

## Circular imposing new restriction is ultra-vires and retrospective operation of such circular is manifestly arbitrary - Gujarat HC

4 May 2022



## Summary

The Gujarat High Court (HC) has held that circular issued to impose new restriction under the Export Promotion Capital Goods Scheme (EPCG)<sup>1</sup> is ultra vires. It further stated that transmission and distribution are distinct activities and the impugned circular clarifying that transmission and distribution are one and the same cannot be held as valid and legal. When the EPCG licenses were granted to the petitioner based on their disclosure that the capital goods will be used in distribution of electricity, they cannot now be put to prejudice by issuing retrospective circular. Therefore, the retrospective operation of such circular is manifestly arbitrary and violative of Articles 14 and 19(1) (g) of the Constitution.

## Facts of the case

- The petitioner<sup>2</sup> is engaged in generation, transmission and distribution of electricity.
- The petitioner had applied for the EPCG license for import of capital goods which would be used for power distribution. Based on the applications filed, the Directorate General of Foreign Trade Policy (DGFT) granted the EPCG licenses as well as the invalidation letters from time to time.
- One refund was sanctioned, and the petitioner was informed that approval has been withdrawn for future refund application for terminal excise duty in light of a notification.
- Thereafter, the DGFT issued circular<sup>3</sup> clarifying that transmission and distribution of electricity constituted the same process of supply of electricity. Hence, benefit of import of capital good used in distribution of power is not allowed under EPCG scheme.
- Therefore, the petitioner surrendered all its EPCG licence along with one refund received and interest and requested for release of bank guarantees.
- However, a Show Cause Notice (SCN) was issued by the DGFT asking the petitioner to show cause as to why the EPCG authorisations should not be cancelled ab initio and why penalty should not be imposed for submitting false and incorrect declaration/undertaking in their EPCG applications.
- The DGFT rejected the submissions made by the petitioner and passed the order that it had mis-utilised the EPCG scheme and wilfully defaulted and imposed penalty.
- Therefore, the petitioner filed present writ before the HC<sup>4</sup> challenging the impugned circular.

## Gujarat HC observations and ruling<sup>5</sup>:

- **Transmission and distribution of power are different activity:** The term transmission and distribution of electricity are separately defined as well as governed by different statutory provisions and required separate license. Therefore, HC observed that both

<sup>1</sup> provided under the Foreign Trade Policy (FTP)

<sup>2</sup> Torrent Power Ltd

<sup>3</sup> dated 4 January 2019

<sup>4</sup> R/Special Civil Application No. 13513 Of 2020

<sup>5</sup> R/Special Civil Application No. 13513 Of 2020 order dated 16-03-2022

transmission and distribution are different activities and hence the impugned circular clarifying that transmission and distribution are one and the same cannot be held as valid and legal.

- **Allegation of misdeclaration not acceptable:** The EPCG licenses were issued to the petitioners in full light of the fact that the capital goods were to be used in distribution of electricity. Thus, the allegation of misdeclaration against the petitioner does not merit acceptance. Thus, the petitioner cannot now be put to prejudice for the past transactions by issuing a retrospective circular. Such retrospective circular apart from being legally fallacious is also manifestly arbitrary and violative of Articles 14 and 19(1)(g) of the Constitution in so far as it operates retrospectively.
- **Retrospective amendment through circular cannot take away vested right:** The policy could not have been retrospectively amended by the government without there being any express power in this regard and that in this case the retrospective amendment of policy cannot take away vested rights of the exporters.
- **Amendment in policy cannot take away the vested rights of exporter:** If some vested rights have accrued in favour of the exporter who achieved the target stipulated in the scheme and thereby become eligible for the benefit cannot be taken away by subsequent retrospective amendment.
- **Retrospective amendment through circular held ultra vires:** The HC observed that distribution of electricity is not included in

prohibited list of activities<sup>6</sup> and in public notice<sup>7</sup>. Distribution word was only mentioned in the circular. The HC also place reliance on a judgement<sup>8</sup> held that retrospective amendment which does not remove the lacuna which it intended to remove, but merely legislates to impose a new burden has also been held to be unconstitutional. Hence the circular was declared ultra vires and the retrospective operation of the circular was held to be manifestly arbitrary.

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<sup>6</sup> Para 5.01(g) of EPCG scheme w.e.f. 18-04-2013 and amendment thereon dated 29-01-2016

<sup>7</sup> No. 47/2015-20 dated 06-12-2017

<sup>8</sup> D. Cawasji and Co. v. State of Mysore reported in (1984) 150 ITR 648: (AIR 1984 SC 1780),

## Our comments

The Apex Court in the case of J K Lakshmi Cement Limited had held that circular should not be adverse/cause prejudice to the assessee. Further, in the case of Atul Commodities Pvt. Ltd. the Apex Court had held that the power to amend the FTP is exclusively vested in the Central Government and it is not given to the DGFT, whereas the power to clarify is vested in the DGFT.

Even, the Bombay HC<sup>9</sup> had recently held that a clarificatory circular issued by the DGFT cannot, retrospectively, amend or take away the benefits granted. The HC stated that the DGFT has powers to issue clarification but cannot, retrospectively, amend the provisions.

The present ruling is in line with above rulings and thus reiterates that the benefit which has been accrued to the exporter at a particular point of time is their fundamental right and cannot be taken away by subsequent retrospective amendment.

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<sup>9</sup> Essar Shipping Ltd.

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