

Government of India
Ministry of Commerce & Industry
Directorate General of Foreign Trade
Udyog Bhawan, New Delhi -110011

F.No. 18/17/2020-21/ECA-I

Date of Order: 20.05.2022

Date of Dispatch: 20.05.2022

Name of the Applicant:

Torrent Power Limited, Torrent House, Off
Ashram Road, Ahmedabad, Gujarat -380009

IEC No.

0806010487

Order reviewed against:

Order-in-Original No. 08/37/21/ 415/ AM16
dated 07.09.2020 passed by Additional DGFT,
Ahmedabad

Order-in-Appeal passed by:

Santosh Kumar Sarangi, DGFT

Order-in-Appeal

Torrent Power Limited, Ahmedabad (here-in-after referred to as the 'Appellant') filed an appeal dated 12.10.2020 under Section 15 of the Foreign Trade (Development & Regulation) Act, 1992 as amended (here-in-after referred to as 'the Act') against Order-in-Original (OIO) dated 07.09.2020 passed by Additional DGFT, Ahmedabad imposing a penalty of Rs.50,52,59,535/- in addition to payment of Customs Duty (duty saved value utilized) on the Petitioner for misutilisation of Export Promotion Capital Goods (EPCG) scheme.

Facts of the case:

2.1 The Petitioner as Common Service Provider obtained 18 EPCG Authorisations under EPCG scheme from the office of the Joint DGFT, Ahmedabad for import of capital goods to be used for "Distribution purpose for the Town of Export Excellent" such as Agra, Ahmedabad etc. . The export items are leather products and textiles products. The details of EPCG authorizations are given in the following table:

Sl.No.	EPCG Authorization No. and Date	Duty saved value	FOB Value
1	0830006645 dt. 08.10.2014	1,48,71,599/-	8,92,29,594.00
2	0830006646 dt. 07.10.2014	27,45,357/-	92,19,594.00
3	0830006684 dt. 16.10.2014	6,08,89,683/-	36,53,38,098.00



4	0830007002 dt. 18.02.2015	1,30,18,248/-	7,81,09,488.00
5	0830007001 dt. 18.02.2015	82,48,895/-	4,94,93,370.00
6	0830006999 dt. 18.02.2015	4,06,75,171/-	24,40,51,026.00
7	0830007027 dt. 26.02.2015	74,17,236/-	4,45,03,416.00
8	0830007053 dt. 10.03.2015	5,72,10,843/-	34,32,65,058.00
9	0830007184 dt. 07.05.2015	27,25,910/-	1,63,55,460.00
10	0830007182 dt. 07.05.2015	2,11,97,786/-	12,71,86,716.00
11	0830007186 dt. 07.05.2015	7,01,15,410/-	42,06,92,460.00
12	0830007725 dt. 05.11.2015	6,04,61,523/-	36,27,69,138.00
13	0830007726 dt. 05.11.2015	2,89,84,494/-	17,39,06,964.00
14	0830007727 dt. 05.11.2015	30,21,600/-	1,81,29,600.00
15	0830007846 dt. 18.12.2015	1,23,07,898/-	7,38,47,388.00
16	0830008034 dt. 17.02.2016	8,46,90,783/-	50,81,44,698.00
17	0830008035 dt. 17.02.2016	39,83,885/-	2,39,03,310.00
18	0830008036 dt. 17.02.2016	1,26,93,214/-	7,61,59,284.00
Total		50,52,59,535	3,02,4304,662

2.2 The export obligations are to be completed within a period of 6 years from the date of issue of the Authorizations. The Appellant got all the 18 EPCG Authorizations invalidated and procured the capital goods by paying excise duty. It submitted Terminal Excise Duty (TED) claims in respect of all authorizations to RA, Ahmedabad and got TED benefits of Rs.1,51,986/- in respect of one EPCG Authorization No.0830006645 dated 08.10.2014.

3.1 DRI informed RA, Ahmedabad vide their letter dated 21.01.2019 that the Petitioner obtained 18 EPCG Authorizations in violation of extant provisions, utilized them, but did not fulfil export obligations. RA, Ahmedabad issued a Show Cause Notice dated 26.12.2019 to the Petitioner for action under Sections 9(4) and 11(2) & (3) of the Act and Rule 7(1) of Foreign Trade (Regulations) Rules, 1993. It was also granted personal hearing on 19.02.2020.

3.2 The Adjudicating Authority observed that the Petitioner obtained EPCG Authorizations in violations of extant provisions and claimed TED which were not allowed and that it misutilised EPCG Scheme and wilfully defaulted, deserving themselves for action, and imposed a penalty of Rs.50,52,59,535/- in addition to custom duty (duty save value utilized) and interest thereon vide OIO dated 07.09.2020.

4.1 The Petitioner submitted an appeal dated 12.10.2020 to the undersigned. It submitted that :





(i) DGFT issued Notification No. 7 (Re-2014)/2009-2014/2009-2014 dated 18.04.2013 which provides for the following:-

Authorization under EPCG Scheme shall not be issued for import of any Capital Goods (including Captive plants and Power Generator Sets of any kind) for

- a. Export of electrical energy (power) ,
- b. Supply of electrical energy (power) under deemed exports ,
- c. Use of power (energy) in their own unit, and
- d. Supply/export of electricity transmission services.

DGFT further issued a Policy Circular No. 15/2015-20 dated 04.01.2019 clarifying that the transmission of electricity and the distribution of electricity is nothing but the same process of "supplying of the electricity" from one point to the other,

(ii) it obtained 18 EPCG Authorizations for import of various Capital Goods for distribution of energy (power) during the period October 2014 to February 2016. The nature of Capital Goods are indeed required for distribution of electricity,

(iii) it, in the covering letter, while making the application for EPCG Authorization, indicated that the Capital Goods were required for power distribution,

(iv) based on above applications, RA Ahmedabad issued 18 EPCG Authorizations for Custom Duty saved amount of Rs. 50,52,59,535/-,

(v) it applied for invalidation of EPCG Authorizations and got them invalidated,

(vi) it procured Capital Goods from domestic market by invalidating the said EPCG Authorizations and installed for the purpose of distribution and paid Central Excise Duty to the domestic suppliers,

(vii) supply of Capital Goods by domestic suppliers against EPCG authorizations is considered as deemed export in terms of Para 8.2 of FTP and Appellant being recipient of capital goods were entitled for deemed export benefit, one benefit being refund of Terminal Excise Duty in terms of Para 8.3 of FTP and thus, Appellant applied for TED refund claims. Out of various applications only one application, TED application No. 08/40/083/00244/AM17, amounting to Rs. 1,51,986 /- was granted and the balance applications were rejected by RA, Ahmedabad.

(viii) it after issuance of Circular No. 15/2015-20 dated 04.01.2019 and letter dated 09.01.2019, without disputing the same, had surrendered the EPCG Authorizations and also returned the TED refund amounting to Rs. 1,51,986/- along with interest,

(ix) DRI, based on its investigation, intimated RA Ahmedabad that Capital Goods for production, generation, supply, transmission of energy (power) is not eligible for EPCG Authorization in terms of Notification No. 7 dated 18.04.2013,

(x) RA Ahmedabad without waiting for conclusion of investigation of the DRI issued Show Cause Notice dated 26.12.2019. RA Ahmedabad issued Order-in-Original dated 07.09.2020 without appreciating the submissions made by the Appellant imposed a penalty of Rs. 50,52,59,535/- in addition to payment of Customs Duty saved and interest thereon,



(xi) Notification No. 07 (RE-2013)/2009-2014 dated 18 April 2013 does not restrict issue of EPCG Authorization in respect of Capital Goods for distribution of Electricity. The only restriction is with regards to Capital Goods for generation and transmission of Electricity,

(xii) DGFT vide Policy Circular No. 15/2015-20 dated 04.01.2019 clarified that import of capital goods required for distribution of electricity in energy (power) under EPCG scheme is not permitted. Power to amend the Foreign Trade Policy is vested only with Central Government and a Circular cannot curtail the provisions of FTP. Further, the Circular dated 04.01.2019 cannot be applied retrospectively to EPCG Authorisations issued and utilized prior to 04.01.2019,

(xiii) Adjudicating Authority (ADG, Ahmedabad) wrongly applied Policy Circular No. 15 dated 04.01.2019 in the Appellant's case,

(xiv) it did not avail any benefit either under Customs or under Excise in respect of EPCG Authorisations in question and it procured the goods locally on payment of applicable excise duties,

(xv) the local supplier did not avail any duty benefit in respect of various inputs procured for manufacturing the capital goods supplied to the appellants. The local supplier procured duty paid inputs which were used in the manufacture of the said Capital Goods and they have also not availed any deemed export benefits of the excise duty paid on the capital goods,

(xvi) the Appellant on its own applied for clarification to the RA, Ahmedabad and DGFT, Delhi. Further, once the Policy Circular No. 15/2015-2020 dated 04.01.2019 was issued clarifying the amendment, the Appellant, without disputing the matter further, on its own surrendered all the EPCG Authorisation along with TED refund availed by it,

(xvii) it has not violated the provisions of FTP, FT(D&R) Act, and FT(Regulations) Rules. It has neither evaded the duty nor intended to evade duty. Therefore penalty should not be imposed on it,

(xviii) there is complete absence of mens rea in the present case and therefore the imposition of penalty on the Appellants vide the impugned order cannot be sustained and needs to be quashed.

4.2 The Appellant has prayed for:

- (i) a stay of the operation of OIO dated 07.09.2020 and waiver of pre-deposit of duty, interest and penalty and stay to their recovery pending disposal of the appeal,
- (ii) and setting aside OIO dated 07.09.2020.

4.3 Subsequently the Appellant vide its letter dated 01.04.2022 furnished synopsis of the case and the Hon'ble Gujarat High Court's judgment dated 16.03.2022 in Civil Application No. 13513 of 2020 titled Torrent Power Ltd vs. UOI. The Court



rendered the circular dated 4.1.2019 as ultravires of para 5.01(g) of the FTP 2015-2022/2009-2014 read with the provisions and the scheme of the Electricity Act and declared retrospective operation of this circular is manifestly arbitrary and violative of Articles 14 & 19 of the Constitution.

5. RA, Ahmedabad has furnished para-wise comments on the appeal vide their email dated 21.01.2021 wherein they have stated that :

- (i) the import of Capital Goods under EPCG Scheme for production generation/supply/transmission of energy (Power) by virtue of DGFT Notification No. 07 dated 18.04.2013 is not permitted. Despite this policy provision, the Appellant obtained EPCG Authorisations and invalidated them by mis-representing and mis-declaration in the applications and this act of concealment of facts and circumstances shows the malicious and malafide intention on the part of Appellant,
- (ii) RA, Ahmedabad issued EPCG Authorisations and invalidation letters to the Appellant only after the applications made by the Appellant stated that it rendered the services of 'Common Service Provider',
- (iii) the Authorisations were availed by the Appellant and the physical ownership of the Capital Goods vested with the Appellant, it is factual and evident since the benefits arising from the Authorisations as well as invalidation letters have been subsequently availed and utilized by the Appellant,
- (iv) all the Authorisations were utilized by the Appellant by procuring the Capital goods from the domestic market by subsequently requesting RA, Ahmadabad letters of invalidation and the Export Obligation under the said EPCG Authorisations were not fulfilled by the Appellant,
- (v) the application of TED refund claims were rejected by RA, Ahmedabad as the malafide and malicious intention of the Appellant were caught and noticed by them. The TED application which was refunded alongwith interest by the Appellant was only done after the malice on their part was brought to notice by RA, Ahmedabad,
- (vi) Policy Circular No. 15 dated 14.01.2019 is merely a clarification / amplification or explanation of already existing Policy Provisions,
- (vii) RA, Ahmedabad issued SCN dated 26.12.2019 with due consideration of power vested under FT(D&R) Act, 1992. RA, Ahmedabad gave numerous opportunities and issued repeated reminders to appear before them. OIO dated 07.09.2020 was passed after giving repeated opportunities of personal hearing despite clear instance of malice were present in the case. RA, Ahmedabad was very liberal and just while passing the OIO. Imposition of penalty and recovery of Customs Duty saved and interest thereon was /is well within the rights of Adjudicating Authority.

6.1 The Appellant was granted personal hearing on 04.04.2022 which was attended by its Advocates Shri Viswanathan T and Shri Manish Jain. The Advocates, in their oral



submissions, submitted that DGFT issued a circular dated 04.01.2019 verifying that EPCG Scheme does not permit power transmission as well power distribution. Based on this circular, adjudication proceedings were initiated against the Appellant for imposition of penalty on the ground that despite knowing the fact EPCG Scheme does not permit transmission and distribution of power, and penalty was imposed. The EPCG scheme does not specifically prohibit distribution of power. The Appellant is very much aware that generation, transmission and distribution are different and Electricity Act also deals all three separately. Further, a circular in 2019 cannot be basis for misinterpretation in 2014 by the Appellant. Appellant clearly indicated in its applications that it would import capital goods for distribution of electricity. The Appellant challenged the circular dated 04.01.2019 in the Hon'ble Gujarat High Court. The Court held that circular cannot be applied retrospectively and amend the policy. The Court observed that transmission and distribution are separate activities for the purpose of Electricity Act and they are distinctly understood by business involved in supply of electricity. The Advocates also submitted that the Appellant is not interested in getting back the Authorizations already surrendered.

6.2 Shri R. Muthuraj, ADG, Ahmedabad was also present during the hearing. He informed that DGFT issued Policy Circular date 04.01.2019 clarifying the issue and the same is final. The Reviewing Authority asked the Advocates to submit an affidavit from local suppliers regarding non-availment of any benefits/incentive under FTP (advance authorization) from any DGFT office since the Appellant had obtained the goods domestically against invalidation from domestic suppliers. RA, Ahmedabad vide its letter dated 22.04.2022 informed that the Appellant had submitted affidavits from all the local/indigenous suppliers to the effect that they have not claimed/availed any benefit/incentive under FTP against supplies effected to the Appellant.

7.1 I have gone through the records and submission made. The DGFT had issued a notification No 07 (RE-2013)/2009-2014 dated 18.4.2013 amending para 5.1 of Foreign Trade Policy (FTP) 2009-2014 which had the effect the prohibiting import of capital goods for production/transmission of energy (power). The licenses issued at Sl No 01 to 08 in the table at para 2.1 are governed by this Notification and other extant policy and procedure. The new Foreign Trade Policy (FTP) 2015-20 came into effect from 1.4.2015. The said policy prohibited issuance of authorization under EPCG scheme for the following [para 5.01(g)] :-

- (a) Export of electrical energy (power),
- (b) Supply of electrical energy (power) under deemed exports,
- (c) Use of power (energy) in their own unit, and
- (d) Supply/export of electricity transmission services.

Licenses issued at Sl No 9 to 15 are covered under this policy provision and other extant rules and procedure. Another amendment to the policy was made vide notification No



35/2015-2020 dated 29.1.2016 which had the effect of prohibiting issuance of EPCG authorization for generation/transmission of power. The licenses issued at SI No 16 to 18 are covered under this policy/notification and other extant rules and procedures.

7.2 Subsequently, a policy circular was issued in 2019 (4th January, 2019) clarifying that the transmission of electricity and the distribution of electricity is nothing but the same process of supplying of the electricity from one point to another. The earlier policy and the notification making amendments to the policy did not refer to "distribution", it was only in 2019 that a clarificatory circular was issued explaining that the intent of DGFT was that transmission and distribution imply the same process. It is also on record that in the application for EPCG authorization, the Appellant had indicated that it was applying for distribution purpose. The Hon'ble High Court of Gujarat in its judgment dated 16.3.2022 in Civil Application No 13513 of 2020 filed by the Appellant has correctly observed that transmission and distribution are separate activities as per the Central Electricity Act, 2003. The Directorate has also decided not to appeal against the said judgment of the Hon'ble Gujarat High Court. Therefore, the contention of the firm that it had indicated that the EPCG authorizations being applied were for distribution purpose for town of export excellence is correct and that distribution of electricity was not a prohibited activity for issuance of EPCG authorization before the policy circular No 15 dated 04.01.2019 was issued. The licenses were issued to the firm between 2014 to 2016 before this policy circular was issued.

7.3 The contention of the Appellant that it had not used the EPCG authorization is, however, incorrect. The Appellant had got the EPCG authorization invalidated for domestic procurement and had procured the necessary goods from domestic suppliers. Subsequently, it had claimed TED refund against those supplies and had received TED refund of Rs. Rs.1,51,986/- from RA, Ahmedabad against one EPCG authorization which was subsequently returned with interest. RA, Ahmedabad vide their letter 22.4.2022 has also informed that the Appellant has submitted affidavit from all the local/indigenous supplier to the effect that they have not claimed/availed any benefit/incentives under FTP against supplies made to the Appellant. The Appellant in the personal hearing held on 04.04.2022 has also stated that they have are surrendered the 18 EPCG authorizations and, therefore, the question as to whether the export obligation against the 18 EPCG authorizations mentioned at para 2.1 has been fulfilled does not arise.



8. I, therefore, in exercise of powers vested in me under Section 16 of the Act pass the following order:

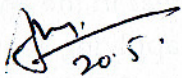
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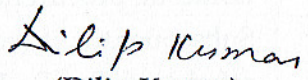
The Appeal dated 12.10.2020 is admitted. Order-in-Original No. 08/37/21/415/AM16 dated 07/09/2020 is set aside.




(Santosh Kumar Sarangi)
Director General of Foreign Trade

Copy To:

- (1) Torrent Power Limited, Torrent House, Off Ashram Road, Ahmedabad, Gujarat - 380009.
- (2) Addl. Director General of Foreign Trade, 3rd Floor, HUDCO Bhawan, Ishwar Bhawan Road, Navrangpura, Ahmedabad-380 009.
- (3) Policy - V Section. This is with reference to their OM No.18/17/AM-19/P-5(Pt) dated 09.05.2022.
- (4) CEIB, 8th Floor, 'B' Wing, Janpath Bhawan, Janpath, New Delhi -110001
- ✓(5) DGFT Website.


(Dilip Kumar)
Dy. Director General of Foreign Trade