

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

F.No. 18/22/2021-22/ECA.I

Date of Order: 21.01.2022

Date of Dispatch: 24.01.2022

Name of the Applicant:

Neccon Power & Infra Limited, AT
Road, Jorhat - 785001, Assam

IEC No. :

1497000629

Order appealed against:

Order-in-Original No.
16/21/021/00001/ AM18/1797 dated
30.08.2021 passed by Addl. DGFT,
Guwahati

Order-in-Appeal passed by:

Shri Amit Yadav, DGFT

APPEAL
Order-in-Review

Neccon Power & Infra Limited, Jorhat (here-in-after referred to as the 'Appellant') filed an appeal dated 01.10.2021 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/AM18/1797 dated 30.08.2021 (OIO) passed by the 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 the 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

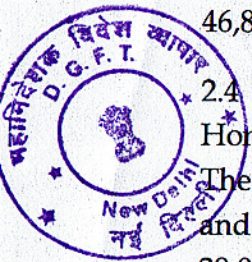


required to submit the prescribed documentary evidence of having fulfilled its export obligation (EO).

2.2 The Appellant 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 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 Excises /Customs authorities at the time of supply evidencing supply of goods against Advance Authorisation alone can 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 imposition fiscal penalty under Section 11 of the Act on the Appellant and its Directors and placing the Appellant in Denied Entity List (DEL) under Rule 7(1)(k) of Foreign Trade (Regulation) Rules, 1993, as amended. The Appellant was also granted personal hearing. The Appellant twice sought extension of time to reply to the SCN which was granted, but, the Appellant failed to reply even after two weeks of expiry of the second extension. The Adjudicating Authority therefore passed an Order-in-Original dated 17.06.2021 imposing a penalty of Rs. 46,81,35,300/-.

2.4 The Appellant filed a 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 its reply to the SCN dated 29.04.2021 and directed the Adjudicating Authority to consider the reply and



pass appropriate speaking orders after hearing the Appellant which was sent by RA, Guwahati by email to the Appellant. The Adjudicating Authority also informed the Appellant by email that it may avail the opportunity of PH within the two week time granted by the Court.

2.5 The Appellant submitted its reply on 17.08.2021 to the SCN and sought personal hearing in the 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 to the Appellant attended the hearing on 30.08.2021. He asked for another opportunity of personal hearing in the next month and intimated that invoices submitted were certified by GST authorities at the time of supply itself and not after 3 years after supply as stated in the 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 the SCN.

2.6 The Adjudicating Authority had observed that the Appellant did not fulfill the export obligation and tried to pass off 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 of 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 a OIO 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/- .

3.1 The Appellant has submitted an appeal dated 27.09.2021 against the OIO dated 30.08.2021. The Appellant has submitted that :

- (i) it was awarded a contract dated 12.08.2016 by Power Grid Corporation of India Limited (PGCIL) for supply to Transmission Line Tower Package TWO4 for 765 KV D/C Ajmer - Bikaner Transmission Line (Part - IV) associated with Green Energy Corridor; ISTS Part-D and thereafter, obtained an Advance Authorisation dated 12.06.2017 for import of Aluminum Wire Road,
- (ii) it had supplied as per provisions of FTP and applied with prescribed documents for EO fulfillment on 10.03.2020 to RA, Guwahati and that it

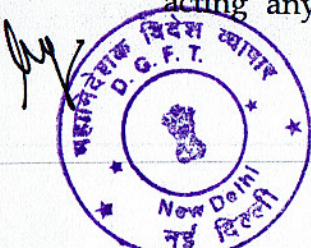


supplied to sub contractors of PGCIL as per its instructions at different sites,

- (iii) it submitted tax invoices with Advance Authorisation number duly stamped and attested by GST authorities evidencing supply of goods vide its letter dated 10.02.2021 and tax Invoices with GST number of the Project Authority have been raised according to GST rules,
- (iv) the e-BRC proves that supply was made to Project Authority and post GST regime Custom authorities have no locus standi in the matter of deemed export,
- (v) it had requested for two months time to produce relevant documents and give a reply to SCN as its Directors were affected with Covid-19 which was allowed by the Adjudicating Authority vide its e-mail dated 18.05.2021 but the Order-in-Original dated 17.06.2021 was passed before the expiry of the period,
- (vi) it had filed Writ Petition in Hon'ble High Court at Guwahati and the Court allowed two weeks time to submit reply to SCN vide its order dated 05.08.2021 and it had submitted its reply to SCN on 17.08.2021,
- (vii) it had asked for personal hearing in the mid of September, 2021 but the request was turned down by the Adjudicating Authority and it was forced to attend personal hearing on 30.08.2021 and the personal hearing was conducted in the most hasteful and hurried manner and the authority was predetermined to decide the issue,
- (viii) it relied upon a Public Notice Number 63 dated 22.02.2018 which the Adjudicating Authority did not even consider and rejected the same,
- (ix) it had sought time to file the documents as per requirement of Appendix-7D as those documents were pending with PGCIL.

3.2 The Appellant has prayed to immediately:

- (i) waive of the statutory deposit in the instant case and the appeal may be decided without calling for deposit of the statutory Bank Guarantee,
- (ii) quash/cancel/set aside the impugned order dated 30.08.2021, passed by the ADGFT in IEC No. 1497000629, forthwith appeal,
- (iii) pass appropriate directions upon the department restraining them from acting any furtherance or from taking any coercive steps against the



- Company, to the impugned order dated 30.08.2021, passed by the ADGFT in IEC No. 1497000629, till the disposal of the instant appeal,
- (iv) decide the issue as raised in the impugned Show Cause Cum Demand Notice dated 29.04.2021, in the appeal,
 - (v) remove the name of the Company form the "Denied Entity List",
 - (vi) pass any other order or orders as may deem fit and proper.

4. The Appellant was granted personal hearing on 23.12.2021 which was attended by Shri Sunny Nandy, Advocate and Shri Pradeep Khaitan. The Advocate informed that the Appellant had asked for time for submission of documents, but RA, Guwahati did not give reasonable opportunity before passing the order. He also informed that the supply invoices submitted were examined by Customs and there is nexus between goods supplied and documents submitted and the value of goods / assessment is based on fair value. He requested that reasonable opportunity may be give for ends of justice.

5.1 I have gone through the facts and records carefully. RA, Guwahati vide their e-mail dated 15.11.2021 have furnished its comments to the Appeal dated 27.09.2021. The supplies in the absence of Customs examinations and assessment are not eligible for considerations as 'deemed export' supply. Examination and valuation of supply goods at the time of supply and duly endorsed can only be considered and it cannot be substituted by post supply attestation by State GST authorities. Subsequent to the introduction of GST on 1st July, 2017, the Customs examinations and valuation of goods is being done by hinterland Customs formation instead of earlier practice of Central Excise Authorities. 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 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 obtained by the Appellant.

5.2 The Export Obligation period expired on 12.06.2019. The Appellant did not submit complete documents even two years and two months after the expiry of Authorisation whereas the documents were required to be submitted within two months of expiry of the Authorisation. 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 instruction of PGCIL as claimed by the Appellant. The prescribed documents required for fulfillment of the conditions of export obligation under the Advance Authorisation have not been submitted by the Appellant. However, the Adjudicating Authority did not provide sufficient time to the Appellant to present its 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.

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

Order

F.No. 18/22/2021-22/ECA.I /443

Dated: 21.01.2022

The Appeal dated 27.09.2021 is admitted and the Order-in-Original No. 16/21/021/00001/AM18 dated 30.08.2021 is rejected. The case is remanded to RA, Guwahati for de-novo consideration.



(Handwritten signature)

(Amit Yadav)

Director General of Foreign Trade

Copy To:

- (1) Neccon Power & Infra Limited, A T Road, Jorhat - 785001, Assam
- (2) Addl. Director General of Foreign Trade, 209, R.G. Garuah Road, Guwahati - 781024.
- ✓ (3) DGFT website
- (4) CEIB, New Delhi

(Handwritten signature)

(Dilip Kumar)

Dy. Director General of Foreign Trade