

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

F.No. 18/10/2022-23/ECA.I

Date of Order: 30.08.2022

Date of Dispatch: 31.08.2022

Name of the Applicant:

Neccon Power & Infra Limited, A T Road,
Jorhat - 785001, Assam

IEC No. :

1497000629

Order reviewed against:

Order-in-Original No. 16/21/021/00001/
AM18/1959 dated 30.03.2022 passed by
Addl. DGFT, Guwahati

Order-in-Appeal passed by:

Santosh Kumar Sarangi, DGFT

Order-in-Appeal

Neccon Power & Infra Limited, Jorhat (here-in-after referred to as the 'Appellant') filed an appeal dated 12.05.2022 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 No. 16/21/021/00001/AM18/1959 dated 30.03.2022 (OIO) passed by Adjudicating Authority (Addl. DGFT, Guwahati) imposing a penalty of Rs. 46,81,35,300/- to be paid within 45 days and if paid thereafter applicable simple interest of 18% per annum for the delayed period beyond 45 days also should be paid in addition to this penalty amount of Rs. 46,81,35,300/- .

Brief Facts of the Case

2.1 The Appellant obtained an Advance Authorization No. 1410000583 dated 12.06.2017 for a CIF value of Rs. 46,81,35,300/- (US\$ 71,910,118) with an obligation to supply ACSR conductors to the project specified in the project authority certificate given by PGCIL, Delhi for an FOB value of Rs.53,87,05,155/- (US\$ 8,275,050) within a period of 18 months from the date of issue of said authorization. As per conditions of the Authorisation, the Appellant was required to submit the prescribed documentary evidence of having fulfilled its export obligation (EO).



2.2 The Petitioner submitted documents to RA, Guwahati for redemption of BG/LUT. RA, Guwahati, on examination of documents, noticed that goods were supplied to various third parties instead of PGCIL who had given the contract and Project Authority certificate and therefore sought a clarification from the Appellant vide the letter dated 08.09.2020. The Appellant on 29.09.2020 submitted material inspection and clearance certificate issued by PGCIL. RA, Guwahati, therefore asked the Appellant to submit original supply invoice evidencing supply to project authority with Advance Authorisation number duly endorsed by the jurisdictional Central Excise. In response, the Appellant submitted copies of tax invoices with Advance Authorisation number stamped and attested by state GST authorities. RA, Guwahati intimated the Appellant that supply invoices attested by State GST authorities, that too three years after supply of goods cannot be considered for discharge of EO under Advance Authorisation since only supply invoices duly endorsed by jurisdictional Central Excise/Customs authorities at the time of supply evidencing supply of goods against Advance Authorisation alone could be considered for EO fulfillment and it was also informed to the Appellant that supplies had been effected to various third parties instead of the project authority and directed the Appellant to regularize the case by paying Customs duty and applicable interest.

2.3 The Appellant neither submitted the prescribed documents nor regularized the case by paying Customs duty and applicable interest. Adjudicating Authority issued Show Cause Notice (SCN) dated 29.04.2021 for imposing fiscal penalty under Section 11 of the Act on the Appellant and its Directors and placing the Appellant in Denied Entity List under Rule 7(1)(k) of Foreign Trade (Regulation) Rules, 1993, as amended. The Appellant was also granted personal hearing. The Appellant sought extension of time twice, to reply the SCN which were granted, but, the Appellant failed to reply even after two weeks of expiry of second extension. The Adjudicating Authority passed OIO dated 17.06.2021 imposing a penalty of Rs. 46,81,35,300/-.

2.4 The Appellant filed Writ Petition (Civil) No. 3568/2021 before the Hon'ble Guwahati High Court against the Order-in-Original dated 17.06.2021. The Hon'ble Court vide its order dated 06.08.2021 set aside the Order-in-Original and allowed the Appellant two weeks time to submit reply to SCN dated 29.04.2021 and directed the Adjudicating authority to consider the reply and pass appropriate speaking order after hearing the Appellant. The Adjudicating Authority also informed by email that it may avail the opportunity of PH within the two weeks time granted by the Court.

2.5 The Appellant submitted reply dated 17.08.2021 to SCN and sought personal hearing in second week of September, 2021. However, the Adjudicating Authority granted personal hearing on 27.08.2021 or 28.09.2021 or 30.08.2021 as the High Court



of Guwahati in its order had granted two weeks time to pass appropriate speaking order after hearing the Appellant. The Advocate of the Appellant attended the hearing on 30.08.2021. He asked for another opportunity of personal hearing in next month and intimated that invoices submitted were certified by GST authorities at the time of supply itself and not after 3 years of supply as stated in SCN. He also informed that documents were submitted as per Public Notice No. 63 dated 22.02.2018 and also reiterated the submissions made in the reply to SCN.

2.6 The Adjudicating Authority observed that the Appellant did not fulfill the export obligation and only tried to masquerade the domestic sales / supplies done to various third parties unconnected to the Advance Authorisation as fulfillment of Export Obligation, without getting the goods examined and valued by Customs Authorities and get the Advance Authorisation number endorsed after valuation and examination in sale / supply invoices at the time of supply to connect its sales / supplies to the Advance Authorisation and obligation fulfillment therein. The Adjudicating Authority therefore passed Order-in-Order dated 30.08.2021 imposing a penalty of Rs. 46,81,35,300/- to be paid within 45 days and if paid thereafter applicable simple interest of 18% per annum for the delayed period beyond 45 days also should be paid in addition to this penalty amount of Rs. 46,81,35,300/- .

3. The Appellant submitted an appeal dated 27.09.2021 against the Order-in-Original dated 30.08.2021 praying to set aside OIO dated 30.08.2021. RA, Guwahati vide their e-mail dated 15.11.2021 furnished para-wise comments to the Appeal dated 27.09.2021. The Appellant was granted personal hearing on 23.12.2021 which was attended by Shri Sunny Nandy, Advocate and Shri Pradeep Khaitan.

4. The Appellate Authority after going through the facts and records carefully, remanded the case to RA, Guwahati for denovo consideration vide the Order-in-Appeal dated 21.01.2022 while observing the following:

- i. The supplies in the absence of Customs examinations and assessment would not be eligible for considerations as deemed export supply. Examination and valuation of supply goods at the time of supply and so endorsed alone can be considered and it cannot be substituted by post supply attestation by State GST authorities. Subsequent to introduction of GST on 01.07.2017, the Customs examinations and valuation of goods is being done by hinterland Customs formation instead of earlier practice of Central Excise Authorities doing the Customs Duties in hinterland areas. The supplies made by the Appellant were not examined and assessed by Customs authority. The parties to whom the actual supplies were made are not even endorsed as supporting manufactures in the Advance Authorisations. Therefore, the supplies made by the Appellant cannot be reckoned for fulfillment of EO of the Advance Authorization,



ii. The Export Obligation period expired on 12.06.2019. The Appellant submitted the documents after two years and two months of the expiry of Authorisation whereas the documents were required to be submitted within two months of expiry of Authorization. The Appellant has submitted payment certificate (Appendix 7D) issued by Project Authority which in itself does not evidence fulfillment of export obligation. The Appellant may have supplied the goods to various firms instead of PGCIL which had given the order on the instructions of PGCIL as claimed by the Appellant. The prescribed documents required for fulfillment of the conditions of export obligation under the Advance Authorization have not been submitted by the Appellant. However, the Adjudicating authority did not provide sufficient time to the Appellant to present the case in the personal hearing. The request of the Appellant to grant time till middle of September, 2021 to furnish additional documents was not accepted by the Adjudicating Authority. The OIO dated 30.08.2021 passed by the Adjudicating Authority indicated undue haste in adjudication.

5. The Adjudicating Authority (Addl. DGFT, Guwahati) thereafter granted personal hearing to the Appellant on 29.03.2022 as per its convenience and passed an OIO dated 30.03.2022. The Adjudicating Authority observed the following:

- (i) All the 158 Invoices have not been signed by the unit which received the supplies and the Jurisdictional excise/GST/Customs authorities too haven't certified the item of supply, technical characteristics, its quantity, value and date of such supply. Only after RA, Guwahati on 10/02/2021 pointed out this lacuna, the Appellant submitted all the supply invoices attested by State GST authorities without any confirmation regarding item of supply, technical characteristics, its quantity, value and date of supply. Moreover State GST authorities have no locus standii on deemed export matters and in post GST regime such endorsement should be obtained from Customs authorities (in pre GST it was Central Excise authorities who were mandated with this task). Moreover attestation obtained from State GST authority apart being bereft of jurisdiction, also is unacceptable due to the fact that it has been obtained 3 years after supply.
- (ii) The Appellant submitted four sets of same invoices in a span of three years. In first two times the invoices neither had AA number endorsed on it nor had any endorsement by custom/GST. It didn't even have signature of the unit which received the material. Third time the invoices had the Advance authorization number rubber stamped on it and fourth time had additionally attestation of State GST authorities. Even as on date there's no signature of



the unit which received the material. This is the position in the case of all 158 Invoices.

- (iii) Though invoices have been raised in the name of PGCIL the consignees are different like EMC Ltd, Bajaj Electricals, L&T Ltd and signatures in all the invoices are of the same person whose identity is not clear, but being the same signature it clearly shows that it has not been signed by the unit receiving the materials since EMC Ltd, Bajaj Electricals Ltd, L&T Ltd etc. cannot have the same person to sign receipt of the material on their company's behalf. None of the invoices has PGCIL as the consignee. The Appellant had stated before the Appellate authority that all these entities viz L&T-Ltd-Bajaj Electricals, EMC Lid, etc. are PGCIL themselves.
- (iv) The Appellant stated during PH that all its supplies were made within the state, thus SGST is the appropriate assessing authority. If this is factually correct, its a violation of actual user condition since it has imported Aluminum wire rods duty free using Advance authorization for manufacturing conductors at its factory located at Jorhat in Assam and it was supposed to supply "conductors" to PGCIL for a transmission project in Rajasthan. So it's surprising when the Appellant stated that supplies all have been made within one State and it possibly meant that it diverted the raw materials imported duty free elsewhere and supplied materials procured locally in Rajasthan. Since this order is issued without prejudice to any other action that may be taken under any other Act, Rules or Regulations in force, this possible violation to should be taken cognizance by the appropriate authority and investigated appropriately, in due course,
- (v) The Appellant has not fulfilled the Export Obligation cast on it and it only trying to masquerade the domestic sales/supplies done by it to various third parties unconnected to Advance Authorization as fulfillment of Export Obligation, without having got the goods examined for nexus and fair value by Customs Authorities and without getting the Advance Authorization number endorsed after valuation and examination in its sale/supply invoices by Customs at the time of supply, to connect its sales/supplies to the subject Advance Authorization and obligation fulfillment therein.

6 The Adjudicating Authority imposed a penalty of Rs. 46,81,35,300/- to be paid within 45 days and if paid thereafter applicable simple interest of 18% per annum for the delayed period beyond 45 days also should be paid in addition to this penalty amount of Rs. 46,81,35,300/- . He also ordered to put the Appellant or any other connected entity under DEL till payment of penalty.

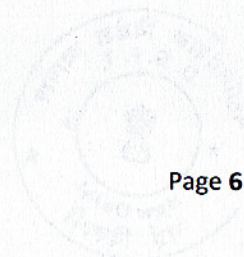


Amr



7.1 The Appellant has submitted an appeal dated 12.05.2022 against the OIO dated 30.03.2022. It has submitted that:

- (i) It submitted Tax Invoices duly certified by the GST authority certifying the item of supply, technical characteristics, its quantity value and date of such supply as per DGFT Public Notice No. 63 dated 22.02.2018 as supply was made in SGFT regime and there is no existence of Excise authority.
- (ii) Its supply was within the State of Rajasthan and its CGST division is also with the State GST authority and accordingly the Tax Invoices were certified by the State GST authority at the time of supply, proving that state GST authority having the local standi on deemed export matters in conformity to Public Notice No. 63 dated 22.02.2018 and it was certified at the time of supply only not after 3 years.
- (iii) A certificate was also issued by GST Authority stating the supply made to PGCIL with their GST number with details of Supply Invoices. Its all supply invoices were attested by GST authority and GST portal also shows GST number of PGCIL (Project Authority) only and the goods were supplied to implementing agencies as per instructions of PGCIL (Project Authority). PGCIL has already issued a certificate for the same and also Dispatch Instructions were issued by PGCIL for delivery of goods to implementing agencies.
- (iv) It has already submitted Material Receipt by PGCIL the Project Authority duly signed by the unit receiving the material as per the process followed by the PGCIL already reflecting all 158 Invoices.
- (v) Its material has been supplied within Rajasthan from its manufacturing unit situated in Rajasthan only, as mentioned in the condition sheet of the Advance License Sl. No. 14, its Manufacturing unit Sl. No. 1 &3 are from Rajasthan.
- (vi) Authorization was issued to it at registered office in ASSAM and with factory addressed of Rajasthan duly mentioned in the condition sheet. It imported aluminum in its Rajasthan plant and supply to Project Authority was done from same plant within the state of Rajasthan.



7.2 The Appellant has prayed for :

- a) waiver of the statutory deposit in the instant case and the appeal may be decided without calling for deposit of the statutory Bank Guarantee,
- b) quashing/cancelling/setting aside the impugned order dated 30.03.2022 passed by the ADGFT,
- c) passing appropriate directions to RA, Guwahati restraining from acting any furtherance or from taking any coercive steps against it, till the disposal of the appeal,
- d) deciding the issue as raised in the impugned Show Cause Cum Demand Notice dated 29.04.2021, in the appeal,
- e) removing its IEC from the "Denied Entity List",
- f) direction for EODC/Redemption of its Advance Authorisation No. 1410000583 dated 12.06.2017,
- g) passing any other order or orders as may deem fit and proper.

8.1 The Appellant was granted personal hearing on 03.08.2022 which was attended by Shri P.K. Khetan, Joint Managing Director of the Appellant. He informed that the Appellant submitted GST authorities certified Tax Invoices, material receipt certificate from PGCIL, payment certificate issued in September 2021 after the Order-in- Original dated 31.08.2021 was passed, GST return copy. PN No. 63 dated 22.02.2018 states that GST authority, and not the custom authority, is certifying authority. Further, PN No. 11 dated 07.06.2022 stated that a copy of the invoice or a statement of invoices duly signed by the unit receiving the material certifying the item of supply, its quantity, value and date of such supply is valid for issue of EODC.

8.2 Shri Amit Sharma, Joint DGFT, Guwahati was also present during the meeting. He informed that the license was issued in 2017 under customs notification for physical exports. So the Appellant should have got amended the license under customs notification for deemed exports before the import was made. Since the licence were issued under customs notification, assessment of all goods should be done by customs authority.

9 I have gone through the facts and records carefully. RA, Guwahati vide their e-mail dated 26.07.2022 have furnished comments to the appeal dated 12.05.2022. Based on the orders of Adjudicating Authority and the response of the Appellant, the issues to be decided are as follows:

(a) Whether the required certificate to be obtained from the GST/Customs Authorities have been obtained on time;



(b) Whether the invoices had the advance authorization number endorsed or not;

(c) Whether the supply certificate from PGCIL is to be treated as valid or supplies to EMC Limited, Bajaj Electricals Ltd., L&T Limited etc. should be treated as supplies outside the ambit of advance authorization.

Based on the arguments of the Appellant during the personal hearing and the views submitted by RA, Guwahati, it appears that the Appellant has fulfilled the following:

- (i) Tax invoices have been duly certified by GST authorities within the period of advance authorization. Further, in accordance with the Public Notice No.11/2015-20 dated 7.6.2022, they fulfil the requirements of deemed export.
- (ii) The GST certificate should be treated as valid on account of it being an intra-State supply from the manufacturing plant in Rajasthan to PGCIL location in Rajasthan. As claimed, this was reflected in the condition sheet of advance licence Sl.No.14.
- (iii) The certificate issued by GST Authorities reflects that supplies have been made to PGCIL and details of GST No. and supply invoices are available. The materials were supplied to different implementing agencies of PGCIL as per the instructions of PGCIL has issued the supply certificate as per requirement.

10. I, therefore, in exercise of powers vested in me under Section 15 of the Act pass the following order:

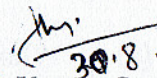
Order

F.No. 18/10/2022-23/ECA.I/259

Dated: 30.08.2022

The O-I-O dated 30.03.2022 is set aside.

The case is remanded to RA, Guwahati to carefully scrutinize the documents submitted by the Appellant towards export obligation fulfillment of the Advance Authorization No 1410000583 dated 12.6.2017 and take an appropriate decision.


(Santosh Kumar Sarangi)

Director General of Foreign Trade

Copy To:

- (1) Neecon Power & Infra Limited, A T Road, Jorhat - 785001, Assam



- (2) Joint Director General of Foreign Trade, 209, R.G. Garuah Road, Guwahati
- 781024.
- ✓(3) DGFT website
- (4) CEIB, New Delhi



Dilip Kumar

(Dilip Kumar)

Dy. Director General of Foreign Trade