

**AUTHORITY FOR ADVANCE RULINGS  
(CENTRAL EXCISE, CUSTOMS & SERVICE TAX)  
NEW DELHI**

**PRESENT**

**Mr. Justice P. V. Reddi (Chairperson)**  
**Mr. A.Sinha (Member)**                      **Mrs. Chitra Saha,**  
**(Member)**                                      **(Member)**

**Friday, the 19<sup>th</sup> day of December 2008**

**Ruling No. AAR/08/Cus/2008**

**In**

**Application No.AAR/01/Cus/2008**

Applicant	M/s AES Chattisgarh Energy Pvt. Ltd., 8th Floor, Block-B, Vatika Towers, Sector-54, Gurgaon – 122 002, Haryana.
Designated Commissioner	Commissioner of Customs(Port), Kolkata-1.
Present for the Applicant	Mr.S.Ganesh, Sr.Counsel Mr. Sujit Ghosh – BMR Associates Mr.Sudipta Bhattacharjee – BMR Associates Mr.Aditya Bhagat } Applicant's Mr.Ritesh Nimani } officials
Present for the Commissioner concerned	Ms. A.P.Tiwari, Jt.CDR Mr.Sumit Kumar, SDR

**RULING**

(By Chairperson)

1. This is an application for advance ruling under section 28E of the Customs Act, 1962. The applicant ( AESC for short), which is a company incorporated in India, is a wholly owned subsidiary of the foreign company

– AES India Holdings (Mauritius). In March, 2006 AES India (Pvt.) Ltd. signed a Memorandum of Understanding with the State Government of Chhattisgarh to develop 1200 MW power plant with an integrated coal mine in that State. Subsequently, the applicant, AESC, was incorporated in India in order to develop the power project. The applicant states that it proposes to set up a “1200 MW green field integrated coal fired power plant” which would include (a) captive coal mine, (b) dedicated coal transportation facility and (c) dedicated water intake and pumping system and (d) dedicated power evacuation system.

2. The applicant submits that the four items mentioned above are integral to the generation of electricity through the proposed project. In order to implement the project, the applicant will have to import appliances, equipments, machinery, coal mining equipment, control gear and transmission equipment and components. The applicant states that it is in the process of obtaining all necessary authorizations and permissions required by law. The applicant points out that in the latest draft of the Implementation Agreement, the term ‘project’ has been defined to mean ‘the thermal power station alongwith the captive coal mine, associated water pipelines, fuel transportation system and transmission facilities.’ . The applicant gives his comments in detail as to how all the five items constitute an integrated power project to be undertaken by the applicant. The illustrative list of the goods to be imported for the power plant as well as the other four items is given in the application. The applicant claims

the benefit of nil duty under Sl. No. 400 of Notification No. 21/2002- Customs, as amended. The applicant submits that the proposed project with all the five components qualifies as a mega power project subject to the fulfillment of the conditions prescribed in the notification and the goods imported for the project will not bear any duty i.e. basic or additional customs duty by reason of the said notification.

2.1 The relevant portion of Notification No: 21/2002, as it stands today, reads as follows:

Sl.No.	Chapter/ heading/ sub-head no.	Description of goods	Standard Rate	Additional Duty rate	Condition No.
400	9801	Goods required for setting up of any Mega Power Project, so certified by an officer not below the rank of a Joint Secretary to the Govt. of India in the Ministry of Power, that is to say – (a) an inter-state thermal power plant of a capacity of 700MW or more, located in the States of Jammu and Kashmir, Sikkim, Arunachal Pradesh,	Nil	Nil	86

\* Sl.No. in the Table is hereafter referred to as Entry no.

		<p>Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura; or</p> <p><b>(b) an inter-state thermal power plant of a capacity of 1000MW or more, located in States other than those specified in clause(a) above; or</b></p> <p>(c) an inter-state hydel power plant of a capacity of 350MW or more, located in the States of Jammu and Kashmir, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura; or</p> <p>(d) an inter-state hydel power plant of a capacity of 500MW or more, located in States other than those specified in clause (c) above</p>			
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We are concerned here with clause (b) of the above Table.

2.2 The immediately preceding Entry is also relevant. The material portion thereof is extracted below:

Sl. No.	Chapter/ Heading/ sub- heading no.	Description of goods	Standard rate	Additional Duty rate	Condition No.
399	9801	Goods required for –			
		(i) fertilizer projects;.	5%	10%	-
		(ii) Coal mining projects	5%	10%	-
		(iii) (omitted)			
		(iv) power generation projects including gas turbine projects(excluding captive power plants.....)	5%	10%	-
		(v) barge mounted power plants	5%	-	-
(vi) Power transmission, sub-transmission or distribution projects	5%	10%	-		

2.3 Notification No. 21/2002-Cus was issued by the Central Government in exercise of the powers conferred by Section 25(1) of the Customs Act, 1962. The notification exempts wholly or partially the duty of customs or additional duty leviable on the goods specified in First Schedule to the Customs Tariff Act, 1975.

3. The following question is framed by the applicant for the purpose of seeking advance ruling :-

*Whether or not the applicant is eligible to import goods for the purposes of the captive coal mine, the dedicated coal transportation system, the dedicated water transportation system and the dedicated power evacuation system under the proposed project under a complete customs duty exemption under entry 400 of Notification 21/2002-Cus, or a concessional rate of customs duty under Entry 399 of Notification 21/2002-Cus?*

3.1 In view of the letter dated 11/9/2008 filed by the applicant, the Ruling on the second part of the question relating to Entry 399 need not be given. The letter filed by the authorized representative reads as follows:

“Pursuant to the above instruction, the Applicant seeks to humbly submit that it no longer seeks any ruling for concessional customs duty under Entry 399 and accordingly, the paragraphs dealing with entry 399 in the Application and other documents filed by the Applicant need not be considered by Your Lordships for the purposes of the captioned matter.”

Hence, that part of the question is not answered in this Ruling.

3.2 As regards the import of equipments etc., for setting up the Power generation plant of the description referred to in Entry 400, it admits of no doubt and there is, in fact, no dispute that on the fulfillment of the

conditions laid down in the Notification, no duty is attracted under the Customs Act read with the Customs Tariff Act. That is why, in the question framed, the term 'power plant' is not included. However, the list of the goods required for power plant is given in paragraph 12 of the application, may be by way of abundant caution. The dispute is with regard to the goods to be imported for the purpose of captive coal mine, coal transportation facilities, water transportation system (water intake and pumping) and power evacuation system. It is the contention of the applicant that all these facilities/systems are necessary for establishing coal based power project and the scope of the relevant entry in the Notification (No. 400) ought not to be confined only to the power plant proper.

4. We shall advert briefly to the relevant facts set out by the applicant with reference to each of the four items in order to consider the applicant's contention.

(I) **Captive Coal Mine**

The Department of Coal, Government of India, has allotted Coal Block field of Chihttisgarh specifically to meet the requirement of the proposed power plant. The distance between the power plant site and the coal mine is 20 to 25 kms. The applicant submits that as per the provision of Coal mine Nationalization Act, 1973, coal mining can be undertaken by private sector companies only for

certain specified purposes which includes generation of power.

The coal will have to be used exclusively as fuel in the power plant.

(ii) **Coal Transportation System**

Coal from the captive coal mine will have to be transported to the power plant site through a conveyer system or a dedicated road.

The coal transported from the mine will be received in the inplant coal handling system which feeds the coal to the boiler units.

(iii) **Water Transportation System:**

The Water Resources Department of the Government of Chhatisgarh has allocated to the applicant certain quantity of water to be drawn from River Mahanadi for usage in the proposed project. The applicant states that it will build, operate and maintain a system of adequate capacity for transporting, storage and handling of water required for the project. The distance between the source of water and the power plant site is roughly 110 kms. Water transportation system would involve laying pipelines, pumping and storage.

(iv) **Power Evacuation System:**

The applicant states that as per MOU with State of Chhattisgarh, it is obliged to supply 7.5 per cent of the total capacity of the proposed power plant to the State at fuel prices and the applicant can sell the balance output to any other customer. The entities like the applicant who intend to sell power to various utilities and

consumers need to coordinate with Power Grid Corporation for evacuating the power generated in the power plant and for the subsequent transmission of such power to the intended recipients. The power Grid Corporation of India Ltd which is a Government of India Undertaking, is a Central Transmission Utility and the said body is responsible for the control and supervision of the transmission of electricity through inter-state transmission system. The said Corporation has prepared a report according to which the proposed power plant should be connected to the powergrid network via a 400 KV line. Accordingly, a dedicated power evacuation system needs to be developed by the applicant specifically to interconnect the power plant with the regional grid. The applicant submits that evacuation is an essential feature of a power generation project and as electricity cannot be stored, it has to be necessarily evacuated. It is pointed out that without power evacuation system, it would not be possible to transmit the power to the intended inter-state customers through the powergrid. For the purpose of establishing the system, the applicant will have to import transmission towers, 400 KV transmission lines, transformers, optical cable etc.

5. The contentions advanced by the learned counsel for the applicant are as follows:

The expression 'mega power project' employed in the notification should be given a wide meaning so as to cover not merely the power plant from where the electricity is generated but also the other key features such as dedicated coal mine etc. integrally connected to the functioning of the power plant. The expression 'project' is word of wide import and the use of expression 'plant' in the latter part of the Entry is not intended to cut down the amplitude of the phrase 'mega power project'. Project and plant, it is pointed out are synonymous in the context and the word 'power plant' is used only to specify the capacity, but not to exclude other integral features associated with power plant. The scope of exemption cannot be whittled down to the goods required for the actual power plant. The notification which contains both the expressions 'power project' and 'power plant' must be read as a whole in keeping with the objective behind the exemption as apparent from the power policy of the Central Government. In that sense, the goods required for the project as a whole with all the requisite infrastructure, viz coal mine, water pumping and power evacuation systems should also qualify for exemption. If the notification cannot be so interpreted as to cover the other key elements apart from the power plant proper, the notification to that extent will be against the law because the notification issued by the Central Government should be in conformity with the policy/guidelines formulated by it. Such

policy/guidelines which has the approval of the Cabinet cannot be bypassed by restricting the scope of exemption.

5.1 It is also contended that even the word 'plant' by itself bears a wide meaning and anything that is necessary for the running of the plant should be regarded as a component of power plant. In any case, it is submitted that the equipment required for the four adjuncts of the power plant (set out supra) shall be regarded as 'auxiliary equipment' and therefore qualify for concessional duty under Tariff item No.9801. It is also contended that the expression 'coal mining project' occurring in Entry 399 (ii) is not an integrated or dedicated coal mine and therefore the goods required for making the coal mine operational for the specific purpose of running the power plant are covered by Entry 400.

6. It is the contention of the Revenue that only the goods imported for the purpose of thermal power plant of the capacity of 1000 MW or more will fall in Entry 400 of Notification 21/2002-Cus, subject to the fulfillment of other conditions, but not the goods imported for the coal mine and other items and systems mentioned in the application. In other words, the power plant contemplated by Entry 400 of the Notification is the one which generates electricity and all the systems and equipments directly related to the setting up of the power plant. The expression mega power project has to be understood and be confined to the power plant proper, having regard to the context and language of the Entry. The equipment etc. required for coal mining and, power evacuation and coal transportation

and water pumping/transportation systems are covered by Entry 399 (sub-Entry (ii) and (vi) respectively) under which the benefit of concessional rate of duty is available to the importer. As regards water transportation system, it would fall under Entry 441 of Notfn.No.21/2002 and the rate of 5% basic customs duty would apply. The Revenue also counters the alternative contentions of the applicant. In regard to the power policy, the learned DR has taken the stand that the latest policy issued under the new Electricity Act has to be looked into, but not the Policy statements of 1995 and 1998. Certain definitions in the Electricity Act, 2003 are also referred to.

7. Now, we shall analyse and interpret Entry 400 of Notification 21/2002-Cus.(as amended) under which the applicant claims to seek the benefit. To appreciate the applicant's contentions, it is also necessary to trace the evolution of this Entry.

7.1 The Entry corresponding to the present Entry was introduced for the first time in 1999. As pointed out by the learned Sr. counsel for the applicant, the introduction of this Entry in the Customs notification seems to be a follow up to the policy decision taken by the Central Government as set out in the communication dt. 10-11-1995 addressed by the Secretary, Ministry of Power, Government of India and the revised policy/guidelines relating to Mega power projects issued in 1998. The policy formulated in 1995 was in relation to the "setting up of power plants of capacity of 1000 MW or more supplying power to more than one state".

In that policy document, it is stated that the “project of capacity of 1000 MW and more and catering power to more than one state should be considered as a mega project. Projects which cater power to a single State, irrespective of size, would not come under this category”. In the policy which has been recast in 1998, it was decided that inter-state and inter-regional mega power projects were to be set up both in the public and private sectors. The re-organization of the public sector power corporations was also envisaged by the policy. The policy contemplates the beneficiary States constituting Regulatory Commissions with powers to fix tariff. Paragraph 5 of the guidelines is important. It says “the import of capital equipment would be free of custom duty for these projects”. In order to ensure that domestic bidders were not adversely affected, certain safeguards were spelt out.

7.2 Entry / Sl.No. 288A of Ch. 98.01 inserted by Notification No. 63/1999 substantially gives effect to the 1995 policy read with revised policy of 1998. The same concept of mega power project is to be found in that Entry. The Entry reads :

Sl. No.	Chapter/ heading/ sub-head no.	Description of goods	Standard Rate	Additional Duty rate	Condition No.
288A	9801	Goods required for setting up of any Mega Power Project specified in	Nil	Nil	82

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\* Sl.No. in the Table is hereafter referred to as Entry

		<p><b>List 33, if such Mega Power Project is –</b></p> <p>(a) an inter-state thermal power plant of a capacity of 1500MW or more; or</p> <p>(b) an inter-state hydel power plant of a capacity of 500MW or more.....,</p>			
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**Condition No.82 is as follows :-**

**82. (a) If an officer not below the rank of a Joint Secretary to the Government of India in the Ministry of Power certifies that -**

**(i) the power purchasing State has constituted the Regulatory Commission with full powers to fix tariffs;**

**(ii) the power purchasing State undertakes, in principle, to privatize distribution in all cities, in that State, each of which having a population of more than one million within a period to be fixed by the Ministry of Power; and**

**(b) In the case of imports by a Central Public Sector Undertaking, the quantity, total value, description and specifications of the imported goods are certified by the Chairman and Managing Director of the said Central Public Sector Undertaking; and**

**(c) In the case of imports by a Private Sector Project, the quantity, total value, description and specifications of the imported goods are certified by the Chief Executive Officer of such project.”**

7.3 List 33 specifies by name the thermal projects and hydel projects in respect of which exemption is made applicable. Then, under Customs Notfn.No.100 of 99 dated 28/7/99, the capacity of thermal power project specified in the earlier notification was altered from 1500 to 1000 MW. As a result of this notification, 7 more thermal projects were added to the list.

7.4 Then, the next notifications in succession are Customs Notfn.No.16 of 2000 and 17 of 2001 which are substantially the same excepting that the number of thermal and hydel projects specified in List 33 has gone down.

7.5 Then comes the Customs Notfn.No.21 of 2002 dated 1.3.2002 which is material for our purpose. It reads as follows :

Sl. No.	Chapter/ heading/ sub-head no.	Description of goods	Standard Rate	Additional Duty rate	Condition No.
400	9801	<p>Goods required for setting up of any Mega Power Project specified in List 42, if such Mega Power Project is –</p> <p>(a) an inter-state thermal power plant of a capacity of 1000MW or more; or</p> <p>(b) an inter-state hydel power plant of a capacity of 500 MW or more,</p> <p>as certified by an officer not below the rank of a Joint Secretary to the Government of India in the Ministry of Power</p>	Nil	Nil	86

7.6 Entry 400 was amended by the Notfn.No.26/2003. The said amendment was necessitated by reason of the policy decision taken by the Government as reflected in the Union budget speech of 2003-04. The following extract from the budget speech is relevant :

“Simultaneous to the emphasis on improvement in power distribution, our attention on capacity addition remains. The Government had earlier, in 1999, notified 18 power projects as mega projects, conferring upon them various duty and licensing benefits. The Government now proposes to liberalise the mega power project policy further by extending all these benefits to any power project that fulfills the conditions already prescribed for mega power projects.”

Pursuant to the above policy, Notification No.26/2003-Cus. was issued amending the notification no.21/2002-Cus. Entry 400 as amended reads:

400. 9801 Goods required for setting up of any Mega Power Project, *Nil Nil 86*  
**that is to say-**

*(a) an inter-State thermal power plant of a capacity of 1000 MW or more; or*

*(b) an inter-State hydel power plant of a capacity of 500 MW or more,*

*as certified by an officer not below the rank of a Joint Secretary to the Government of India in the Ministry of Power*

7.7 The amended notification no.21of 2002 is almost in the same language as it stands now (vide para 3 supra). Thus, w.e.f. 1/4/2003, the list of specified power projects has been deleted in tune with the liberalized policy of the Government. Further, it is to be mentioned that

Entry 400 of notification no.21 of 2002 was further amended keeping in view the revised policy guidelines issued in order to cater to the special requirements of power projects in Jammu and Kashmir and NE States. Entry 399 substantially remained the same from 1999 onwards excepting that there was change in the Sl.no. and the rate.

8. An analysis of Entry 400 would show that in the opening part, a broad description - “mega power project” has been given. What exactly is that mega power project which was in the contemplation of the Central Government when the Entry was introduced in 1999 followed by similar but wider entries in successive years? This has been spelt out in specific terms by the second part of the Entry preceded by the expression, “that is to say”. That expression has been advisedly employed to specify the type and potential of mega power project within the contemplation of the Government. The phrase, ‘that is say,’ is intended to specify and delineate the parameters of a mega power project that qualifies for the duty relief. Three types of power plants are specified immediately following ‘that is to say’. The three characteristics that are laid down in clause (b) of Entry 400 are (i) it must be a thermal power plant, (ii) of the capacity of 1000 MW or more and (iii) it must be located in the States other than those mentioned in clause (a). The specification of these criteria in the latter part of Entry 400, prefaced by the expression ‘that is to say’ fall in line with the power policy statement/guidelines of 1995 read with the policy recast in 1998. As explained later, the notification issued

under the Customs Act is in conformity with those guidelines. The same pattern of identifying the particular types of power projects which needed incentives was followed in both.

8.1 It is true that the expression 'power project' is wider in ambit than power plant. At the same time, these two expressions are often used inter-changeably. Assuming that the expression 'power project' used in the opening part of the Entry 400 is something more than the power generation plant located within a particular premises, the question will arise whether it takes within its fold even the 'dedicated' coal mine and coal/water transportation systems. That question can be approached from the angle of the general concept of Power Project and its amplitude. However, without delving the issue from a general perspective, the answer could be found on having an insight into the setting and language of the Entry itself. As rightly pointed out by the Commissioner as well as the departmental representative, the expression 'that is to say' is very significant. What exactly is the type of mega power project that is contemplated by Entry 400 is amplified and put in specific terms by employing the phrase, 'that is to say', followed by specific description of project.

8.2 The meaning and implication of the phrase 'that is to say' can best be understood by referring to the four judge Bench decision of the

Supreme Court in *State of Tamil Nadu vs. Pyare Lal Malhotra*\*. That case arose under Central Sales-tax Act. The interpretation of the item “Iron and steel” occurring in section 14(iv) of the Central Sales-tax Act came up for consideration. Iron and steel are among the declared goods specified in section 14 of CST Act. The words ‘iron and steel’, (broadhead), followed by the expression ‘that is to say, gave a list of items and sub-items representing iron and steel products. The Supreme Court held that even though steel in the form of plates was subjected to tax, it does not preclude the taxation on the wire drawn from the tax suffered steel plates because it is a separately listed item. Adverting to the use of words ‘that is to say’, their Lordships approvingly referred to the passage in *Stroud’s Judicial Dictionary* which reads as under:

“That is to say – (1) ‘That is to say’ is the commencement of an ancillary clause which explains the meaning of the principal clause. It has the following properties: (1) it must not be contrary to the principal clause; (2) it must neither increase nor diminish it; (3) but where the principal clause is general in terms it may restrict it: See this explained with many examples, *Stukeley v. Butler*, Hob. 171.”

The Supreme Court then observed:

“the quotation given above, from Stroud’s Judicial Dictionary shows that, ordinarily, the expression “that is to say” is employed to make clear and fix the meaning of what is to be explained or defined. Such words are not used, as a rule, to amplify a meaning while removing a possible doubt for which purpose the word “includes” is generally employed. In unusual cases, depending upon the context of the words “that is to say” this expression may be followed by illustrative instances. In *Megh Raj v. Allah Rakhia*, the words “that is to say”, with reference to a general category “land” were held to introduce, “the most general concept” when followed, inter alia, by the words “rights in or over land”. We think that the precise meaning of the words “that is to say” must vary with the context. Whereas in *Megh Raj’s* case, the amplitude of legislative power to enact provisions with regard to “land” and rights over it was meant to be

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\* 1983 (13) ELT 1582, AIR 1983,.....

indicated, the expression was given a wide scope because it came after the word “land” and then followed “rights over land” as an explanation of “land. Both were wide classes. The object of using them for subject-matter of legislation, was obviously to lay down a wide power to legislature. But, in the context of single point sales tax, subject to special conditions when imposed on separate categories of specified goods, the expression was apparently meant to exhaustively enumerate the kinds of goods on a given list”.

8.3 The underlined proposition in the above passage as well as the last observation applies in all fours to the case on hand. In Entry 400, what follows after the words “that is to say” are not illustrative instances but they are exhaustive of ‘mega power project’. What is sought to be achieved by introducing the expression ‘that is to say’ in the year 2003 was to fix the meaning of the opening clause of the Entry in specific and clear terms. The expression ‘mega power project’ was evidently borrowed from the power policy statement and the definition thereof as given in the policy was adopted in the Customs notification. The introduction of ancillary clause, “that is to say”, after the expression ‘mega power project’ became necessary when the net of exemption was widened in 2003 so as to include not merely listed power projects but also other specified categories of power projects – both in public and private sector. Thus, the object, the context and the language of the Entry – all point out in one direction that the mega power project should conform to and be restricted to the specific description given in clauses (a) to (d) which follow “that is to say” and it should not be extended further. Incidentally, we may mention that such understanding of the tariff item does not in any way do violence to the ordinary meaning of power project because there is no dichotomy

between the power project and power plant, though the former expression is wider in its scope, as observed earlier. The context and the language of Entry 400 rules out the adoption of the general and wider meaning of the term.

8.4 At this juncture, we may also refer to the following pertinent observations of the Supreme Court in the case of CST, *Madhya Pradesh vs. Popular Trading Company*\*\*.

“The expression “that is to say” is descriptive, enumerative and exhaustive and circumscribes to a great extent the scope of the entry”.

8.5 There is another angle from which the problem can be looked at. Goods required for coal mining project are covered by Entry no. 399 of the same notification no. 21/2002-Cus. According to the counsel for the applicant, the Entry 399 governs a stand-alone coal mine which is not an adjunct to the power plant. This contention overlooks the fact that if the Government wanted to extend the benefit under Entry 400 to the associated coal mine, express words would have been employed in the notification. Such an important item as coal mine equipment would not have been left uncovered, if it was intended to give the benefit to the so-called dedicated coal mine. We are saying this especially for the reason that the previous Entry i.e. 399 deals with goods required for coal mining project explicitly. That being so, if the Central Government wanted to draw a distinction between a stand alone coal mine and a dedicated coal

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\*\* 2000 (117) ELT 531 (S.C.)

mine, that should have been reflected in express language. A cloud of doubt could not have been allowed to disguise such an important aspect. The learned Sr. Counsel for the applicant submitted that the real reason for specifying the power plant in the second part of the Entry following, 'that is to say' was only to specify the capacity of the power plant which could qualify as a mega power project, so that the lesser capacity power plant may not be treated as mega power project. We find it difficult to accept this contention in the face of the language of the notification especially the use of expression, 'that is to say' which has received authoritative judicial interpretation by the time the Entry was introduced.

9. In the light of the above discussion, we cannot uphold the contention of the applicant that the power plant specified is only one facet of power project and the other allied facets viz. coal mine, coal transportation, water pumping/transportation systems are also comprehended within the scope of Entry 400. Such an interpretation would go against the language employed and unduly widen the scope of Entry.

10. In an apparent bid to get over the difficulty in interpretation especially by reason of usage of the crucial phrase, 'that is to say', the learned counsel for the applicant has advanced an argument that irrespective of what is contained in notification No. 21/2002-Cus, the applicant derives the benefit of duty relief from the power policy announced by the Central Government with the approval of the Council of

Ministers. In other words, it is his contention that the notification issued under the Customs Act should fall in line with the said power policy. Otherwise, the notification will be *pro tanto* illegal. Therefore, the counsel for the applicant submits that in accordance with the power policy as recast in 1998, the goods required for the 'mega power project' as a whole including associated coal mine etc. shall be exempted from Customs duty. The following statement in the revised policy/guidelines of 1998 (adverted to supra) is relied upon:

“The import of capital equipment would be free of customs duty for this project”.

The learned counsel also drew our attention to the statement in 1995 policy document which says :

“When the mega power projects come up in the private sector, there would be composite proposal and include scheme for development of the legal coal mine as well in many cases. This would be an additional advantage.”

10.1 Based on the above statement, it is contended that the Central Government took a policy decision to exempt the capital equipment required for the mega power project as a whole but not merely for the power plant proper. This argument, in our view, is based on a wrong premise that the notification does not give effect to the policy. We have already adverted to this aspect earlier while analyzing the notification. However, at the risk of repetition, we shall deal with this point in some more detail.

10.2 The learned counsel for the applicant drew support for this argument on the decision of the Supreme Court in *State of Bihar vs. Suprabhat Steel Limited (1999) 1 SCC 39*. We are of the considered view that the decision in *Suprabhat Steel* does not lend support to the contention of the applicant. The dicta in the said judgment should be understood in the light of the industrial policy considered therein coupled with the fact situation. In that case, their lordships were dealing with the exemption notification issued under section 7 of Bihar Finance Act. The Industrial policy resolution of 1993 published by the State Government, while announcing sales-tax exemption on the purchase of raw material, laid down that the old industrial units whose investment on plant and machinery did not exceed Rs.15 crores on 1.4.1993 shall be eligible for exemption for a period of 7 years from 1.4.1993. The respondent – assessee in that case started production prior to 1.4.1993 and availed of certain benefits under the prior policy of 1986. The notification issued under section 7 of the Bihar Finance Act on 4.4.1994 made the old industrial units such as those held by the respondent ineligible for sales-tax exemption on raw materials. The High Court allowed the writ-petition filed by the respondent for quashing the notification dated 4.4.1994 in so far as it denied the benefit of exemption to the old industrial units as it was opposed to the industrial policy decision of the State Government. The Judgment of the High Court was affirmed by the Supreme Court. The Supreme Court observed thus:

“Coming to the second question, namely the issuance of notification by the State Government in exercise of power Under Section 7 of the Bihar Finance Act, it is true that issuance of such notifications entitles the industrial units to avail of the incentives and benefits declared by the State Government in its own industrial incentive policy. But in exercise of such power it would not be permissible for the State Government to deny any benefit which is otherwise available to an industrial unit under the Incentive Policy itself. The Industrial Incentive Policy is issued by the State Government after such Policy is approved by the Cabinet itself. The issuance of the notification Under Section 7 of the Bihar Finance Act is by the State Government in the Finance Department which notification is issued to carry out the objectives and the policy decisions taken in the Industrial Policy itself. In this view of the matter, any notification issued by the Government Order in exercise of power Under Section 7 of the Bihar Finance Act, if is found to be repugnant to the Industrial Policy declared in a Government Resolution, then the said notification must be held to be bad to that extent. In the case in hand, the notification issued by the State Government on 4<sup>th</sup> of April, 1994 has been examined by the High Court and has been found, rightly, to be contrary to the Industrial Incentive Policy, more particularly the Policy engrafted in Clause 10.4(iXb).

10.3 The Supreme Court further observed :

“we are not persuaded to accept the contention of the applicant’s counsel that it would be open for the Government to issue a notification in exercise of power under section 7 of the Bihar Finance Act which may override the incentive policy itself”.

We do not think that the ratio of the said decision can be applied to the present case. The clear terms of the industrial policy resolution in that case makes all the difference. It did not differentiate the old and new industrial units. The new units were covered by cl(a) of para 10.4(i) and the old ones by cl(b). The only restriction in respect of old units was that the investment on machinery should not have exceeded Rs.15 crores by 1.4.1993. If that condition was fulfilled, the old units were entitled for the relief for a period of 7 years from 1.4.1993. The policy statement regarding

grant of sales tax relief was thus clear and categorical. In the instant case, we cannot reach the conclusion that the notification issued under the Customs Act fails to give effect to the relief announced by the Central Government in its 1998 power policy guidelines or that it falls foul of the policy. Nowhere in the revised policy guidelines issued in 1998, it was stated that the customs duty exemption would be made available not merely to the power plant equipment but also to the equipment needed for all the supporting infrastructure including the coal mine and coal transport. So much cannot be read into the compendious expression 'mega power project'. In fact, a perusal of the 1995 and 1998 policy statements gives an indicia that the Union government itself did not use the expressions 'power project' and 'power plant' in a distinct sense. In the letter of 1995 spelling out the policy, it is noted in the Preamble : "Setting up of power plants of capacity of 1000 MW or more....". In the 1998 revised policy guidelines, it was stated in the opening para : "guidelines for setting up of mega power projects of capacity 1000 MW or more.... were issued in 1995". Thus, no dichotomy was ever maintained between these two terms. A statutory notification cannot be construed, much less invalidated on the basis of fragile deductions and subtle inferences drawn from an executive policy. An unambiguous, specific and categorical policy statement of the Government is a pre-requisite for its legal enforceability. *Suprabhat Steel* was one such case.

11. Reliance was placed by the learned counsel for the applicant on the decision of the Supreme Court in *Kerala State Electricity Board vs. Collector of Customs*\*. In that case, the appellant KSEB imported certain equipment for setting up new sub-stations to improve its transmission and distribution network. The claim of the appellant that the imported goods were covered by Tariff heading 98.01 was negated by the Tribunal. All items of machinery including apparatus and transmission equipment required for the initial setting up of or the substantial expansion of an existing unit by a specified 'power project' and other projects were classified under that Tariff heading. The Tribunal held that the expression 'power project' meant only a project which generates electricity, but not the one which transmits or distributes electricity. The Supreme Court reversed the view taken by the Tribunal and held that the power project should not be confined to the project that generates electricity but it should extend to a project that transmits and distributes electricity. The learned Judges endorsed the concession made by the learned Solicitor General in this regard. This decision, in our view, does not, in any way, support the applicant's stand. While construing the term 'power project' without any qualifying words, the learned Judges held that it was broad enough to include the network for transmission and distribution also. Obviously, an unit transmitting and distributing power fell within the ambit of the broad expression 'power project'. The Entry/Tariff item with which we are concerned is very much different from the Entry interpreted by their

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\* 2002 (142) ELT 278

Lordships. There is nothing in that judgment which warrants expansion of the term 'power project' even to the coal mine and the like on the ground that they are necessary adjuncts to the running of power plant. Apart from that, the Entry is cast in a different language so as to specify the particular types of power projects which are eligible to avail of duty relief.

12. The learned counsel for the applicant also drew our attention to the observations made by the Supreme Court in *Union of India vs. Indian Charge Chrome*<sup>\*\*</sup>. One of the questions considered therein was whether the Customs Notfn. No.133 of 85 which granted duty relief to the 'power projects' will include captive power plants. The notification was amended in the next year by adding an Explanation that power projects shall mean such projects whose end product is power, but shall not include captive power plants. The learned Judges of the Supreme Court held that this amendment was clarificatory in nature and the captive power plants were, in any case, not comprehended within the scope of the main notification. In that context, the Supreme Court observed that the word 'project' is much more extensive than a plant. Then, it was held :

“The learned senior counsel for the appellant is right in submitting that power project could not have meant 'power plant' also and the scope for confusion or doubts, if any, was done away with by inserting a clarification”.

Far from supporting the contention of the applicant, the decision perhaps militates against its stand. Having regard to the context in which the expression 'power project' was used, their Lordships came to the

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<sup>\*\*</sup> 1994 (112) ELT 753

conclusion that it did not include a power plant unconnected with public distribution. A small power plant meant for generation of electricity for internal consumption was held to be not a 'power project' within the contemplation of the notification. This decision is not an authority for the proposition that all power generating units the end product of which is power (meant for distribution) should necessarily be classified as power projects and they cannot be treated as power plants, notwithstanding the language of the Entry. In any case, it is not the ratio of the decision that power project should include the infrastructure for the supply and transportation of raw material etc.

13. Reliance was then placed by the applicant's counsel on the decision of the Supreme Court in *Vikram Cement vs. Commissioner of CE, Indore*\*. The question arose whether Modvat/Cenvat credit could be allowed on the capital goods used in mines. The only observation which was made in this context is as follows :-

“As regards the Modvat/Cenvat credit on capital goods, if the mines are captive mines so that they constitute one integrated unit together with the cement factory, Modvat/Cenvat credit on capital goods will be available to the assessee. On the other hand, if the mines are not captive but they apply to various other cement companies, the credit on capital goods used in such mines will not be available to the concerned assessee under the appropriate Modvat/Cenvat rules.”

13.1 With this observation, the matter was remanded to the Excise authority. It is pointed out that the receipt of inputs/capital goods in the factory is the criterion for the availment of credit under the aforesaid rules

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\* (2006) 197 ELT 145

and therefore the principle stated in *Vikram Cement* will equally apply to the present case because the applicant too will be operating a 'dedicated' coal mine to secure the coal needed for the thermal power plant. We find this argument untenable. The nature and wording of the Cenvat/Modvat schemes are entirely different. The principle laid down by their Lordships in the two sentences quoted above cannot be extended by analogy to the interpretation of Entry 400 of Notfn. No.21 of 2002-Cus. There is nothing in the said Entry to indicate that the associated coal mine is treated as part and parcel of the power plant. If the expression 'mega power project' had stood alone without being qualified by "that is to say", the argument based on *Vikram Cement* case would have deserved serious consideration.

14. The learned Sr. counsel for the applicant made a further submission that the term 'power plant' is itself comprehensive enough to include the captive coal mine etc which are essential for running the plant. He relied on the decisions interpreting the meaning of the word 'plant' under the Income-tax Act wherein the issue involved was about the admissibility of depreciation. Section 32(1) of the Income-tax Act, 1961 allows deductions in respect of "depreciation of buildings, machinery, plant or furniture owned by the assessee and used for the purposes of the business or profession". In the case of *CIT vs. Taj Mahal Hotel*<sup>\*\*</sup>, the Supreme Court held that sanitary and pipeline fittings installed in a hotel

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<sup>\*\*</sup> (1971) 82 ITR 44

fell within the definition of the term 'plant' under the old Income-tax Act.

The following are the relevant observations :

“To have sanitary fittings, etc., in a bathroom is one of the essential amenities or conveniences which are normally provided in any good hotel, in the present times. If the partitions in Jarrold's case [1962] 40 TC 681 (CA), could be treated as having been used for the purpose of the business of the trader, it is incomprehensible how sanitary fittings can be said to have no connection with the business of the hotelier. He can reasonably expect to get more custom and earn larger profits by charging higher rates for the use of rooms if the bathrooms have sanitary fittings and similar amenities. We are unable to see how the sanitary fittings in the bathrooms in a hotel will not be 'plant' within section 10(2)(vib) read with section 10(5) when it is quite clear that the intention of the Legislature was to give it a wide meaning and that is why articles like books and surgical instruments were expressly included in the definition of 'plant'.”

14.1 The following test was formulated by the Supreme Court in *Scientific Engineering House Pvt. Ltd. vs. CIT*<sup>\*\*\*</sup>.

“In other words, the test would be : Does the article fulfil the function of plant in the assessee's trading activity? Is it a tool of his trade with which he carries on his business? If the answer is in the affirmative, it will be plant.”

The decision of the Karnataka High Court in *Pathange Poultry Farm vs. CIT*<sup>#</sup> was also referred to by the learned counsel. These decisions turned on the language of the inclusive definition clause and the provision allowing depreciation. The context and the language both warranted very wide interpretation. While referring to *Indian Charge Chrome* case (supra), the applicant itself contended that the expression 'plant' unlike 'project' bears a narrow connotation. In any case, in view of the vastly different nature of the provisions and the issues involved, the ratio in the

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<sup>\*\*\*</sup> (1986) 157 ITR 86 p.676

<sup>#</sup> (210) ITR p.668

above decisions cannot be applied to the question under consideration.

We have no hesitation in rejecting this contention of the applicant.

15. The applicant has raised an 'alternative contention' based on Tariff item no. 9801 forming part of Chapter 98 of the First Schedule to the Customs Tariff. The "description of goods" in the said Tariff item in so far as it is relevant is as follows:-

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 :

- (1) Industrial plant,
- (2) Irrigation project,
- (3) Power project,
- (4) Mining project,

15.1 It is the contention of the applicant that the captive coal mine, coal transportation and water transportation systems apart from power evacuation system have an inextricable link with the power plant and therefore the goods required in relation to those interlinked items can be legitimately regarded as auxiliary equipment because they aid or help the setting up of the power plant. The applicant has referred to two decisions of the Supreme Court viz. *CCE, Mumbai vs. Toyo Engineering India Ltd.*<sup>\*</sup> and *Commissioner of CE vs. Paradeep Phosphates Ltd.*<sup>\*\*</sup> to elucidate the meaning of the expression 'auxiliary equipment'.

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<sup>\*</sup> (2006) 201 (ELT) 513

<sup>\*\*</sup> (2006) 200 ELT 515

15.2 This contention is based on a wrong premise that the auxiliary equipment etc. covered by tariff item 9801 should be transplanted into Entry 400 of exemption notification no.21/2002. As already noted, the Entry 400 refers to mega power project, that is to say, an inter-state power plant of 1000 MW or more and it is in relation to the goods required for such power plant that the exemption is granted. Once it is held that the goods required for dedicated coal mine, coal and water transportation systems cannot be brought within the ambit of Entry 400, we do not see any relevancy in the argument based on the ambit of the expression 'auxiliary equipment' occurring in tariff item 9801.

16. In view of the foregoing discussion, the interpretation sought to be placed by the applicant on Entry 400 of the Customs Notfn.21 of 2002 does not merit acceptance. The equipment for 'dedicated' coal mine and transportation of coal from the mine to the production unit and the water intake and pumping systems are not covered by Entry 400 of Exemption Notfn.21 of 2002 and therefore cannot get *Nil* duty relief. The mere nexus or interrelation of these items to the power generating plant is not sufficient to claim the benefit of the notification. However, it is made clear that the in-plant coal handling system i.e., within the factory premises, has to be treated as part of the thermal power plant under Entry 400. The applicant has listed the coal handling plant as one of the items required for the power plant. The Commissioner in his comments has rightly conceded to this extent.

17. What remains to be considered is power evacuation system. This item, in our view, stands on a different footing and the goods required for the said purpose fall within the ambit of Entry 400 of Customs Notfn.No.21 of 2002. This conclusion of ours is mainly based on the clear language of the Entry itself. The various power plants referred to in clause (a) to (d) are inter-state in nature. In clause (b) of Entry 400 with which we are concerned, the description given is “inter-state thermal power plant of a capacity of 1000 MW or more”. That means the power plant must be designed in such a way that it delivers power to the customers of other states. It is not a power plant which merely caters to the requirements of the state in which it is located. The policy formulated in 1995 (referred to in paragraph 10 supra) has explicitly stated so. It was emphasized that projects which cater power to a single state, irrespective of the size of the power plant would not come under the category of mega power project. In the policy recast in 1998, it was again declared that setting up of inter-state and inter-regional mega power projects in public and private sectors was the policy of the Govt. Accordingly, the expression ‘inter-state power plant’ finds its place in sl.no.288A of Notfn.No.63/99 and the corresponding entries in subsequent notifications. In order to transmit power for use in other states, necessarily the applicant has to establish connection with the power grid’s network at a place suggested by the Powergrid Corporation of India Ltd., which is a Govt. of India enterprise.

Extracts from the Powergrid report are given in Annexure 7 to the application.

17.1 'Grid' means the high voltage backbone system of inter-connected transmission lines, sub-stations and generating plants (vide s.2(32) of the Electricity Act). Inter-state transmission system includes any system for the continuance of electricity by means of main transmission line from the territory of one state to another etc. (vide s.2(36) ). The Power Grid Corporation is a 'Central Transmission Utility' as per section 38(1) of the Electricity Act, 2003. The functions of the Central Transmission Utility are laid down in sub section (2) of section 38. They are : (a) to undertake transmission of electricity through inter-State transmission system; (b) to discharge all functions of planning and co-ordination relating to inter-state transmission system with State Transmission Utilities, Central and State Governments, generating companies, licensees etc.; (c) to ensure development of an efficient, co-ordinated and economical system of inter-State transmission lines for smooth flow of electricity from generating stations to the load centres; (d).....]. The applicant is authorized to install transmission lines and other apparatus only to facilitate the transmission of power to the power grid so that it could be made available to the inter-state customers who buy power from the applicant. Otherwise, the applicant is not an independent transmission licensee within the meaning of Electricity Act. The applicant states that the evacuation system which the applicant has to put in place in order to interconnect the

power plant with the Power Grid should be “technically configured” to meet the specific requirements of the said Corporation. The fact that in order to be an inter-state power plant the interconnection between the power plant and the power grid is essential and there cannot be an independent transmission of power beyond the borders of the state without such connection is not in dispute. An inter-state power plant cannot come into existence unless the transmission lines etc. are laid to establish inter-connection with the Power Grid Corporation. Hence, whatever goods are required in connection therewith qualify for duty relief under Entry 400.

17.2 The learned Departmental Representative has referred to the definitions of ‘generation station’, ‘electricity system’ and ‘electrical plant’ under the Electricity Act 2003. None of them, in our view, have any bearing on the connotation of the expression ‘inter-state power plant’ – which is the expression used in Entry 400 of the Customs Notification. The meaning of that expression cannot be controlled by the terminology used in a later enactment dealing with a different subject. Certain special definitions are inserted therein for the purposes of that Act. We need not therefore embark on a discussion of the various definitions in the Electricity Act to find the meaning of the expression ‘inter-state power plant’ used in the Customs notification of 2002 and even earlier.

18. There is another aspect which has been highlighted by the applicant. It is pointed out that evacuation is an essential feature of a power generation plant as electricity cannot be stored. It is stated that the

applicant is obliged to supply 7.5% of the total capacity of the plant to the Govt. of Chattisgarh at the agreed price and the balance power generated will have to be sold to the inter-state customers through the power grid. The power has to be released and transmitted up to the power grid network on continuous basis in order to make it available to other inter-state customers. In this connection, the learned counsel for the applicant has drawn our attention to the observations of the Supreme Court in *State of Andhra Pradesh vs. NTPC Ltd.* The Constitution Bench of the Supreme Court observed thus :

“However, A.N. Grover, J. speaking for three-Judge Bench of this Court went on to observe that electric energy “can be transmitted, transferred, delivered, stored, possessed etc. in the same way as any other moveable property”. In this observation we agree with Grover, J. on all other characteristics of electric energy except that it can be ‘stored’ and to the extent that electric energy can be ‘stored’, the observation must be held to be erroneous or by oversight. The science and technology till this day have not been able to evolve any methodology by which electric energy can be preserved or stored.” *{emphasis supplied}*

18.1 The applicant has also referred to the observations to the similar effect in *Indian Aluminum Co. vs. State of Kerala*<sup>\*\*</sup>. The applicant has also drawn our attention to the decision of the Appellate Tribunal for Electricity in the case of *Gajendra Haldea vs. Grid Corporation of Orissa Ltd.*, wherein it was observed thus :

“Thus it is clear that in view of the peculiar nature of electricity, its generation, sale, supply and consumption take place without any gap or break”.

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\* AIR 2002 SC 1895

\*\* (1996) 7 SCC 637

18.2 The applicant further clarified in its written submissions dated 8/12/2008 that the electricity generated will not and cannot be stored from its generation till the point of interconnection to the transmission network of Power Grid Corporation or any other transmission company and that it is technically 'impossible' to store electricity after generation. In view of this factual position, which is not in dispute, it is clear that power evacuation system must be legitimately treated as a part of the inter-state power plant.

### **Ruling**

19. In the result, we hold that excepting the power evacuation system, the other three items do not fall within the scope of Entry / Sl.No.400 of Notfn.no.21 of 2002, as amended. The goods required for power evacuation/transmission system to connect the power grid will be eligible for customs duty exemption as per Entry 400.

It is made clear that the goods required for in-plant coal handling system however fall within the scope of Entry 400.

Accordingly, the question is answered and the Ruling is given.

Signed on this the 19<sup>th</sup> day of December, 2008.

Sd/-  
**(A.Sinha)**  
**Member**

Sd/-  
**(P.V.Reddi)**  
**Chairman**

Sd/-  
**(Chitra Saha)**  
**Member**

Pronounced in the open court by the Hon'ble Chairman and Member on 23/12/2008 at 10.30 AM.

Sd/-  
**(R.K.Meena)**  
Joint Commissioner