

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 22/RP/2017

In

Petition No. 157/MP/2015

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri A.K. Singhal, Member

Shri A.S. Bakshi, Member

Dr. M.K. Iyer, Member

Date of order: 31.10.2017

In the matter of

Review of the order dated 17.3.2017 in Petition No. 157/MP/2015 seeking adjustment of tariff for increase/ decrease in revenues/ costs of CGPL due to 'change in law' during the operating period for years 2011-12, 2012-13 and 2013-14

And

In the matter of

Gujarat Urja Vikas Nigam Limited
Sardar Patel Vidyut Bhawan
Race Course, Vadodara- 390007
Gujarat

.....Review Petitioner

Vs

1. Coastal Gujarat Power Limited
C/o Tata Power Company Limited
34, Sant Tuka Ram Road
Carnac Bunder, Mumbai-400021

2. Maharashtra State Electricity Distribution Company Limited
4th Floor, Prakashgad, Plot No. G-9,
Bandra (East), Mumbai- 400051
Maharashtra

3. Ajmer Vidyut Vitaran Nigam Limited
Hathi Bhata, Old Power House
Ajmer- 305001, Rajasthan

4. Jaipur Vidyut Vitaran Nigam Limited
Vidyut Bhawan, Janpath,
Jaipur- 302005, Rajasthan



5. Jodhpur Vidyut Vitaran Nigam Limited
New Power House, Industrial Area,
Jodhpur- 342003, Rajasthan

6. Punjab State Power Corporation Limited
PP&R, Shed-T-1, Thermal Design,
Patiala- 147001, Punjab

7. Uttar Haryana Bijili Vitran Nigam Limited
Vidyut Sadan, Plot No. C-16,
Sector-6, Panchkula-134112, Haryana

8. Dakshin Haryana Bijli Vitran Nigam Limited
Vidyut Nagar, Vidyut Sadan, Hisar- 125005
Haryana.

.....Respondents

Parties Present:

Shri M.G. Ramachandran, Advocate, GUVNL
Ms. Ranjitha Ramachandran, Advocate, GUVNL
Ms. Anushree Bardhan, Advocate, GUVNL
Shri S.K. Nair, GUVNL
Shri Amit Kapur, Advocate, CGPL
Shri Apoorva Mishra, Advocate, CGPL
Shri Tushar Nagar, Advocate, CGPL
Ms. Swapna Seshadri, Advocate, PSPCL
Ms. Neha Garg, Advocate, PSPCL

ORDER

Petition No. 157/MP/2015 was filed by Coastal Gujarat Power Limited (CGPL) under Section 79 (1)(b) of the Electricity Act, 2003 read with Article 13.2(b) of the Power Purchase Agreement dated 22.4.2007 (as amended from time to time) seeking adjustment of tariff for increase/ decrease in revenues/ costs of Coastal Gujarat Power Limited due to 'Change in Law' during the Operating Period for the Financial Years 2011-12, 2012-13 and 2013-14. The Commission vide order dated 17.3.2017 disposed of the said Petition allowing certain 'change in law' events as under:



| Change in Law Events | Decision |
|---|---|
| Levy of Clean Energy Cess on imported coal | Allowed |
| Change in Basic Customs Duty and Countervailing Duty on imported coal | Allowed subject to outcome of pending proceedings before the Central, Excise and Service Tax Appellate Tribunal |
| Reduction in Excise Duty | Allowed |
| Reduction in Central Sales Tax | Allowed |
| Increase in Gujarat Value Added tax | Not Allowed |
| Increase in Service tax | Allowed |
| Levy of Green Cess | Not Allowed |
| Additional Condition imposed by MoEF | Not Allowed |
| Carrying Cost | Not Allowed |

2. Aggrieved by the said order dated 17.3.2017, the Review Petitioner, Gujarat Urja Vikas Nigam Limited (GUVNL) has filed this review petition seeking review of the Commission's order dated 17.3.2017 in Petition No. 157/MP/2015 for rectification of errors with regard to the following events in change in law:

- a) *Allowing Service Tax as a change in law; and*
- b) *Computation of quantum of coal for considering the compensation for Clean Energy Cess*

Submissions of the Review Petitioner

A. Service Tax as Works contract

3. The Petitioner in the Petition has submitted the following:

(i) The Commission in its order dated 17.3.2017 has allowed the Service Tax as per Notification No. 32/2007 – Service Tax dated 22.5.2007 and Notification No. 7/ 2008- Service Tax dated 1.3.2008 as 'change in law' on the basis that there was no service tax on Works Contract Service prior to the said notifications. There has been an incidence of Service Tax on works Contract as on the cut-off date.

(ii) Though in the original Petition, CGPL had stated that there was no service tax payable on Works Contract service, CGPL in its rejoinder dated 14.10.2015 (reply to MSEDCL) had clarified that the service tax was payable on Works Contract @ 12% on service portion as on the cut-off date (page 11 of the rejoinder).

(iii) In 2007, Ministry of Finance vide Notification No. 32/2007- Service dated 22.5.2007 introduced Works Contract (Composition scheme for payment of service tax) Rules, 2007 and gave an option to the person liable to pay service tax at 2% of the gross amount charged instead of 12% of



service portion. This has also been recorded in the order dated 17.3.2017. Thus, para 43 of the said order is to be reviewed and issue of Service tax requires to be reconsidered.

(iv) Though changes in Service Tax on Works Contract may in a given circumstance be considered as change in law, CGPL is first required to establish that there was a change. In the present case, the service tax on Works Contract was existing on the cut-off date as admitted by CGPL itself. CGPL has represented that the service tax of 12% was imposed on service component/element on works contract after eliminating the supply component.

(v) The Notification dated 1.3.2008 increase the tax to 4% but it is still option to a person to discharge his tax liability. The alternate of paying 12% of the service portion remains as such from the cut-off date till now. The above was not a new levy but an option given to the person to pay tax of 2% / 4% of gross instead of 12% of Service component. Such option need not be exercised unless the exercise of option is beneficial to the person liable to pay tax. The person is not required to pay at 2% or 4% of gross, as the case may be, if the same cast upon the person a liability in excess of 12% on service portion. If the option is not exercised, then the status quo as was existing on the cut-off date namely 7 days prior to the date of bidding and therefore, be no change in law within the scope of Article 13 of the PPA.

(vi) By exercising the option of 2% or 4% of the gross, the person is discharged of the service tax of 12% and therefore, the benefit of such shift is to be passed on to the consumers. On the other hand, as claimed by CGPL, if the exercise of option results in higher expenditure, it is not understandable why such an option was exercised. The increase in expenditure, if any, is not due to any change in law, but due to exercise of option by the person liable to pay service tax. Therefore, such increase cannot be passed on to the procurers.

B. Computation of coal

4. The Petitioner in the Petition has submitted as under:

(i) While allowing the imposition of Clean Energy Cess, the Commission has held that the quantum of coal to be considered as per the parameters decided in Petition No. 159/MP/2012 as under:

“.....It is clarified that the petitioner shall be entitled to recover clean energy cess on coal in proportion to the actual coal consumed in accordance with the parameters as decided by the Commission in Para 82 (d) of the order dated 6.12.2015 in Petition No. 159/MP/2012 corresponding to the scheduled generation for supply of electricity to the procurers. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of clean energy cess on coal.”



(ii) The order dated 6.12.2015 mentioned in the above para is incorrect and should be read as 6.12.2016.

(iii) The reference to para 82 (d) is also erroneous and the reference should be all bid parameters as considered in the order dated 6.12.2016 at para 84. The quantum of coal to be considered therefore is actuals or as bid parameter, whichever is lower. This would be consistent with the decision of the Commission in order dated 6.12.2016 in Petition No. 159/MP/2012 and order dated 9.2.2016 in Petition No. 153/MP/2015.

5. Accordingly, the Petitioner has prayed that the review petition may be allowed and the order dated 17.3.2017 may be modified.

6. The Petition was admitted on 18.7.2017 and the Commission ordered notice on the respondents. Reply has been filed by the respondent CGPL vide affidavit dated 29.8.2017 and has submitted as under:

(i) CGPL by way of reply is raising its preliminary objection as regards the maintainability of the review petition. This Commission, as a preliminary issue ought to decide on the maintainability of the review petition before getting into merits of the matter. In the event the Commission is inclined to hear review petition on merits, CGPL craves leave of the Commission to file detailed reply on merits.

(ii) The review petition is misconceived and not maintainable as it seeks the reopening/ rehearing/ reconsideration of the issues conclusively decided by the Commission in order dated 17.3.2017 under the garb of review. The Petitioner has also failed to demonstrate the error apparent on the face of the record which would justify the exercise of power of review by the Commission.

(iii) The Commission has passed the order dated 17.3.2017 after hearing the parties at length and considering the submissions made by all concerned. In fact, the issues raised by GUVNL in this Petition were not even raised by it in reply dated 14.8.2015 filed in the original petition.

(iv) CGPL has preferred an appeal (Appeal No. 172 of 2017) before the APTEL which has been admitted and is pending adjudication. Therefore, this Commission ought not to consider it in this review petition.



7. Accordingly, it has submitted that the review petition is liable to be dismissed as not maintainable.

8. During the hearing of the Petition on 27.9.2017, the learned counsel for the Petitioner reiterated the above submissions and prayed that the review petition may be allowed. In response, the learned counsel for the respondent, CGPL however submitted that the review petition was not maintainable as the Petitioner has sought to reopen/re-hear the issues already decided by the Commission in order dated 17.3.2017. He further clarified that as on the Cut-off date, Service Tax was payable on Works Contract at the rate of 12%. He also submitted that on 22.5.2017, the Ministry of Finance vide its notification gave option to persons liable to pay Service Tax on Works Contract, to pay Service Tax at the rate of 2% of gross amount of the Works Contract instead of paying at the rate of 12% on the service component which was again increased from 2% to 4% vide notification dated 1.3.2008. He has further submitted that if the option is not exercised, then the status quo would be maintained and there would be no Change in Law in terms of Article 13 of the PPA. The learned counsel therefore contended that the increase in expenditure, if any, is not due to Change in Law but due to exercise of option by the person liable to pay Service Tax. He added that CGPL has filed appeal before the Appellate Tribunal for Electricity challenging the computation of impact of change in law with respect to levies on coal and the same is pending. The learned counsel accordingly argued that there is no merit in the review petition filed by the Petitioner. The Commission after hearing the parties reserved its order in the Petition. Based on the submissions of the parties and documents available on record, we now proceed to examine the issues as stated in subsequent paragraphs.



Maintainability

9. The respondent, CGPL has raised preliminary issue as regards the maintainability of the Petition and has submitted that the Petitioner has sought to reopen the issues which has been conclusively decided by this Commission in order dated 17.3.2017. It has also submitted that the issues raised by the Petitioner were never raised in the reply dated 14.8.2015 filed by it in the original Petition. It has further submitted that the review petition is not on account of discovery of new and important matter on evidence which after exercise of due diligence was not within its knowledge at the time of hearing. The respondent has stated that the Commission ought to decide the maintainability of the review petition and leave of the Commission may be granted for filing reply on merits in case the Commission is inclined to hear the review petition on merits. The Petitioner in the review petition has pointed out that there has been incidence of Service Tax on Works Contract services as on the cut-off date of (30.11.2006). In justification of the said contention, the Petitioner has submitted that though the respondent CGPL has stated in the original petition that there was no service tax payable on Works Contract Service, it has, in its rejoinder to the reply filed by MSEDCL clarified that service tax was payable on works contract at the rate of 12% on service portion as on the cut-off date. Accordingly, it has prayed that the issue of Service Tax may be reconsidered as the respondent CGPL has represented that the service tax of 12% was imposed on service component of works contract after eliminating the supply component.

10. We have perused the review petition, the documents on record and the submissions of the learned counsel for the review petitioner. In the first instance, we examine the maintainability of the review application on the ground that it is not covered under the scope of Order 47 Rule 1 of the CPC. The Commission's power of



review is governed in accordance with section 94(1)(f) of the Electricity Act, 2003 read with Order 47 Rule 1 of the Code of Civil procedure, 1908 (CPC). Section 94 (1) (f) of the Electricity Act, 2003 provides that the Commission shall have the same power as vested in a civil court under the CPC for reviewing its decisions, directions and orders. Order 47 Rule 1 of CPC provides that any person considering himself aggrieved by an order may apply for its review to the court which passed the order, under the following circumstances:

“(a) on discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced at the time when the decree was passed or order made, or

(b) on account of some mistake or error apparent on the face of the record, or

(c) for any other sufficient reasons”

11. The Commission in order dated 17.3.2017 had allowed Service Tax on Works Contract Service as under:

“42. The petitioner in its affidavit dated 14.10.2015 has submitted that the Service Tax was applicable at the rate of 12% and by the Finance Act, 2006, the Works Contract was brought within the ambit of Service Tax by which a Service Tax of 2% was imposed on the service component of the Works Contract after eliminating the supply component. Subsequently, the Ministry of Finance vide Notification No. 32/2007-Service dated 22.5.2007 introduced “Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007, which became effective from 1.6.2007 and by the said notification, an option was given to the persons who were liable to pay service tax in relation to Works Contract to discharge its liability of paying Service Tax, instead of paying service tax at the rate specified in Section 66 of the Finance Act, 1994, by paying an amount equivalent to 2% of the gross amount charged for the works contract. Subsequently, the Department of Revenue vide Notification No. Order in Petition No. 157/MP/2015 Page 29 7/2008-Service dated 1.3.2008 amended Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 and increased the Service Tax from 2% to 4% on works contract service. The petitioner has further submitted that by the Finance Act, 2007, a Secondary and Higher Educational Cess has been levied at the rate of 1% on aggregate duty of Service tax levied and collected by the Central Government. The petitioner vide affidavit dated 2.9.2015 has placed on record the Statutory Auditor’s Certificates impacting Change in Law due on account of increase in Service Tax

43. We have considered the submissions of the petitioner and MSEDCL. As on the cut-off date of 30.11.2006, there was no service tax on Works Contract Service. As per the bid documents, the petitioner was required to factor in all the taxes, cess, duties etc. in the bid. In the absence of service tax on Works Contract Service as on cut-off date, the petitioner could not be expected to factor the same while quoting the tariff. The service tax on works contract service was introduced through the Finance Act,



1994 and levied by the Ministry of Finance, Department of Revenue vide Notification No. 32/2007-Service Tax dated 22.5.2007 at the rate of 2% under Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 issued under Section 93 and 94 of the Finance Act, 1994. Subsequently, Government of India, Ministry of Finance, Department of Revenue (Tax Research Unit) vide Notification No. 7/2008-Service Tax dated 1.3.2008 increased service tax on works contract service from 2% to 4%. Government of India, Ministry of Finance through Finance Act, 2007 levied a Secondary and High Educational Cess at the rate of 1% on aggregate duty of service tax levied and collected by the Central Government. The petitioner has been paying service tax on work contract service at the rate of 4% and 1% of Secondary and Higher Education Cess to the tune of Rs.13 lakh and Rs. Order in Petition No. 157/MP/2015 Page 30 39 lakh for the years 2012-13 and 2013-14 respectively since the effective date of the notifications. Therefore, the service tax on works contract service and levy of Secondary and Higher Education cess Act of Parliament and the rates were being notified from time to time by Ministry of were introduced after the cut-off date through the Finance (Department of Revenue) and Department of Revenue (Tax Research Unit) which are Indian Government Instrumentalities. Accordingly, the claim of the petitioner is allowed under Change in Law. The petitioner shall submit to the beneficiaries the auditor certificate based on the service tax paid on the service component of the works contract after obtaining all relevant documents from the contractor on annual basis.”

12. It is noticed from the above that the claim of the respondent, CGPL for Service tax on works contract service was allowed under ‘change in law’ as per Notifications dated 22.5.2007 and 1.3.2008 on the basis that service tax on Works Contract Service were introduced after the cut-off date. The Petitioner in this review petition has pointed out to an error in the said order and has submitted that the respondent CGPL had admitted in its rejoinder dated 14.10.2015 (to the reply filed by MSEDCL) that Service tax on work contract service was existing as on the cut-off date and that the Notifications dated 22.5.2007 and 1.3.2008 only gave an option to a person to discharge his service tax liability by paying an amount equivalent to 2% of gross amount charged for Works contract, instead of paying service tax. In other words, the grievance of the Petitioner is that the Commission, while observing that the Service Tax on Works Contract Service was introduced after the Cut-off date, had inadvertently not considered the submissions of the respondent, CGPL in its rejoinder dated 14.10.2015 had admitted that the said tax was existing as on the cut-off date. This according to the Petitioner is an error apparent on the face of the order



dated 17.3.2017. There is force in the submissions of the Petitioner. It is observed that the Commission while allowing the said claim of the respondent, CGPL in order dated 17.3.2017 had not considered the submissions in its rejoinder dated 14.10.2015, wherein, the said respondent has admitted that the Service Tax on Works contract Service existed as on the cut-off date, though the option to pay at 2% of gross amount of the Works Contract was introduced after the cut-off date. The non-consideration of this submission of the respondent, is in our view, an error apparent on the face of the order dated 17.3.2017. Hence, the review petition is maintainable on this ground.

13. Further, the order dated 17.3.2017 in Petition No. 157/MP/2015 relates to reliefs claimed by the respondent, CGPL under 'Change on law' events during the Operating period of the Mundra Project. It is however noticed that a similar Petition (Petition No. 141/MP/2016) was filed by the respondent, CGPL seeking increase in tariff as a result of increase in capital cost of the same Project (Mundra UMPP) due to 'Change in Law' events during the Construction period. In the said Petition, the respondent, CGPL had claimed Service tax on Works Contract Service and had submitted that the Service tax was applicable at the rate of 12% as on the cut-off date (30.11.2006). Based on this, the claim of the respondent, CGPL for Service tax on Works Contract Service was disallowed by order dated 31.8.2017. Since it is evident that there has been an incidence of Service Tax on Works Contract services as on the cut-off date of the Project, the order dated 17.3.2017 granting relief on the basis that there has been no Service Tax on Works Contract services, as on the cut-off date, is in our view, an error apparent on the face of the order. Hence, the review petition is maintainable.



Decision on merits

14. The respondent, CGPL has submitted that in case the Commission is inclined to hear the review petition on merits, it shall be granted liberty to make submissions, on merits. We notice from the ROP of the hearing dated 27.9.2017, that the learned counsel for the parties have made submissions on merits, and the Commission had accordingly reserved its orders in the Petition. In view of this, we find no reason to again hear the matter on merits. Hence, the prayer of the respondent, CGPL is rejected.

15. Based on the above discussions, there exists sufficient reasons to review the impugned order dated 17.3.2017 with regard to the decision to allow the Service Tax on Works Contract services under Change in Law as claimed by the respondent, CGPL. Considering the fact that the increase in Service tax has resulted due to exercise of an option by the Petitioner, we in line with the decision of the Commission dated 31.8.2017 in Petition No. 141/MP/2016, review the decision in para 43 of the order dated 17.3.2017 as under:

“43. It is noticed that the Service tax of 12% was imposed on service component/ elements of Works Contract, thereby effectively considering 2% of service tax on Works Contract at the time of the bid. This has been considered by the Petitioner as on the cut-off date (30.11.2006). Thus, the notification dated 22.5.2007 of the Ministry of Finance giving options to the persons by paying an amount equal to 2% of the gross amount charged for the Works Contract, instead of paying service tax at the rate specified under the Finance Act, 1994 is not a new levy but an option given to the person to pay 2% of the gross instead of 12% of the service component. Thus, in our view, the exercise of option by the Petitioner, which is beneficial to the person liable to pay tax, cannot therefore be termed as a Change in law event falling within the scope of Article 13 of the PPA. Similarly, the increase of Service tax to 4% as per Notification dated 1.3.2008 is also an option to the person to discharge his tax liability. Since the increase in Service tax has resulted due to exercise of an option by the Petitioner, the impact of the same cannot be passed on to the Procurers. In this background, the claim of the Petitioner during the Operating period is not allowed.”



Accordingly, the Respondent shall not be entitled for service tax on works contract under change in law. The impugned order dated 17.3.2017 shall stand modified to this extent.

Correction of errors

16. One more contention of the Petitioner is that the Commission in order dated 17.3.2017, while allowing the imposition of Clean Energy Cess has held that the quantum of coal to be considered as per parameters decided in Petition No. 159/MP/2012:

“20....It is clarified that the petitioner shall be entitled to recover clean energy cess on coal in proportion to the actual coal consumed in accordance with the parameters as decided by the Commission in Para 82 (d) of the order dated 6.12.2015 in Petition No. 159/MP/2012 corresponding to the scheduled generation for supply of electricity to the procurers. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of clean energy cess on coal...”

17. Accordingly, the Petitioner has pointed out that the order dated 6.12.2015 mentioned in the above para is 6.12.2016 and not 6.12.2015. It has also submitted that the reference to para 82(d) is also erroneous and that the reference should be to all bid parameters as considered in Para 84 of the order dated 6.12.2016.

18. We have examined the matter. It is observed that certain clerical errors as pointed above by the Petitioner had crept in the order dated 17.3.2017 and the same is required to be corrected by this order. Accordingly, the review on this ground is allowed and the para 20 of the order dated 17.3.2017 stands corrected as under:

(a) *The order dated 6.12.2015 is corrected as ‘6.12.2016’.*

(b) *The sentence, “the parameters as decided by the Commission in Para 82(d) of the of the order dated 6.12.2016 in Petition No. 159/MP/2012” is corrected as “the parameters as decided by the Commission in Para 84 of the of the order dated 6.12.2016 in Petition No. 159/MP/2012..”*



19. The respondent, CGPL has submitted that the issue of computation of impact of change in law with respect to levies is pending adjudication before the Hon'ble Appellate Tribunal for Electricity (Tribunal) and therefore this Commission ought not to consider it in the present Review Petition. It is noticed that the respondent CGPL has filed Appeal No. 172/2017 before the Tribunal challenging the order dated 17.3.2017 on change in law events which have not been allowed by the Commission in the said order. Moreover, the issue of Service Tax on Works Contract Service is not a matter pending before the Tribunal. Even otherwise, the pendency of the appeal filed by the respondent, CGPL do not bar the consideration of the issues raised in the review Petition filed by the Petitioner, GUVNL. Accordingly, the submissions of the respondent are rejected.

20. Petition No. 22/RP/2015 is disposed of in terms of the above.

Sd/-
(Dr. M. K. Iyer)
Member

Sd/-
(A.S. Bakshi)
Member

Sd/-
(A. K. Singhal)
Member

Sd/-
(Gireesh B. Pradhan)
Chairperson

