicable provisions of FEMA and obtain necessary permissions, if required, from the Reserve Bank of India.

(iii)the proposed Scheme of Arrangement does not affect the rights and interests of the Creditors of the Transferee Company in any manner. The Transferee Company is a financial strong company having substantially positive net worth. The company has been regularly meeting all its financial commitments towards its creditors. Upon the scheme being effective, it shall continue its business in the same manner as at present and shall make the payments to its creditors in the normal course of business. As submitted in the petition, the Transferor Company is essentially an investment company and has no outstanding creditors. It is a company with positive net worth. The operative loss of US \$4373 as per the audited Balance sheet of the company at 31st March 2011 (annexed to the petition as Annexure D) is negligible arising merely out of the administrative expenses. Hence, even after the amalgamation of the Transferor Company with the Transferee Company, the rights and interests of the creditors of the Transferee Company shall not be affected in any manner. The said contention is further strengthened by the fact that no creditor of the Transferee Company has come out with any objection whatsoever to the proposed scheme.

(iv)It is hereby respectfully submitted that as provided in the said Clause 13 of the Scheme, and as per the applicable provisions of the Mauritius Act, the Petitioner Company hereby undertakes to file the order passed by this Hon'ble Court, sanctioning the scheme, with the Office of the Registrar of Companies, Mauritius in order to enable the said authority to dissolve the said Transferor company without

winding up and remove the company from its Register. I clarify that the Scheme does not contemplate that the Transferor Company shall be dissolved by an order of this Hon'ble Court.

3.4. However, with a view to removing any doubt, it is, hereby directed that the petitioner and the transferor company shall diligently and completely comply all applicable Laws Rules and Regulations including all applicable provisions, conditions and requirements under FEMA, FERA and RBI Act and Companies Act and shall also strictly and completely comply all instructions - directions and guidelines issued by the RBI with reference to the issue / allotment of shares to Foreign/Non Resident Indian shareholders and subscribers and also regarding the process of amalgamation and obtain all necessary permissions, licences, authorization etc. as may be required and that it shall comply all directions, guidelines and instructions issued by RBI and/or Income Tax Department and/or Enforcement Directorate or any other body/authority in the matter of any transaction with foreign/NRI shareholders and/or foreign based/incorporated companies and for that purpose one of its Directors and the Company Secretary and Managing Director (if any) shall jointly file an affidavit and make declaration to the said effect that it shall comply.

3.5. In view of such stipulation, assurance and declaration by the company in its above referred affidavit and in light of the above direction, the observations and

remarks by the Regional Director would stand duly addressed and complied with.

4. Before proceeding further, it is appropriate to mention, at this stage, the objections dated 15th November 2011 filed by one of the two shareholders, viz. Mr. Bhupendra C. Gandhi who has, in his aforesaid written objections alleged, with reference to the proposed Scheme, inter alia, that:

“7. I say that Growmore Trade and Investment Private Limited (Transferor) is a Private Limited Company incorporated in Mauritius on 15th September 2010 under Mauritius Companies Act. The company has shown its Registered Office as C/o Trust Link International Limited, Suite 501, St. James Court, St. Denis Street, Port Louis, Mauritius. (Point No.8 – Page No. non provided). I say the Transferor Company is based in a Tax Haven Country Mauritius and the company has no business income but some amount is shown as US \$23 earned as interest and after adjustment of Expenses of US \$4396 has shown loss of US \$4373 as per the Audited Financial Statements provided with period as from 15th September 2010 to 31st March 2011.

8. I say that our company Adani Power Limited is a profit making company with profits shown as Rs.523.75 crores as on 31st March 2011 (Page No.37 of the 15th Annual Report). I say that Adani Power has an number of Subsidiaries with its holding in most at 100% and in only one subsidiary Adani Power Maharashtra Limited it is 74% (Page No.62 of 15th Annual Report).

9. I say that the Company Adani Power Limited with Promoter Holding 73.50% as on 31st March 2011 (Page No.30 of Annual Report) rather than declaring dividend to benefit the Minority shareholders has been avoiding the same in the name of conserving the resources. I say the resignation of three of the Directors within a span of Two Months in February and March 2011 is a matter of concern and investigation to ascertain with regards to the proposed amalgamation.

10. I say that the proposed valuation done is unfair to the shareowners of Adani Power Limited. It is mentioned in Point No.10 under heading Issue and Allotment of shares that for every holding of 10000 shares of US \$ 1/- each in transferor company Growmore, the transferee company Adani Power Limited would issue 16615 shares of Rs.10/- each.

11. I say that Adani Power Limited is already in Majority with 74% holding with Management Control in Adani Power Maharashtra Limited (APML) in which Growmore is said to be holding the balance and after amalgamation would become

wholly owned subsidiary (Point No.12). I say that APML has not shown any profits for 31st March 2011. I say the proposal for amalgamation is done in haste and may be with high valuation for the Company APML shares as the APML project is yet to take off.

12. I say that the Registered office address of Growmore is shown as C/o. Trust Link International Limited, Suite 501, St. James Court, St. Denis Street, Port Louis, Mauritius (Point No.8 Page No. not provided) and in the High Court order for Company Petition No.80 of 2010 in Point No.9 there is the reference of letter dated 23.04.2010 from Trustlink. I say that clarification may be sought for the similarity in name for this C/o. address and earlier ones. I submit the copies of email/s, Copy of Order, Newspaper articles collectively marked as Exhibit "A".

13. I say that if the scheme is allowed, we shareowners would be deprived of the benefits which belongs to us and created from our wealth now and may be also in future."

4.1. As against the written objections filed by Mr. Gandhi, the petitioner company has, through its Company Secretary and Authorized Signatory, Mr. Rahul Shah, filed a composite additional affidavit dated 21st January 2012 wherein, while dealing with the objections raised by the Shareholder, it is stated, inter alia, that:

"7(vi)It is true that the Transferee Company is a profit making company and has not declared dividend. It is pertinent to note that the company is in the process of developing several power projects and the Board of Directors has found it appropriate not to distribute the earnings in form of dividend and thought it prudent to conserve resources for the development of several projects being implemented at different stages. It is respectfully submitted that the same being the commercial decision of the board of Directors of the Company is strictly out of the realm of the shareholders for the purpose of consideration of the proposed scheme.

(vii)the resignation of some of the Directors of the company for personal reasons and induction of new Directors is an issue totally irrelevant for the consideration of the proposed Scheme.

(viii)the Exchange ratio was worked out on the basis of the Valuation undertaken by Ernst & Young Private Limited, an independent valuer. The same was duly approved by the Board of Directors and the majority of shareholders at the meeting. It is pertinent to note that the concerned Stock Exchanges viz. BSE and NSE did not find the same objectionable or against the interest of the shareholders. It is also pertinent to note that apart from the bald allegation that the valuation is unfair, the said shareholder has not been in a

position to substantiate his contention.

(ix) It is true that APML i.e. Adani Power Maharashtra Limited has not made any profits as yet as the project is yet in its development stage and has not started power generation. Once again it is in the realm of the Board of Directors' commercial decision as to at which stage the interest in the said company should be acquired by the Petitioner Company. The only relevant issue for the consideration of the scheme has to be that the same is not to the detriment of the shareholders of the petitioner company. It is hereby asserted and reiterated that the present scheme is in the interest of the company and its shareholders and not to the detriment to the interest of the shareholders.

8.the Transferor Company has complied with the requisite process for amalgamation in compliance with the applicable provisions of Companies Act, Mauritius."

4.2. With reference to the written submissions (dated 18th January 2012) filed by the objector-Shareholder Mr. Gandhi in support of his written objections dated 15th November 2011, the petitioner company has filed further affidavit wherein the Deponent Mr. Rahul Shah, Company Secretary and Authorized Signatory, for the company, stated, inter alia, that:

"3.....the shareholder has suggested an alternate mode of presenting the result of the meetings. It is hereby respectfully submitted that the Chairman's report is presented to the Hon'ble Court in consonance with the statutory format provided vide Form No.39 of the Company Court Rules, 1959. The petitioner is duty bound to present the result of the meeting in the given format only. Further, the bifurcation as per the shareholding pattern shall not impact the result of the meeting and the statutory compliance of Sec.391(2) of the Companies Act, 1956."

4.3. As regards the petitioner company's submission against the shareholder's objections that the shareholder who has raised objections holds only five shares and therefore has no locus to raise objection, it is necessary and appropriate to observe at the outset that, merely because the shareholder raising objection is in minority

or holds only few shares it does not mean that such minority shareholder has no locus and/or that his objection should not be considered or should be or can be ignored. If any of the objections, even by a solitary or singular shareholder or shareholders holding only one share or couple of shares is found to be substantial or of such nature or scope or gravity which may persuade the Court to take different view or hold back the sanction, then such objection has to be given due weightage and consideration.

4.4. So far as the objections raised by the aforesaid shareholder who appeared before the Court are concerned, the company has filed its response and with reference to the said shareholder's submission that though the petitioner transferee company is a profit making company it has not declared dividend, the company has in its reply, submitted that it is in process of developing several power projects and therefore the Board of the company considered it appropriate to not to distribute the earnings and instead to conserve the resources for development of projects. It appears that since the inception – incorporation of the petitioner transferee company and until now i.e. all along the Annual Reports of the company have been approved by the Annual General Meeting of the members of the company and that therefore the Board's decision (of distributing profit and not declaring – paying the dividend) is said to have been ratified and approved and

accepted by the members of the company. In such situation it would not be for the Court to comment on the decision of the Board, much less to interfere with the said decision. Those are the matters which are within the realm of the management and internal administration of the company and are governed by the collective commercial wisdom with which the Court would rarely interfere i.e. unless it is shown that there is mismanagement, malfeasance or fraud on shareholders. In present case, neither the said shareholder has made such allegation nor any data or material is placed before the Court to form even prima facie opinion to such effect and any proceedings before the competent authority do not appear to have been taken out, on such ground. Therefore, at this stage, it would not be justified or permissible for the Court to delve into the said submissions made by the said shareholder.

4.5. The said shareholder has, then, made reference of a company named Adani Power Maharashtra Limited (APML for short) and has raised objection on the ground that the APML project is yet to take off and the proposal for amalgamation is done in haste. He has also raised objection on the ground that APML has not shown any profits in the financial year ending as on 31st March 2011. The said shareholder has also mentioned that the transferor company is holding about 26% shares of said APML while the petitioner transferee company is holding 74% of APML's shares and upon amalgamation, said

APML will become wholly owned subsidiary of the transferee company.

4.6. On this count, the petitioner company has mentioned, in its additional affidavit that, such decisions are in the realm of the Board of Directors and are always taken in light of commercial inputs and the interest of the company. It is also claimed that the Board has not found the decision detrimental to the interest of the company or the members and even the Central Government and/or members of the company have also not considered the decision detrimental or prejudicial to the interest of the company or its members.

4.7. So far as the said shareholder's objections or submissions with reference to the determination of exchange ratio are concerned, the petitioner transferee company has, in its reply, stated that the decision has been taken on the basis of the valuation report submitted by an independent valuer viz. Ernst & Young Private Limited. The exchange ratio fixed by the company does appear a little odd and out of ordinary and usual inasmuch as for every 10,000 ordinary shares in the value of US \$ 1/-, 16,615 equity shares of Rs.10/- each are to be issued by the transferee company to the members of the transferor company. However, it is also noticed that majority shareholders, except two shareholders, have accepted and approved the said decision. Besides this, as submitted by the company, the decision is based on

valuation undertaken by an independent valuer. Furthermore, the Regional Director has also not raised any objection on this count and has found, after examining the report of the independent valuer, the said decision proper in the facts of the case and the Regional Director has not raised any objection or not offered any adverse comment. The concerned Stock Exchanges i.e. Bombay Stock Exchange and National Stock Exchange have also not found the said decision objectionable. On the other hand the shareholder has not placed any material, data or details on record to demonstrate as to how the determination of exchange ratio is improper, unjustified and unsustainable and he has also not placed any material, data or details to suggest proper ratio i.e. what could be proper exchange ratio having regard to the valuation and the financial and economical aspects and details of both companies as well as the market related position. Therefore, in background of such facts, any base or cause for interference by the Court is not available. Nonetheless, the clarification and directions contained in present order particularly the requirement to forward a copy of present order to the competent authority in Income-tax Department and also to the Enforcement Directorate would take care of the said aspect and if any irregularity is noticed, the said authorities would submit their objections.

4.8. On this count, having regard to the decision of the Apex Court in the case of *Miheer H. Mafatlal v.*

Mafatlal Industries Ltd. (AIR 1997 SC 506) the Court is not to sit in appeal over the decision of the Board of Directors which is duly approved, ratified and accepted by the statutory majority of members of the company, unless it is shown that the decision is rigged by the Board or by any interested Director or it is established, with appropriate and relevant and scientific data and details, that the decision is a commercial harakiri and fraud on the members, it would be difficult for the court to interfere with and upset such decision which is claimed to have been taken with collective commercial wisdom and not objected by anyone except the two shareholders. The shareholder has attempted to cast a shadow of doubt over the decision, however, any material whatsoever is not placed before the Court to justify such allegations or apprehension. Therefore, it is difficult and not possible for the Court to interfere with the said decision, particularly when the transferee company is, even as per the said shareholder, already holding more than 75% shares of said APML.

4.9. The said shareholder has, then, submitted that the minority shareholders would be deprived of the benefits which belong to them and created out of their wealth. The said submission is also unsubstantiated. There is no material available on record to lead the Court to such conclusion or to satisfy the Court on this count. Even the shareholder has not placed any material or data before the Court to demonstrate as to how the minority

shareholders would be deprived of their wealth or rights.

4.10. As regards the submissions made by the said shareholder with reference to the office and address of the transferor company, the petitioner company has, in its reply affidavit, tendered explanation by stating that according to the applicable provisions under the Mauritius Companies Act, 2001, particularly Section 187 of the said Act, every company is obliged to have its registered office in Mauritius to receive all communications and notices which shall constitute the address for service of legal proceedings on the company. The said provision, according to the deponent of the affidavit filed by the petitioner company and according to the submissions by the learned counsel appearing for the petitioner company, also provides that a company incorporated and registered under the Mauritius Companies Act, 2001 can have a registered office at the office of any firm of any Chartered Accountant or Attorney at Law or other person. It is also mentioned in the affidavit that it is in view of the provisions under the said Act that the registered office of the transferor company is shown at C/o. Trust Link International Limited, Suite 501, St. James Court, St. Denis Street, Port Louis, Mauritius. It is also clarified that Trust Link is appointed as an agent for the previous schemes of arrangement and also present scheme and to facilitate continuity of informations/communications. The said explanation, it seems addresses the remarks by the

shareholder but they also make it clear that the transferor company does not own any assets or property of its own, not even office premises.

4.11. So far as the suggestion made by the shareholder about the alternate mode of presenting the result of the meeting is concerned, it is submitted by the learned counsel for the petitioner that the Chairman's report is presented on the record of the Court in consonance with the statutory format provided vide form No.39 under Company Court Rules, 1959 and that the company is duty bound to present the result of the meeting in the given format. It is also stated that the bifurcation of the shareholding patent would otherwise also have no impact on the result of the meeting and statutory compliance under Section 391(2) of the Companies Act, 1956.

5. Having regard to aforesaid aspects and on overall consideration of the provisions under the scheme and the reply – explanation tendered by the petitioner company by its affidavit it emerges that the objections raised by the said shareholder are satisfactorily explained or dealt with by the petitioner company. It also emerges that the said shareholder has not placed any material, data or details or any scientific base to support the objections and he has also not offered any suggestion supported by any material or data to justify the objections raised by him.

Unless it is satisfactorily demonstrated that what is proposed in the scheme is a facade and the end result would be detrimental to or prejudicial to the interest of the shareholders and / or creditors, the Court would not be inclined to entertain the objection based on apprehensions or on the grounds suggested by the shareholder. In present case if the apprehension expressed by the said shareholder had any real base and substance then at least some substantial number of shareholders, if not majority of the shareholders, would have raised objection. However, when the scheme is unanimously (according to the result of the meeting declared on affidavit by the Chairman – which is not controverted or denied by anyone including present objector) approved by the shareholders of the companies and any apprehension (as expressed by the above named shareholder) is not ventilated by other shareholders and when the above named shareholder has not been able to substantiate and support or justify his apprehensions by any affidavit or appropriate and relevant figures or data and has merely come out with unsubstantiated apprehension, then the Court does not find it worthy of acceptance more particularly when any authority has also not raised objections (except the observations by Regional Director which are mentioned above).

5.1 Hence, not on the ground that the said shareholder is the only shareholder (or there are only 2 shareholders) raising objections against the scheme but on the ground that the objections are not substantiated and any material to take a different view, particularly contrary to the opinion given by the Registrar of Companies, the Regional

Director, the two Stock Exchanges and the independent valuer, and that too in absence of any material or scientific base and data to justify such different view is not made out or possible and having regard to the observations by the Apex Court in the case of Miheer Mafatlal (supra), the said objections are not accepted.

5.2 However, in respect of some of the aspects mentioned by the shareholder and some other aspects which the Court has noticed, appropriate directions and clarifications have been made in present order imposing certain conditions and obligations on the companies which shall have to be complied by them so as to make the scheme effective. Hence, on overall consideration of all these aspects the objections raised by the said shareholder would not survive.

6. Before proceeding further, it is relevant and necessary to note, at this stage, that the transferor company is not incorporated and registered in India but is incorporated and registered in Mauritius and that therefore the question would arise as to whether a company which is not incorporated and registered under the provisions of the Act and consequently is not “a company” under the provisions of the Act, can be wound up under the provisions of the Act or not.

6.1. The said issue had also come up for consideration and decision before the Court in case of

Essar Shipping Port and Logistic Limited in Re wherein the Court in the decision dated 16.1.2009 in Company Petition No. 280 of 2008 in Company Application No.490 of 2008 considered similar objection and relying on the decision Bombay High Court in case of Zenta P. Limited, in Re, the Court rejected the objection in light of the provisions contained under Section 394 (4)(b) holding that since the provisions contained under Section 394 (4) (b) includes the term “body corporate” the transferor company situated outside India can be amalgamated with the transferee company which is incorporated, registered and situate in India and the only condition would be that amalgamation should not be in violation of provisions contained under the companies act and the Act applicable and prevailing in such foreign Country or any laws prevailing and applicable in India.

6.2. Thus, as held in the aforesaid earlier cases if the transferor company is a “body corporate” as contemplated under Section 394 (4)(b) then though the transferor company is not incorporated and registered in India, it can be amalgamated with the transferee company so long as the transferee company is incorporated and registered and situate in India. However, it would be subject to the condition that such amalgamation must not be in violation of the provision contained under Reserve Bank of India Act, 1934 and / or Foreign Exchange Management Act, 1999 and also the provision of the Companies Act or any other law. Such amalgamation also

should not be in violation of any provision applicable to the transferor company i.e. should not be in violation of the laws applicable to the companies in the Country where the transferor company is formed and registered and situate.

6.3. Hence, it is necessary to examine and ascertain whether the said aspects exist and are complied with in present case, or not.

6.4. When the facts of present case are considered, it is noticed, as mentioned hereinabove, that the transferor company is incorporated, registered and situated outside India i.e. in Mauritius and under the provisions of the laws prevailing and applicable in Mauritius. From the proposed scheme and the details mentioned in present petition it comes out that the said transferor company fall within the purview of the terms "body corporate" which is defined under Section 2(7) read with Section 394(4)(b) of the Act and the petitioner transferee company is incorporated, registered and situated in India.

6.5. Thus, so as to support and justify the request for sanction and so as to satisfy the Court to grant the request, the transferor company and the petitioner company shall have to comply and fulfill all requirements under the laws applicable in Mauritius and in India and the transferor as well as the petitioner company shall

have to obtain, before the scheme can be implemented, all types and categories of permission, approval, licences, consents, etc. from all concerned and appropriate authorities, as may be necessary under the relevant and applicable laws.

6.6. In this context it is necessary to note at this stage that the learned Counsel for the petitioner has declared and stipulated that any provision under Reserve Bank of India Act, and / or FEMA Act and / or any applicable laws are not violated and that the scheme does not violate and it shall not result into any violation of any provisions under any applicable laws including the provisions under RBI Act and / or FEMA Act and all provisions shall be diligently complied with.

6.7. It is also clarified and declared / stipulated by the learned Counsel that the transferor company has also diligently followed and complied and shall always comply all relevant provisions applicable in Mauritius. The learned advocate for the petitioner company has stated that the petitioner company undertakes to comply with all provisions of law with respect to amalgamation under the laws of Mauritius and that the petitioner company also undertakes that upon the scheme being sanctioned by this Court, the petitioner company shall take necessary steps for getting the names of the amalgamating companies (Transferor Companies) struck-off in accordance with the Companies Act, 2001 as applicable in Mauritius.

6.8. So as to satisfy the Court to consider the request in this petition, it appears, having regard to the provisions contained in the scheme, that:-

(a) The transferor company shall have to obtain and accordingly then shall obtain appropriate orders, as may be necessary in law applicable in Mauritius sanctioning the proposed scheme from the competent Court, for satisfying the Court to consider the request for sanction.

(b) Board of Directors, through one of the Directors of the petitioner company, the Company Secretary and the Managing Director (if any), must file an undertaking on affidavit that there is no violation of and there shall not be any violation of any provisions under any of the applicable laws, including the guidelines, instructions, policy or directions issued by RBI or other competent authority, particularly and including the provisions under RBI Act and FEMA and that the petitioner shall comply all conditions, provisions and requirements under all applicable laws, rules and regulations including RBI Act, FEMA and all guidelines, directions and instructions, Rules, etc. issued by RBI and/or by Enforcement Directorate and/or any other body-authority constituted by Central or State Government as may be applicable to cases of amalgamation of a body corporate/company incorporated and registered

outside India and/or for allotment of shares to foreign/NRI shareholders. Such undertaking shall be filed within two weeks, to satisfy the Court about the assurance to comply all conditions.

(c) One of the directors shall file an undertaking on affidavit that all permission, licences, registrations, sanctions, approvals etc. including prior permission as may be required in India and in Mauritius shall be obtained from all competent authorities and that if the Scheme is sanctioned, it shall prepare all entries and accounts and shall maintain the Accounts as per AS 14 notified by Central Government.

7. The above discussed aspects and the clarifications as well as directions contained in this order would take care of the objections raised by the Regional Director and the shareholder.

8. Now, after considering the shareholder's objections and the observations-objections by the Regional Director, the petitioner's request for sanction to the scheme may be considered.

9. Under the Scheme provisions are made, inter alia, for the Effective and Operative Date, Appointed Date, for transfer and vesting of the undertaking of the Transferor Company, for the contracts etc. to which the Transferor Company is party, legal proceedings and their continuation, the employees of Transferor Company, issue and allotment of shares by the Transferee

Company, accounting procedure, dissolution of Transferor Company, etc. Clause No.4 which contains provision regarding transfer and vesting of the undertaking, inter alia, reads thus:

“4.1 Upon the coming into effect of this Scheme and with effect from the Appointed Date, and subject to the provisions of the Scheme in relation to the mode of transfer and vesting, the Undertaking of the Transferor Company shall, without any further act, instrument or deed, be and stand transferred to and vested in and/or be deemed to have been transferred to and vested in the Transferee Company as a going concern so as to become on and from the Appointed Date, the estate, assets, rights, title, interests and authorities of the Transferee Company, pursuant to Section 394(2) of the Act.

4.2. Without prejudice to Clause 4.1 above, in respect of the assets of the Undertaking of the Transferor Company as are movable in nature or are otherwise capable of transfer by manual delivery or by endorsement and/or delivery, the same shall be so transferred by the Transferor Company, and shall, upon such transfer, become the property, estate, assets, rights, title, interests and authorities of the Transferee Company as an integral part of the Undertaking of the Transferor Company transferred to the Transferee Company.

4.3. In respect of the assets of the Undertaking of the Transferor Company other than those referred to in clause 4.2 above, the same shall, without any further act, instrument or deed, be transferred to and vested in and/or to be transferred to and vested in the Transferee Company pursuant to the provisions of Section 394 of the Act.

4.4. All estates, assets, rights, title, interests and authorities accrued to and/or acquired by the Transferor Company after the Appointed Date and prior to the Effective Date shall be deemed to have been accrued to and/or acquired for and on behalf of the Transferee Company and shall, upon the coming into effect of this Scheme, pursuant to the provisions of Section 394(2) and other applicable provisions of the Act, without any further act, instrument or deed be and stand transferred to or vested in or be deemed to have been transferred to or vested in the Transferee Company to that extent and shall become the estates, assets, rights, title, interests and authorities of the Transferee Company.

4.7. Upon coming into effect of this Scheme and with effect from the Appointed Date, all debts, liabilities, duties and obligations of every kind, nature and description of the Transferor Company shall, pursuant to the provisions of Section 394(2) and other applicable provisions of the Act, without any further act, instrument or deed be and stand transferred to and vested in and/or be deemed to have been transferred to and vested in the Transferee Company, so as to become as and from the Appointed Date, the debts, liabilities, duties and obligations of the Transferee Company on the same terms and conditions as were applicable to the Transferor company and further that it shall not be necessary to obtain the consent of any person who is a party to any contract or arrangement by virtue of which such liabilities and obligations

have arisen in order to give effect to the provisions of this clause.”

9.1. Clause 5 of the proposed Scheme which makes provision regarding contracts etc. to which the Transferor Company is party, inter alia, provides that:

“5.1 Upon coming into effect of this Scheme and subject to the provisions of this Scheme, all contracts, deeds, bonds, agreements, schemes, arrangements, understandings whether written or oral and other instruments, if any, of whatsoever nature to which the Transferor company are parties or to the benefit of which the Transferor Company may be eligible and which are subsisting or having effect immediately before the Effective Date, without any further act, instrument or deed, shall be in full force and effect or against or in favour of the Transferee Company, as the case may be, and may be enforced by or against the Transferee Company as fully and effectually as if, instead of the Transferor Company, the Transferee Company had been a party or beneficiary or obligee thereto.

5.2. Notwithstanding the fact that vesting of the Undertaking of the Transferor Company occurs by virtue of this Scheme itself, the Transferee Company may, at any time after coming into effect of this Scheme in accordance with the provisions hereof, if so required under any law or otherwise, execute such deeds (including deeds of adherence), writings, confirmations or enter into any tripartite arrangements or novations with any party to any contract or agreement to which the Transferor Company is a party or any writings as may be necessary to be executed in order to give formal effect to the provisions. The Transferee Company shall, under the provisions of this Scheme, be deemed to be authorized to execute any such writings on behalf of the Transferor Company and to carry out or perform all such formalities or compliances referred to above on the part of the Transferor Company to be carried out or performed.”

9.2. Clause 6 and Clause 7.1, which contain provisions with reference to the legal proceedings and employees, read thus:

“6. Legal Proceedings

Upon the coming into effect of this Scheme, all suits, actions, and other proceedings including legal and taxation proceedings, (including before any statutory or quasi-judicial authority or tribunal) by or against the Transferor Company, whether pending and/or arising on

or before the Effective Date shall be continued and/or enforced by or against the Transferee Company as effectually and in the same manner and to the same extent as if the same had been instituted and/or pending and/or arising by or against the Transferee Company.

- 7.1. The employees of the Transferor Company who are in service on the Effective Date, shall become the employees solely of the Transferee Company with the benefit of continuity of service and such that the terms and conditions of their employment with the Transferee Company are not less favourable than those applicable to them as employees of the Transferor Company on the Effective Date."

9.3. So far as the issue and allotment of shares to the Transferor Company is concerned, this proposed Scheme provides, inter alia, that:

"10.1 Upon the Scheme being effective, and in consideration of the transfer and vesting of the Undertaking of the Transferor Company in the Transferee Company in terms of the Scheme, the Transferee Company shall, without any further application, act, instrument or deed, issue and allot to the shareholders of the Transferor Company, whose names are recorded in the Register of Members of the Transferor Company, on a date (hereinafter referred to as "Record Date") to be fixed in that behalf by the Board of Directors or a committee thereof of the Transferee Company, equity shares of the face value of Rs.10/- each in the Transferee Company, credited as fully paid-up, in the following manner:

16,615 equity shares of Rs.10/- each credited as fully paid up of the Transferee Company for every 10,000 ordinary shares of USD 1/- each fully paid-up held by such shareholder in Growmore;

- 10.2. The shares issued to the shareholders of the Transferor Company by the Transferee Company pursuant to clause 10.1 above shall be issued in dematerialized form by the Transferee Company.
- 10.4. For the purpose of issue of equity shares to the shareholders of the Transferor Company, the Transferee Company shall, if and to the extent required, apply for and obtain the required statutory approvals and other concerned regulatory authorities for the issue and allotment by the Transferee Company of such equity shares.
- 10.5. The equity shares of the Transferee Company issued in terms of this Scheme will be listed and/or admitted to trading on the Stock Exchanges where the shares of the Transferee Company are listed and/or admitted to trading. The Transferee Company shall enter into such arrangements and give such confirmations and/or undertakings as may be necessary in accordance with the applicable laws or regulations for complying with

the formalities of the Stock Exchanges.”

9.4. As regards the accounting procedure, it is, inter alia, provided that:

“11.2. All assets and liabilities, including reserves, of the Transferor Company transferred to the Transferee Company under the Scheme shall be recorded in the books of the Transferee Company at the value as recorded in the Transferor Company books as on the Effective Date or in any other manner as may be deemed fit by the Board of Directors of the Transferee Company.

11.3. The Transferee Company shall account for the amalgamation in accordance with ‘Pooling of Interest Method’ laid down by Accounting Standard 14 (Accounting for Amalgamations) prescribed under Companies (Accounting Standards) Rules, 2006.”

9.5. So far as the transferor company is concerned, it is mentioned in the proposed scheme that:

“14.1. Growmore is incorporated under the Mauritius Act. Presently, Growmore is holding a Category 2 Global Business License issued by Financial Services Commission under the laws of Mauritius.

14.2. In terms of the Mauritius Act, a company holding a Category 2 Global Business License can merge with one or more companies incorporated under the laws of jurisdiction other than that of Mauritius.”

9.6. In the scheme it is also mentioned and clarified that in view of the terms of para 4(2)(a) of part-II of fourteenth Schedule to the Mauritius Act, the transferor company shall have to comply with the laws of India and that it shall so do. Under para 14.5 of the scheme the details about the documents and material which the companies will have to submit before the Registrar of Companies of Mauritius are also mentioned.

9.7. Another relevant aspect with reference to the

transferor company which is mentioned in the scheme is that the said transferor company has passed resolution approving the scheme and the shareholders of the transferor company have also approved the scheme.

9.8. However, copy of the said resolution is not placed on record.

9.9. Therefore, the petitioner company is directed to place on record of present petition a copy of the resolution passed by the shareholders of the transferor company and the details about the date when the meeting of the shareholders of the transferor company was convened, the names and total number of shareholders who attended the meeting and the result of voting, along with copy of the resolution said to have been passed. Before taking final decision and passing final order, the Court would prefer to be satisfied about these aspects.

9.10. In this context, before proceeding further it would be appropriate to take into account some of the observations made by the Apex Court in the decision in the case of Mihir H. Mafatlal vs. Mafatlal Industries (supra) wherein the Apex Court has observed that:-

“The aforesaid provisions of the Act show that compromise or arrangement can be proposed between a company and its creditors or any class of them, or between a company and its members or any class of them. Such a compromise would also take in its sweep any scheme of amalgamation/merger of one company with another. When such a scheme is put forward by a company for the sanction of the Court in the first instance the Court has to direct holding of meetings of creditors or class of creditors, or members or class of members who are concerned with such a scheme and once the majority in number representing three fourths in value of creditors of

class of creditors, or members or class of members, as the case may be, present or voting either in person or by proxy at such a meeting accord their approval to any compromise or arrangement thus put to vote, and once such compromise is sanctioned by the Court, it would be binding to all creditors or class of creditors, or members or class of members, as the case may be, which would also necessarily mean that even to dissenting creditors or class of creditors or dissenting members or class of members such sanctioned scheme would remain binding. Before sanctioning such a scheme even though approved by a majority of the concerned creditors or members the Court has to be satisfied that the company or any other person moving such an application for sanction under sub-section (2) of Section 391 has disclosed all the relevant matters mentioned in the proviso to sub-section (2) of that Section. So far as the meetings of the creditors or members, or their respective classes for whom the Scheme is proposed are concerned, it is enjoined by Section 391 (1)(a) that the requisite information as contemplated by the said provision is also required to be placed for consideration of the concerned voters so that the parties concerned before whom the scheme is placed for voting can take an informed and objective decision whether to vote for the scheme or against it. On a conjoint reading of the relevant provisions of Sections 391 and 393 it becomes at once clear that the Company Court which is called upon to sanction such a scheme has not merely to go by the ipse dixit of the majority of the shareholders or creditors or their respective classes who might have voted in favour of the scheme by requisite majority but the Court has to consider the pros and cons of the scheme with a view to finding out whether the scheme is fair, just and reasonable and is not contrary to any provisions of law and it does not violate any public policy. This is implicit in the very concept of compromise or arrangement which is required to receive the imprimatur of a Court of law. No Court of law would ever countenance any scheme of compromise or arrangement arrived at between the parties and which might be supported by the requisite majority if the Court finds that it is an unconscionable or an illegal scheme or is otherwise unfair or unjust to the class of shareholders or creditors for whom it is meant. Consequently it cannot be said that a Company Court before whom an application is moved for sanctioning such a scheme which might have got the requisite majority support of the creditors or members or any class of them for whom the scheme is mooted by the concerned company, has to act merely as a rubber stamp and must almost automatically put its seal of approval on such a scheme. It is trite to say that once the scheme gets sanctioned by the Court it would bind even the dissenting minority shareholders or creditors. Therefore, the fairness of the scheme qua them also has to be kept in view by the Company Court while putting its seal of approval on the concerned scheme placed for its sanction. It is, of course, true that so far as the Company Court is concerned as per the statutory provisions of Sections 391 and 393 of the Act the question of voidability of the scheme will have to be judged subject to the rider that a scheme sanctioned by majority will remain binding to a dissenting

minority of creditors or members, as the case may be, even though they have not consented to such a scheme and to that extent absence of their consent will have no effect on the scheme. It can be postulated that even in case of such a Scheme of Compromise and Arrangement put up for sanction of a Company Court it will have to be seen whether the proposed scheme is lawful and just and fair to the whole class of creditors or members including the dissenting minority to whom it is offered for approval and which has been approved by such class of persons with requisite majority vote.

28-A. However further question remains whether the Court has jurisdiction like an appellate authority to minutely scrutinise the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or not when the majority of the creditors or members or their respective classes have approved the scheme as required by Section 391 sub-section (2). On this aspect the nature of compromiser arrangement between the company and the creditors and members has to be kept in view. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court. The Court certainly would not act as a Court of appeal and sit in judgement over the informed view of the concerned parties to the compromise as the same would be in the realm of corporate and commercial wisdom of the concerned parties. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the Scheme by the requisite majority. Consequently the Company Court's jurisdiction to that extent is peripheral and super-visory and not appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire.....

.....It is obvious that the supervisor cannot ever be treated as the author or a policy maker. Consequently the propriety and the merits of the compromise or arrangement have to be judged by the parties who as sui juris with their open eyes and fully informed about the pros and cons of the Scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement. The Court cannot, therefore, undertake the exercise of scrutinising the scheme placed for its sanction with a view to finding out whether a better scheme could have been adopted by the parties. This exercise remains only for the parties and is in the realm of commercial democracy permeating the activities of the concerned creditors and members of the company who in their best commercial and economic interest by majority agree to give signal to such a compromise or arrangement.....But before we do so we may also usefully refer to the observations found in the oft-quoted passage in Buckley on the Companies Act, 14th Edition. They are as under:

"In exercising its power of sanction the Court will see, first that the provisions of the statute have been complied with,

secondly, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interest adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of this interest, might reasonably approve.

The Court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting, but at the same time, the Court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considering the matter with a view to the interest of the class which it is empowered to bind, or some bolt is found in the Scheme."

Learned single Judge of the Calcutta High Court in the case of *Re, Mankam Investments Ltd.*, (1995) 4 Comp LJ 330 (Cal.) relying on a catena of decisions of the English Courts and Indian High Courts observed as under on the power and jurisdiction of the Company Court which is called upon to sanction a scheme of merger and amalgamation of companies:

"It is a matter for the shareholders to consider commercially whether amalgamation or merger is beneficial or not. The Court is really not concerned with the commercial decision of the shareholders until and unless the Court feels that the proposed merger is manifestly unfair or is being proposed unfairly and/or to defraud these other shareholders. Whether the merged companies will be ultimately benefited or will be able to economise in the matter of expenses is a matter for the shareholders to consider. If three companies are amalgamated, certainly, there will be some economies in the matter of maintaining accounts, filing of returns and various other matters. However, the Court is really not concerned with the exact details of the matter and if the shareholders approved the scheme by the requisite majority, then the Court only looks into the scheme as to find out that it is not manifestly unfair and/or is not intended to defraud or do injustice to the other shareholders."

We may also in this connection profitably refer to the judgment of this Court in the case of *Hindustan Lever Employees' Union v. Hindustan Lever Ltd.* 1995 Supp (1) SCC 499:(1994 AIR SCW 4701) wherein a Bench of three learned Judges speaking through Sen, J. on behalf of himself and Venkatachaliah, C.J., and with which decision Sahai, J., concurred. Sahai, J., in his concurring judgment in the aforesaid case has made the following pertinent observations in the connection in paras 3 and 6 of the Report:

"But what was lost sight of was that the jurisdiction of the Court in sanctioning a claim of merger is not to ascertain with mathematical accuracy if the determination satisfied the arithmetical test. A Company Court does not exercise an appellate jurisdiction."

9.11. Now, the proposed scheme should be examined in

light of the observations by the Apex Court in the above referred judgment and while keeping in focus that the Court has to balance the examination or the scrutiny of the scheme in such a way that it does not take up the examination – scrutiny of the scheme as if sitting in appeal and at the same time it does not merely concentrate and merely ensure whether majority has taken the decision bonafide or not.

9.12. However, so far as the commercial perspective of the decision is concerned, unless and until the Court is of the opinion that the proposal is manifestly unfair or amounts to fraud on the shareholders, it ought not be deeply concerned with the commercial decision including the issues as to whether the amalgamation, merger or demerger are beneficial or not.

9.13. As explained by the Apex Court “the Court is really not concerned with the exact details of the matters and if the shareholders approved the scheme by the requisite majority, then the Court only looks into the scheme to find out that it is not manifestly unfair and/or is not intended to defraud or do injustice to the other shareholders.” The Apex Court has also observed that “ It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court and the Court certainly would not act as a Court of appeal and sit in judgment over the informed view.” The Apex Court has also observed that “the Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and

members". The Apex Court has then mentioned the broad contours which the Court has to keep in focus. They are:

"In view of the aforesaid settled legal position, therefore, the scope and ambit of the jurisdiction of the Company Court has clearly got earmarked. The following broad contours of such jurisdiction have emerged:

1. The sanctioning Court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391 (1)(a) have been held.
2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391, sub-section(2).
3. That the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.
4. That all necessary material indicated by Section 393 (1)(a) is placed before the voters at the concerned meetings as contemplated by Section 391, sub-section (1).
5. That all the requisite material contemplated by the proviso to sub-section (2) of Section 391 of the Act is placed before the Court by the concerned applicant seeking sanction for such a scheme and the Court gets satisfied about the same.
6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the Scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.
7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising of the same class whom they purported to represent.
8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.
9. Once the aforesaid broad parameters about the requirement of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory

jurisdiction.

The aforesaid parameters of the scope and ambit of the jurisdiction of the Company Court which is called upon to sanction a Scheme of Compromise and Arrangement are not exhaustive but only broadly illustrative of the contours of the Court's jurisdiction."

10. In this background now, at the outset, it is relevant and appropriate to take into consideration the facts emerging from the record of present petition. It comes out that the Board of Directors of both the companies have, after considering the report of the independent valuer and other financial adviser, approved the proposed scheme and thereafter the scheme was placed for consideration and approval by the shareholders/members of the companies. It is mentioned in the proposed scheme that the shareholders of the transferor company have approved the proposed scheme. So far as the transferee company is concerned, the report of the Chairman of the meeting convened pursuant to the orders of the Court reveals that the statutory majority of shareholders/members of the petitioner – transferor company have also approved the scheme. It is also declared by the petitioner company in the affidavits filed by it that the concerned stock exchanges have also not raised any objections against the proposed scheme and have not found anything objectionable in the provisions under the scheme. The authorities viz. the Regional Director and the Registrar of Companies have also observed that anything objectionable and/or prejudicial to the interest of the company and/or interest of the shareholders or creditors or public has not been found in the scheme and the scheme does not appear to be prejudicial to the interest of the company or the members or the creditors or the public. The Registrar of Companies has, in the report submitted to the Regional Director,

clarified that except the objections by two shareholders (of which reference has been made in present order) any other objections from any member or creditor have not been received in the office of Registrar of Companies. Similar declaration and clarification is made by the Senior Counsel for the company.

11. Upon considering the provisions in the scheme and also having regard to the fact that neither the shareholders/members (except the two shareholders referred to hereinabove) of the transferee or transferor company neither the Regional Director nor the Stock Exchanges or any other person or authority have raised any objection even pursuant to the public advertisement about the scheme or any of the provisions therein and also having regard to the explanations offered and assurance, undertaking given by the petitioner in the additional affidavits, it would, prima facie, emerge that the petitioner has made out case for sanction.

11.1. However, in view of the two important aspects or provisions in the scheme, the Court considers it appropriate to first call for certain details and reports, in addition to the compliance of the conditions and requirement demanded by the Court by way of the direction in present order, before taking final decision and before passing final order. In view of the law laid down by the Apex Court about the Court's role and scope of examination in the matter of arrangement or amalgamation, the Court is conscious about the limitation

in examining the scheme as well as about the duty of the Court to examine the scheme.

11.2. One of the two aspects is about the exchange ratio and the second is the fact that the transferor company does not have any assets or properties. So far as the first aspect is concerned, some of the issues connected therewith have been discussed and dealt with hereinabove earlier while taking note of the fact that against 10,000 shares in the value of US\$ 1/-, the members of the transferor company are to be issued/allotted 16615 shares in the value of Rs.10/- each of the transferee company. It is also noticed that the valuation has been done by financial expert and independent valuer. It is also noticed that the statutory majority shareholders of the transferee company have accepted the valuation and exchange ratio. In this context, reference is also required to be made, besides the decision in case of Miheer Mafatlal (supra) to the decision in case of Alembic Limited v. Deepakkumar J. Shah [(2002) Volume 112 Company Cases P. 64]. In the said case one shareholder holding about 30 shares of the resulting company had raised objection to sanction being granted and against the scheme on the ground that the share exchange ratio and the share valuation was not proper. In the said case, 6 equity shares of Rs.10/- each of the resulting company i.e. Alembic Ltd. was proposed to be issued and allotted at par against 100 equity shares of Rs.10/- each to the shareholders of the demerged

company. The proposal was approved by the majority shareholders of 90.85% in number and 99.32% in value. In present case, as mentioned hereinabove earlier while considering the Chairman's report, it is noticed that majority of 95.76% in number and 99.99% in value have approved the scheme including the provisions related to exchange ratio. In the said decision in case of Alembic Ltd. (supra) the Court considered the judgment of the Apex Court in case of Miheer Mafatlal and the Court also took into consideration the broad contours laid down by the Apex Court which should be considered by the Company Court while examining scheme for arrangement or amalgamation and then the Court dealt with the objections raised on ground of exchange ratio. Thereafter, the Court observed, in the said decision that:-

“Apart from the fact that the objector has not been able to make any dent in the reasoning given by the Chartered Accountants for adopting the discounted cash flow technique as the basis of valuation, the objector himself has not suggested any other alternative method or ratio. In the aforesaid decision in the case of Miheer H Mafatlal (Supra), the Apex Court has already held that when the majority of the shareholders with their open eyes have given their approval to the scheme, even if in the view of the Court there would be a better scheme for the Company and its members, the Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction. In the aforesaid decision, the Apex Court has also quoted with approval the following observations made by the Madras High Court in Kamla Sugar Mills Ltd., (1984) 55 Company Cases 308 dealing with an identical objection about the exchange ratio adopted in the Scheme of Compromise and Arrangement :-

"Once the exchange ratio of the shares of the transferee-company to be allotted to the shareholders of the transferor-company has been worked out by a recognized firm of chartered accountants who are experts in the field of valuation and if no mistake can be pointed out in the said valuation, it is not for the Court to substitute its exchange ratio, especially when the same has been accepted without demur by the overwhelming majority of the shareholders or the two companies or to say that the shareholders in their collective wisdom should not have accepted the said exchange ratio on the ground that it

will be detrimental to their interest."

In the facts of the instant case also, the aforesaid exchange ratio and the other features of the Scheme of Arrangement and Restructure have been accepted by an overwhelming majority of shareholders (90.85% in number and 99.32% in value) out of the shareholders who responded to the postal ballot under the Companies (Passing of Resolutions by Postal Ballot) Rules, 2001. The scheme is also unanimously approved by the secured creditors and all the unsecured creditors who were present at the meeting convened pursuant to the orders of this Court in Company Application No. 213 of 2001.

In view of the above, the first as well as the second objections raised by the objector cannot be sustained."

11.3. Thus, if the exchange ratio determined in present case is considered in light of the observations by the Apex Court in the case of *Miheer Mafatlal (supra)* and this Court in case of *Alembic Ltd. (supra)* then there does not appear to be any ground or material available on record to justify any reservation on that count or to suggest any other ratio or direct the company to adopt any other exchange ratio. However, so as to remove any doubt or reservation and to ensure that there may not be any breach of any provision of any applicable laws, Rules, policy, etc. or any illegality or irregularity, more particularly in view of the fact that the shares of the transferee company are proposed to be issued and allotted in the above mentioned ratio to the members of the transferor company which has no assets, the Court has considered it appropriate to pass final order only after and subject to the reports/views from the concerned and competent authority of Income Tax and Enforcement Directorate and upon compliance of the clarifications and directions mentioned in present order.

11.4. The Court is conscious of the fact that the Court cannot probe deeper into the object and purpose of the

amalgamation / scheme and such aspects are mainly in the realm of the commercial wisdom of the Board of Directors and the members of the company. However, as observed by the Apex Court in the decision in the case of Miheer H. Mafatlal (supra) the Court has to consider the pros and cons of the scheme with a view to find out that the scheme is just, fair and reasonable and is not contrary to any provisions of law and does not violate any public policy. The Apex Court has also observed that, it cannot be said that a company Court before whom application for sanctioning the scheme is moved has to act merely as a rubber stamp and must almost automatically puts its seal of approval to such a scheme. Therefore, the Court has considered it appropriate and necessary to pass certain directions, more particularly because the transferor does not have any assets, which are mentioned in present order and to defer the final order regarding sanction until the reports by the above mentioned authorities are submitted.

12. Having clarified these aspects the Court considers it appropriate to also mention that when present scheme is examined then it is noticed that the Regional Director for the Central Government has clarified that the scheme is not prejudicial to the interest of the shareholders or the company or the public. The Stock Exchanges have also not found any provisions objectionable. The statutory majority shareholders of both the companies have also approved the scheme. Under the circumstances, on overall consideration of the scheme there does not appear, except the above mentioned aspects, any other objectionable feature in the scheme which would oblige the Court to decline the sanction requested for. The Regional Director, the

Registrar of Companies and the counsel for the company have stipulated and declared that even after the public advertisement any objection has not been received from any shareholders (except from the above mentioned two shareholders), creditors or anyone else. Therefore also there does not appear any reason or justification for declining the consent as prayed for. So far as the objections or observations by the Regional Director are concerned (as mentioned in the affidavit filed by the Regional Director) the same have been considered hereinabove along with the explanation tendered by the company and appear to have been satisfactorily dealt with by the company. So far as the objections by one shareholder who appeared before the Court are concerned, the same have been discussed and dealt with hereinabove earlier. However, before making final order regarding the request for sanction, the Court would want to receive the reports from Income Tax Department and Enforcement Directorate for being satisfied that the proposed arrangement is not contrary to any applicable law, guidelines, policy, etc. and/or it may not be a mask to cover any clause in the Scheme which may be contrary to law and/or adverse to the interests of members. Hence, before passing the final order, the company is directed to ensure compliance of all observations, directions and conditions prescribed in present order, including those mentioned in para 3.4, 6.5, 6.8, 9.9, and those mentioned in the following paragraph (i.e. para 13) etc. and the final order shall be passed only after the compliance of conditions and observations in this order is reported and certified and after the reports from the concerned authorities are submitted/received and placed on record and provided the said reports do not raise

any objectionable grounds or features and all directions are complied.

13. It is further clarified, observed and directed that:-

- A. The petitioner company shall apply for and obtain, within prescribed time limit and in prescribed manner, all necessary permissions, licences, registrations, certificates, etc. as may be required under all relevant and applicable laws, rules and regulations.
- B. A copy of present order shall be immediately forwarded by the Regional Director to the concerned officer in Enforcement Directorate and to the concerned Commissioner or Dy. Commissioner of the concerned section/division of the Income-tax Department under which the petitioner is registered as the assessee with a request to submit, within 40 days the Directorate's/Department's views, objections and comments with reference to the transferor company, the holding company of the transferor company, the legality of the proposed merger having regard to the conduct, business and affairs of the transferor company and its holding company and the relevant provisions of all applicable laws and Rules and to also report as to whether the proposed scheme, if

sanctioned, will result into and/or is/are likely to result into breach of any provision of any applicable Acts including the Income Tax Act and Companies Act. The Court shall pass final order only after and subject to the objections, if any, and after the period for submitting the objections expire. It would be open to the office of Enforcement Directorate and Income Tax Department to seek comments from RBI.

The petitioner is permitted to serve sufficient number of certified copies of this order to the Regional Director with a request to forward the copies to the concerned authorities.

- C. A copy of the order shall also be forwarded to the office of concerned and competent Superintendent of Stamps and Registrar of Documents, for the opinion as to whether stamp duty shall be payable if the Scheme is sanctioned and is to be implemented and in that event whether the document shall have to be registered or not.
- D. The observations in this order shall not absolve and/or release and/or exempt and/or protect (and/or provide any type of protection to) the companies, and/or the promoters and/or the officers and/or the executives and/or the directors and/or any responsible/ accountable

person from any obligation and/or from any action already initiated or proposed to be initiated or under contemplation by any authority and/or Government and/or anyone competent or authorised or having right to take any action against the company and/or directors and/or officers / executives / managers / promoters.

- E. It is clarified that present order will not stand in way of the authorities to initiate any action as may be required under any applicable law, rules, regulations, etc. and/or from continuing any and all actions if already initiated.
- F. The petitioner shall comply the directions in para 3.4, 6.5, 6.8, 9.9 and 13 as well as the stipulation and declaration by their counsel as recorded in this order (e.g. in para 6.6 and 6.7).
- G. One of the Directors of the petitioner company, and the Company Secretary and Managing Director (if any) shall jointly file, an undertaking on affidavit, that the Scheme is not in contravention of any provision of any relevant and applicable laws, rules, regulations, etc. including the applicable policies and guidelines issued by Central/State Government, Reserve Bank of India or other Statutory

Authorities and/or the provisions under Income-tax Act, FEMA, FERA and also declaring, undertaking and stipulating that all necessary and prescribed permissions, licences, registrations, etc. shall be applied for and obtained within prescribed time frame and in prescribed manner and that so far as the Transferor Company is concerned appropriate order from the Court of competent jurisdiction in Mauritius shall be requested for in accordance with relevant and applicable provisions of law in Mauritius and that the companies shall comply all requirements, conditions and provisions under FEMA - FERA and/or RBI Act and shall obtain all prior permissions and approval of RBI and shall follow all guidelines and instructions (as are relevant and applicable including those under FEMA - FERA and/or issued by RBI) with reference to amalgamation as well as for allotment of shares to foreign / NRI shareholders.

- H. A copy of the resolution said to have been passed by the shareholders of the transferor company shall be placed on record to satisfy the Court on the count that all conditions and formalities required to be complied have been complied.

I. The Regional Director shall forthwith forward a copy of this order to the Enforcement Directorate (ED) and/or DRI with intimation that in light of and with reference to the conduct of affairs and business of the transferor company and the holding company of the transferor company and relevant provisions of the scheme a report with their views, objections or comments stating whether there is any objectionable feature/provision in the scheme and/or in the affairs and conduct of the companies may be conveyed, within 40 days to the office of the Regional Director and the Regional Director shall, by filing an application, immediately place on record such objections. The final decision and order shall be passed only after and subject to such reports and after the period for submitting such reports is over.

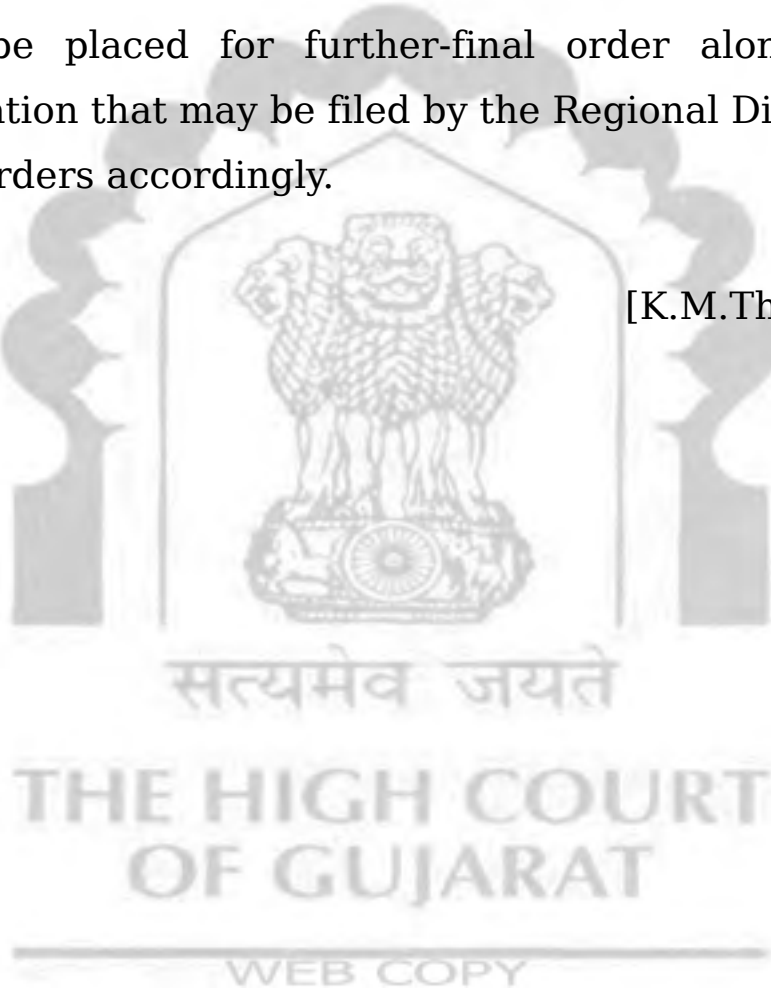
14. Upon completion of the period within which the above mentioned authorities are asked to submit their report, the Regional Director shall immediately move an application placing before the Court the reports or he shall inform the Court if the reports are not received. The Regional Director shall also clarify in the application/report as to whether any objectionable features or facts are noticed by the authorities. After the reports are placed on record and if the reports do not

contain any objections then further-final order with regard to the Scheme will be passed. However, if any objections are raised by the authorities with regard to any provision, then appropriate orders will be passed on such application filed by the Regional Director. For the aforesaid purpose, the petition shall remain pending and shall be placed for further-final order alongwith the application that may be filed by the Regional Director.

Orders accordingly.

[K.M.Thaker, J.]

jani



Annexure 10: Press Release of Ministry of Information and Broadcasting dated 18th August 2022



Ministry of I&B blocks 8 YouTube channels for spreading disinformation related to India's national security, foreign relations and public order

7 Indian and 1 Pakistan based YouTube news channels blocked under IT Rules, 2021

Blocked YouTube channels had over 114 crore views; and 85 lakh 73 thousand subscribers

Fake anti-India content was being monetized by the blocked channels on YouTube

Posted On: 18 AUG 2022 11:27AM by PIB Delhi

The Ministry of Information & Broadcasting, utilizing the emergency powers under the IT Rules, 2021, has issued orders on 16.08.2022 for blocking of eight (8) YouTube based news channels, one (1) Facebook account, and two Facebook posts. The blocked YouTube channels had a cumulative viewership of over 114 crore, were subscribed by over 85 lakh users.

Analysis of Content

The purpose of the content published by some of these YouTube channels was to spread hatred among religious communities in India. False claims were made in various videos of the blocked YouTube channels. Examples include fake news such as the Government of India to have ordered demolition of religious structures; Government of India to have banned celebration of religious festivals, declaration of religious war in India, etc. Such content was found to have the potential to create communal disharmony and disturb public order in the country.

The YouTube channels were also used to post fake news on various subjects such as the Indian Armed Forces, Jammu and Kashmir, etc. The content was observed to be completely false and sensitive from the perspective of national security and India's friendly relations with foreign States.

The content blocked by the Ministry was found to be detrimental to sovereignty and integrity of India, security of the State, India's friendly relations with foreign States, and public order in the country. Accordingly, the content was covered within the ambit of section 69A of the Information Technology Act, 2000.

Modus Operandi

The blocked Indian YouTube channels were observed to be using fake and sensational thumbnails, images of news anchors and logos of certain TV news channels to mislead the viewers to believe that the news was authentic.



All the YouTube channels blocked by the Ministry were displaying advertisements on their videos having false content detrimental to communal harmony, public order and India's foreign relations.



With this action, since December 2021, the Ministry has issued directions for blocking of 102 YouTube based news channels and several other social media accounts. The Government of India remains committed towards



ensuring an authentic, trustworthy, and safe online news media environment, and thwart any attempts at undermining India's sovereignty and integrity, national security, foreign relations, and public order.



Details of Social Media Accounts and URLs Blocked

YouTube Channels

| Sl. No. | YouTube channel Name | Media Statistics |
|---------|--------------------------------|--|
| 1. | Loktantra Tv | 23,72,27,331 views 12.90 lakh subscribers |
| 2. | U&V TV | 14,40,03,291 views 10.20 lakh subscribers |
| 3. | AM Razvi | 1,22,78,194 views 95,900 subscribers |
| 4. | Gouravshali Pawan Mithilanchal | 15,99,32,594 views 7 lakh subscribers |
| 5. | SeeTop5TH | 24,83,64,997 views 33.50 lakh subscribers |
| 6. | Sarkari Update | 70,41,723 views 80,900 subscribers |
| 7. | Sab Kuch Dekho | 32,86,03,227 views 19.40 lakh subscribers |
| 8. | News ki Dunya (Pakistan based) | 61,69,439 views 97,000 subscribers |



Total

Over 114 crore views,
85 lakh 73 thousand subscribers



Facebook Page



Sl. No.

Facebook Account

No. of Followers

1.

Loktantra Tv

3,62,495 Followers

Exemplars of Blocked Content

Loktantra Tv





भारत में छिड़ा धर्मयुद्ध मक्का मदीना पर हमला नहीं बचेगा देश



7:49

शंकराचार्य निश्चलानंद सरस्वती
करेंगे मक्का मदीना पर हमला

166K views • 3 weeks ago

FAKE

U&V TV

अभी अभी बड़ी खबरें देखें



10 बड़ी खबरें

अभी देखें

कमल में अल पार

OM तुम बसोला?

मोदी पर देशद्रोह का केस कैबिनेट खतरे में

PM आवास घेराव मोदी शाह अंडा

8:16

3 August 2022 | Nonstop News | Today breaking news

102K views • 11 days ago

FAKE

AM Razvi



अभी अभी बड़ी खबरें देखें



अजमेर दरगाह में हलचल उतरी सेना मोदी की कुर्सी खतरे में, SC से 9:47

29 May 2022 | Nonstop
| Today breaking news
25K views • 3 days ago



मंदिर पर लहराया इस्लामी झंडा

मुसलमानों ने मंदिर पर लहराया इस्लामी झंडा



मुसलमानों ने मंदिर पर लहराया
इस्लामी झंडा | Mandir Par

1.9K views • 6 days ago





**अजमेर शरीफ दरगाह को बचाना हुआ मुश्किल
भगवाधारियों का दरगाह पर हमला**

3:04

अजमेर शरीफ दरगाह को ब
मुश्किल | Andhbhakton |
8.7K views • 1 month ago

FAKE

Gouravshali Pawan Mithilanchal

**इजिप्ट में हजारों तेजस की एंटी, दुनियां हैरान
भारत और इजिप्ट का तुर्की पे हमला शुरू**

जिसका डर था वही हुआ, युद्ध 9:08

जिसका डर था आखिर हि
पाकिस्तान परस्त तुर्की को
30K views • 3 days ago

FAKE

SeeTop5TH

**ये क्या हुआ, भारत के 18 जवान शहीद
साथ ही 81 लोंग मरे, मणिपुर में हड़कंप**

चीन ने अपने मौत का बुलावा 8:16

अगर समय रहते चीन वी
होती तो यह नौबत नहीं
39K views • 1 month ago

FAKE



मोदी का मुसलमानों के लिए भयंकर पैगाम

BREAKING NEWS

2 मिनट पहले आई
बहुत दुखद खबर!!

मथुरा की मस्जिद को तोड़ने का फैसला

PM Modi message m...
masjid Subhan Allah...
1:56

169K views • 8 months ago

FAKE

मोदी सरकार का अजमेर दरगाह पर एलान
हटाई जाएगी ख्वाजा गरीब नवाज दरगाह

PM Modi speech...
garib nawaz dargah...
1:45

46K views • 1 month ago

FAKE

Sarkari Update

भारत में पहुंचा भयंकर तूफान

भारी तबाही

35 जिलों में चेतावनी

100 साल का रिकॉर्ड तोड़ने वाला तूफान

14 अगस्त 2022 : आसमान में तूफान का समाचार, #Dis_News

209K views • 12 days ago

FAKE



News ki Dunya (Pakistan based)

The screenshot as under claims that 100 crore Hindus will kill 40 crore Muslims, and that Muslims should to go Pakistan or Bangladesh otherwise they will be massacred.



The below screenshot claims that India's Qutub Minar mosque has been demolished.



Saurabh Singh

(Release ID: 1852785) Visitor Counter : 2414

Annexure 11: Details about AIMSL

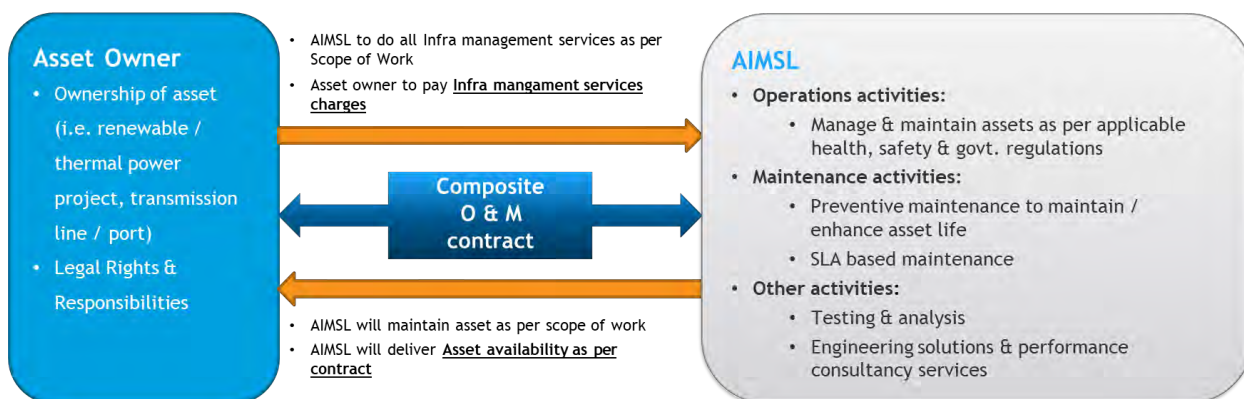
Adani Infrastructure Management Services Limited (AIMSL) has implemented the practices to achieve business excellence by focusing on systematic and structured way of operational & **maintenance that leads Adani portfolio companies towards its asset's performance improvement.** AIMSL is one stop shop for all O&M needs for renewable power plants (Solar & Wind), transmission system & thermal power plants ensuring a very high reliability & availability and leverage tenets of operational excellence to reduce the O&M costs without compromising on the quality.

AIMSL is an integral part of the Adani portfolio's **commitment to O&M excellence and offers an integrated power solution under a single roof** with strong network of engineers and world class project management professionals and O&M experts.

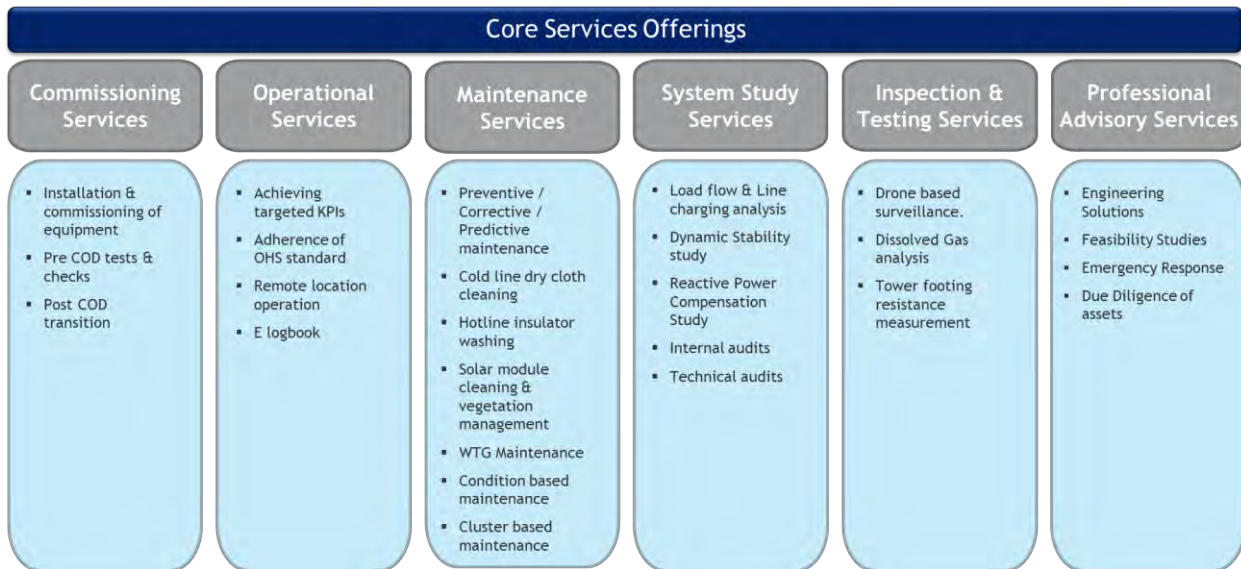
AIMSL has well established systems & processes and is complying with the Integrated Management System (IMS) certification in ISO 9001, ISO 14001, ISO 45001, ISO 50001, ISO 55001, ISO 27001, ISO 27031, ISO 22301 & ISO 26000, 5S (AWMS - Adani Workplace Management System), lean six sigma, Adani Business Excellence Model (ABEM). AIMSL has adopted the world class technologies to upkeep the system availability & performance.

AIMSL business model offers in-house design & value engineering capability to ensure long-lasting world-class asset and consumer experience to the Adani Portfolio. It offers services in the areas of Operations & Maintenance Services, O&M Advisory Services, cluster based maintenance van, technical partnerships for different one time critical testing etc. to name a few.

AIMSL business model aims to create value for clients by leveraging economies of scale, deploying state of the art technological solutions, innovative business excellence strategies coupled with KPI based outsourcing.



AIMSL is the Centre of Excellence for providing Infrastructure Management Solutions and provides range of services across the platform,



Currently, AIMSIL has a total team of 128 experts providing these services and the team has vast experience in all aspects of infrastructure projects from concept to commissioning.

AIMSL O&M Capabilities:

Harnessing Innovation & Technology to Drive Excellence:

- Drone Inspection for Asset Maintenance. Usage of drones through Light Detection and Ranging (LiDAR) method
- Thermography measurement and analysis of assets
- Automatic Power Factor Correction (APFC) at Mahendragarh HVDC
- Solar Projects Installation for lower carbon footprint & reducing auxiliary power consumption cost
- Emergency Restoration System (ERS) technique for early operationalisation and higher reliability of systems
- SCADA for real-time data gathering, monitoring and analysis
- GPS and Surveillance camera system
- Use of Semi-Automatic Machines in solar power plants for reduction in water consumption
- Fully automated module cleaning systems through robots
- Certified for Zero Waste to Landfill (ZWL)

Use of Technology for Preventive Maintenance

- Use of Drones for Coal PV Measurement, Chimney inspection, IDCT internal & external inspection, Coal bunker internal inspection
- Deployment of Honeywell Plant Information Management System (PIMS) in cloud
- Setup and develop Adani Data Analytics Center of Excellence (ACoE) for capability development and propagate use of data analytics across thermal power business.
- Thermo-vision Camera for Stockpile Temperature Monitoring

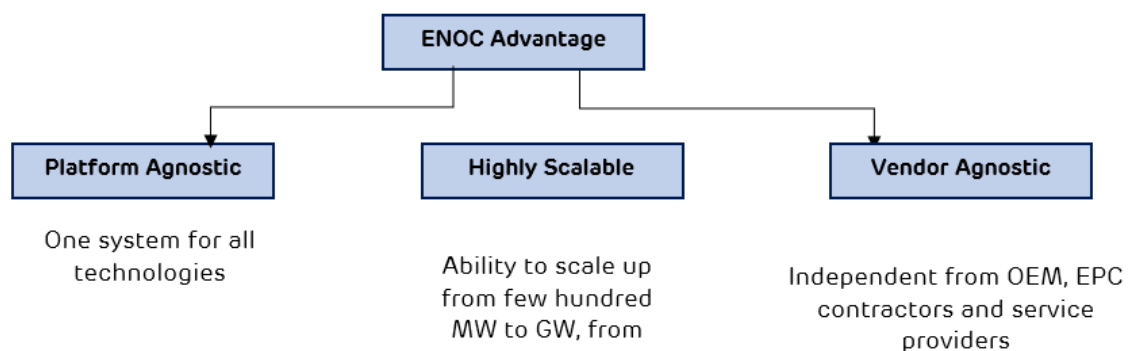
- Improving plant performance by deploying Data Analytics and associated analytical tools.
- Underwater sea water pipeline inspection & desilting by Robot

AIMSL handles the technology enabled operational excellence for Adani portfolio power plants where it centrally monitors all thermal stations, renewable power plant and substation assets from a single location. It has a cluster based operating model enabling smooth governance and efficient utilization of manpower and spares.

Operation through Energy Network Operation Centre (ENOC):

Energy Network Operation Centre (Adani-ENOC), a cloud-based platform which adopts machine learning, uses drones for monitoring project progress and digital asset mapping, and geospatial technologies for surveys and others. It enables the businesses to get the following key outcomes:

- Centralized monitoring of all thermal stations, Renewable power plant and transmission assets from a single location
- Cluster based operating model enabling smooth governance and efficient utilization of manpower and spares: Personnel spread across Central office → Cluster teams → Site personnel
- Remote management of all sites from single location - to help rapid scale-up of capacity
- Cutting-edge advanced analytics cloud-based platform
 - Provides predictive maintenance inputs reducing frequency of scheduled maintenance and reduced mean time between failure
 - Automatically recommends smart corrective actions in real time reducing mean time to repair
 - Detailed insights into plant and portfolio performance with access across multiple devices /locations
 - Backend machine learning and artificial Intelligence for continuously improving insights



ENOC Capabilities

ENOC as a Gateway: Facilitating Intelligent & Data Driven Decision making

- Deliver crisp Business MIS to all users
- Creation of CXO dashboards with management takeaways
- Automation of Energy Business flash report & internal MIS

- Creation of Products/Asset Database
- Creation of FIR incident database & track its RCA/CAPA
- Implementation of APM for asset health monitoring and generating advance warnings
- Implementation of RCM to move from time-based maintenance to need based maintenance thereby increasing longevity
- Implementation of AI/ML based model utilizing predictive analytics
- Tracking of unmanned asset security through GIS

Optimization of O&M costs through ENOC

- Predictive Analytics alerts for equipment maintenance planning
- Tracking of Inventory through Analytics
- Monitoring of MTTR and its benchmarking
- Monitoring and tracking of APC and generate exceptions
- Implementation of closed loop control health monitoring

Leveraging inhouse/ external expertise:

- Devise method to highlight critical Alarms and issues to inhouse SMEs and tracking of the same till closure
- Create mechanism to connect to internal expert or External expert/OEM

Effective Disaster Management Response

- Implementation of EWS (Early Warning System)
- Devise methodology to coordinate during disaster

AIMSL remains a critical part of Adani Portfolio to operate and maintain assets in the energy and utility sectors in a world class manner through development of inhouse technology and processes to enhance the O&M protocols, automate maintenance issue identification and activation of remedial actions, and deploy latest technologies to improve the efficiency of our existing assets and new assets through use of learning across the portfolio companies.