केन्द्रीय विद्युत विनियामक आयोग
CENTRAL ELECTRICITY REGULATORY COMMISSION

**नई दिल्ली**
**NEW DELHI**

**याचिका संख्या. /Petition No.: 1) Petition No. 187/MP/2018;**
**2) Petition No. 192/MP/2018;**
**3) Petition No. 193/MP/2018;**
**4) Petition No. 178/MP/2018; and**
**5) Petition No. 189/MP/2018**

**कोरम/Coram:**

**श्री पी. के. पुजारी, अध्यक्ष/Shri P. K. Pujari, Chairperson**
**डॉ. एम. के. अय्यर, सदस्य/ Dr. M.K. Iyer, Member**

**आदेश दिनांक /Date of Order: 05 of February, 2019**

**IN THE MATTER OF:**

A Petition under Section 79(1)(b) of the Electricity Act, 2003 for the approval of ' Change in Law' and consequent revision in capital cost due to introduction of the Central Goods and Services Tax Act, 2017 promulgated by the Department of Revenue, Ministry of Finance notified by way of notification dated 28.06.2017.

**AND IN THE MATTER OF:**

**1) Petition No. 187/MP/2018**

M/s Renew Wind Energy (TN2) Private Limited,
138, Ansal Chamber – II
Bikaji Cama Place,
New Delhi – 110066

**... Petitioner**

VERSUS

NTPC Limited
Core - 7, SCOPE Complex,
7, Institutional Area,
Lodi Road, New Delhi – 110003.

NTPC Vidyut Vyapar Nigam Limited
Core - 7, SCOPE Complex,
7, Institutional Area,
Lodi Road, New Delhi – 110003.

Southern Power Distribution Company of Telangana Limited
6-1-50, Corporate Office, Mint Compound,
Lakdikapool, Hyderabad,
TELANGANA – 500004

Northern Power Distribution Company of Telangana Limited
H. No. 2-5-31/2, Corporate Office,
Vidyut Bhavan,
Nakkalgutta, Hanamkonda,
Warangal- TELANGANA – 506001

**... Respondents**

**AND IN THE MATTER OF:**

**2) Petition No. 192/MP/2018**

M/s Phelan Energy India RJ Private Limited
Ist Floor, A3/12,
Sultanpuri,
New Delhi- 110086

**... Petitioner**

VERSUS

Solar Energy Corporation of India Limited
1st Floor, A - Wing, D-3,
District Centre, Saket,
New Delhi – 110 017

Jaipur Vidyut Vitran Nigam Limited
Vidyut Bhawan,
JanpathJyoti Nagar,
Jaipur- 302005

Ajmer Vidyut Vitran Nigam Limited
Vidyut Bhawan, Panchseel Nagar,
Makarwali Road,
Ajmer – 305004

Jodhpur Vidyut Vitran Nigam Limited
New Power House,
Jodhpur – 342003

**... Respondents**

**AND IN THE MATTER OF:**

**3) Petition No. 193/MP/2018**

M/s Renew Wind Energy (TN2) Private Limited,
138, Ansal Chamber – II
BikajiCama Place,
New Delhi – 110066

**... Petitioner**

VERSUS

NTPC Limited
Core - 7, SCOPE Complex,
7, Institutional Area,
Lodi Road, New Delhi – 110 003.

NTPC Vidyut Vyapar Nigam Limited
Core - 7, SCOPE Complex,
7, Institutional Area,
Lodi Road, New Delhi – 110 003.

Bangalore Electricity Company Limited
K.R. Circle, Banglore
Karnataka – 560 0001

Hubli Electricity Supply Company Ltd
Navanagar , PB Road,
KARNATAKA – 580 025

Gulbarga Electricity Supply Company Limited
Gulbarga Main Road, Gulbarga
Karnataka - 585102

Mangalore Electricity Supply Company Limited
Mescom Bhavan Bejai, Kavoor Cross Road,
Mangalore, Dakshina Kannada,
Karnataka -575004

**... Respondents**

**AND IN THE MATTER OF:**

**4) Petition No. 178/MP/2018**

M/s ACME Jodhpur Solar Energy Private Limited
Plot No. 152, Sector - 44,
Gurgaon 122002,
Haryana

**... Petitioner**

VERSUS

M/s Solar Energy Corporation of India Limited
1st Floor, A-Wing,
D-3 District Centre,
Saket, New Delhi - 110017

M/s Rajasthan Urja Vikas Nigam Limited
Vidyut Bhawan, Janpath,
Jyoti Nagar, Jaipur- 302005,
Rajasthan

**... Respondents**

**AND IN THE MATTER OF:**

**5) Petition No. 189/MP/2018**

M/s ACME Rewa Solar Energy Private Limited
Plot No. 152, Sector - 44,
Gurgaon 122002,
Haryana

**... Petitioner**

VERSUS

M/s Solar Energy Corporation of India Limited
1st Floor, A-Wing,
D-3 District Centre,
Saket, New Delhi - 110017

M/s Rajasthan Urja Vikas Nigam Limited
Vidyut Bhawan, Janpath,
Jyoti Nagar, Jaipur- 302005,
Rajasthan

**... Respondents**

**Parties Present:** Shri Sujit Ghosh, Advocate, RWEPL, PEIPL
Shri Raarah Gurjar, Advocate, RWEPL, PEIPL
Shri Rishab Prasad, Advocate, RWEPL, PEIPL
Ms. Poorva Saigal, Advocate, NTPC, SECIL
Ms. Ranjitha Ramachandran, Advocate, NTPC, SECI
Shri M. G. Ramachandran, Advocate, SECI
Shri Rishab Prasad, Advocate, ACME
Shri Varun Kapur, Advocate, ACME
Shri Molshree, Advocate, ACME
Ms. Mannat Waraish, Advocate, ACME

## आदेश/ ORDER

1. The Petitioner, M/s Renew Wind Energy (TN2) Private Limited in petition no. 187/MP/2018 and 193/MP/2018 is a wholly owned subsidiary of M/s Renew Power Limited which is an Independent Power Producer (IPP) of clean energy with more than 5600 MW of commissioned and under-construction clean energy assets and has set up a number of wind and solar power projects in India.

2. The Petitioner, M/s Phelan Energy India RJ Private Limited in petition no. 192/MP/2018 is a project company of M/s Phelan Energy Group Limited which is a leading international developer and innovator in the renewable energy sector engaged in the production of photovoltaic solar electricity.

3. The Petitioner, M/s ACME Jodhpur Solar Energy Private Limited and M/s ACME Rewa Solar Energy Private Limited in petition no. 178/MP/2018 and 189/MP/2018 are a Special Purpose Vehicle formed by M/s ACME Solar Holdings Limited (hereinafter referred to as "ASHL") for setting up a 100 MW solar power project.

4. M//s Renew Wind Energy (TN2) Private Limited, M/s Phelan Energy India RJ Private

Limited, M/s ACME Jodhpur Solar Energy Private Limited and M/s ACME Rewa Solar Energy Private Limited (hereinafter collectively referred to as "Petitioners") are generating companies primarily engaged in the business of setting up of renewable energy power plants and generation of electricity.

5. The Respondent, M/s NTPC Limited is a Public Sector Undertaking engaged in the business of generation of electricity and allied activities. NTPC is also the Implementation Agency for setting up of grid-connected solar power projects and for facilitating purchase and sale of power *inter alia* under the National Solar Mission.

6. The Respondent, M/s NTPC Vidyut Vyapar Nigam Limited (hereinafter referred to as "NVVN") is a wholly owned subsidiary of NTPC and is engaged in the business of power trading.

7. The Respondent, M/s Solar Energy Corporation of India Limited (hereinafter referred to as "SECI") is a Government of India enterprise under the administrative control of the Ministry of New and Renewable Energy (hereinafter referred to as "MNRE"). SECI is an inter-State licensee and has been designated as the nodal agency for implementation of MNRE schemes for developing grid connected solar power capacity through VGF mode in India.

8. The Respondent, M/s Rajasthan Urja Vikas Nigam Limited (hereinafter referred to as "RUVNL") is engaged in the business of power trading and has been impleaded as a party as per directions dated 17.09.2018 of the Commission viz. *"to implead all distribution companies as party."*

9. The Petitioners have made the following prayers:

**IN Petition No. 187/MP/2018; 192/MP/2018 & 193/MP/2018**

*a) Declare the introduction of GST as Change in Law in terms of the PPA(s) which have led to an increase in the recurring and non-recurring expenditure for the Project;*

*b) Evolve a suitable mechanism to compensate the Petitioner for the increase in recurring and non-recurring expenditure incurred by the Petitioner on account of*

*Change in Law;*

c) *Grant interest/carrying cost for any delay in reimbursement by the Respondents; and*

d) *Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case.*

**IN Petition No. 178/MP/2018; 189/MP/2018**

a) *Declare that the introduction of the GST Law is a 'Change in Law' event in accordance with Article 12 of the PPAs dated 26.09.2017 executed between the Petitioners and the Respondents and that the Petitioners are entitled to relief thereunder;*

b) *Direct the Respondents to compensate the Petitioners in terms of Article 12 of the PPAs for the additional capital cost incurred/ to be incurred by it due to introduction of GST Law by way of adjustment in the quoted tariff for the recurring expenditure as well as an upfront lump sum payment for the non-recurring expenditure, as the case may be along with the carrying cost/ interest on the additional capital at 14%, as per applicable market rates;*

c) *Direct the Respondents to compensate the Petitioners for the increase in the O&M and other recurring costs by way of an upward revision of tariff;*

d) *Allow legal and administrative costs incurred by the Petitioners in pursuing the instant petition;*

e) *Pursuant to grant of prayer (a) and (b) above, approve the necessary consequential amendments to the PPAs and LoI;*

f) *Grant such order, further relief(s) in the facts and circumstances of the case as this Ld. Commission may deem just and equitable in favour of the Petitioners.*

**Brief facts of the case:**

10. The Respondent (NTPC) issued Request for Selection (hereinafter referred to as "RfS") of Solar Power Developers (hereinafter referred to as "SPDs") for setting up grid-connected solar projects of 350 MW capacity, project size being 10 MW each i.e. 35 MW x 10 Projects in the State of Telangana, through e-bidding process. Pursuant to the RfS, M/s Renew Wind Energy (TN 2) Private Limited, was selected for setting up of a solar power generation facility with an installed capacity of 100 MW located in the State of Telangana. The Petitioner has entered into 10 separate Power Purchase Agreements (hereinafter referred to as "PPAs") with NTPC, each of which is for the setting up of solar power project of 10 MW capacity in the State of Telangana and for the consequent sale of solar power to NTPC. All the 10 PPAs form part of one single solar power project with an installed capacity of 100 MW located in the state of Telangana and such separate PPAs were entered on account of the mandatory bidding requirements under the RfS. The Petitioner entered into a single LOI in relation to the 10 PPAs.

11. The Respondent (SECI) issued a RfS of SPDs for setting up grid-connected Solar PV Projects in Bhadla Phase III & IV Solar Park, Rajasthan on "Build Own Operate" basis for an aggregate capacity of 500 MW & 250 MW capacity respectively through an e-bidding process based on guidelines issued by MNRE. Pursuant to the RfS, M/s ACME Jodhpur Solar Energy Private Limited, M/s ACME Rewa Solar Energy Private Limited and the M/s Phelan Energy India RJ Private Limited were selected by SECI as a SPD for the setting up of a solar power generation facility. The Parties have entered into a PPA with SECI for setting up of solar power project in the State of Rajasthan and for the consequent sale of solar power to SECI. SECI has entered into back to back agreement with Rajasthan Discoms for sale of power supplied by the Petitioner.

12. On 12.04.2017, Government of India (hereinafter referred to as "GOI") introduced the Goods and Services Tax, replacing multiple taxes levied by the Central and State Governments.

13. On 01.07.2017, the Central Goods and Services Tax Act, 2017; The Integrated Goods and Services Tax Act, 2017 for levy and collection of tax on inter-State supply of goods or

services or both by the Central Government were enacted. The State (Telengana/Rajasthan) Goods and Services Tax Act, 2017 was enacted for levy and collection of tax on intra-State supply of goods or services or both by the respective States.

14. Hence the Petitions.

**Submissions of the Petitioners in the pleadings and during the hearings**

15. The Petitioners have submitted that they are entitled to relief under 'Change in Law' in terms of the PPAs and the Commission has the appropriate jurisdiction in the matter

16. The Petitioners have submitted that Article 12 of the PPA provides for an exhaustive list of 6 events which would be considered as 'Change in Law' which include inter alia the enactment, promulgation, adoption in India of any Law, as well as, any change in tax or introduction of any tax made applicable for supply of power.

17. The Petitioners have submitted that in terms of Article 12 of the PPA, for an events, to qualify as a 'Change in Law' event shall be required to fulfil the following two conditions:

    a. The event should have occurred after the Effective Date;
    b. The event should result in additional recurring/ non-recurring expenditure being incurred by the Solar Power Developer i.e. the Petitioner.

18. The Petitioners have submitted that as per Article 2 of the PPA the Effective Date is 19.07.2016 in Petition No. 187/MP/2018, 16.09.2017 in Petition No. 192/MP/2018 & 21.06.2016 in Petition No. 193/MP/2018. Further, the GST laws came into effect from 01.07.2017. Thus, it is clear that the event of enactment of GST Law has occurred after the Effective Date and has resulted in additional recurring and non-recurring expenditure for the Petitioner.

19. The Petitioners have submitted that in terms of Article 12.2.1 of the PPA, an aggrieved party who has incurred additional recurring/ non-recurring expenditure is required to approach the Commission for seeking approval of such change in law event and thereby, claim relief for

the same upon approval by the Central Commission. In the present case, they have approached the Commission for seeking the relief on account of introduction of GST as a change in law event, as per the first and fifth bullet of Article 12.1.1 of the PPA, in as much as it is in the nature of an enactment, coming into effect after the Effective Date and also qualifies as an introduction of a tax on the supply of power leading to additional recurring/ non-recurring expenditure for the Petitioners.

20. The Petitioners have submitted that in the case of *M/s Acme Bhiwadi Solar Power Private Limited Vs. SECI dated 09.10.2018* (hereinafter referred to as 'Order dated 09.10.2018') the Commission had analysed the change in law provision which is *parimateria* with the provision under the PPA and held that introduction of GST apart from being an enactment, promulgation, etc. of a Law covered by the first bullet has also resulted in changes in taxes on inputs required for power generation and was thus also a tax on the supply of power covered by the sixth bullet therein. Thus, GST being a comprehensive indirect tax reform having wide ranging implication, is covered under the first bullet as an enactment, promulgation, etc. of Law. Further, since the fifth bullet of Article 12 includes taxes for supply of power, hence, taxes on inputs for supply of power i.e. taxes on inputs used in generation and the consequent supply of power would also be covered by the said expression. Accordingly, GST would be covered as a change in law event under the first and fifth bullet of Article 12.1.1 of the PPAs.

21. The Petitioners have submitted that the Commission in the case of *Prayatna Developers Pvt. Ltd. v. NTPC Ltd. And Ors., in Petition No. 50/MP/2018* (hereinafter referred to as 'Order dated 19.09.2018'), after analyzing the change in law provision therein (which is *parimateria* with the provision under the present PPA) held that introduction of GST was squarely covered by the first bullet as an enactment, promulgation, etc. of a Law and was not a mere change in tax having limited applicability on supply of power and would thus not be covered under the fifth bullet of Article 12.1.1. The Order dated 19.09.2018 to the extent it holds GST as a change in law event is covered only under the first bullet, is inconsistent with the settled position of law that the expression taxes for supply of power includes within its ambit taxes on inputs used in the generation and supply of power. This is for the reason that generation and supply of electricity being instantaneous are treated as one transaction. Thus, supply of electricity cannot be restricted to the last leg of sale but also encompasses a number of

activities like the setting up of the power plant, generation and ultimately supply which are undertaken by the generator to ensure supply of power to NTPC. The reasoning of this Commission is premised on the fact that taxes 'on supply of power' are sought to be covered under the fifth bullet of Article 12.1.1 of the PPA, which is completely erroneous in as much as the language of the said fifth bullet does not use the words 'on supply of power', instead it uses the term 'for supply of power'. The language of fifth bullet states that "*any change in tax or introduction of any tax made applicable for supply of power….*" which can only mean taxes incurred for the purposes of supply of power and not on the power *per se*. The word "*for*" is a preposition and means 'purpose'. Accordingly all taxes incurred by a generator for the purposes of supply of power, which if not incurred would not enable the generator to generate and supply power are the taxes that are sought to be covered in the fifth bullet.

22. The Petitioners have submitted that the aforesaid aspect has been correctly appreciated in the subsequent decision of the Commission, in the Order dated 09.10.2018. Accordingly, it is submitted that GST being a change in law event should be covered under the first and fifth bullet as per the decision of the Commission dated 09.10.2018 and not only under the first bullet as has been held by the Commission vide its Order dated 19.09.2018.

23. The Petitioners have submitted that the Commission vide Order dated 19.09.2018 has clearly laid down the methodology which is required to be followed by the SPDs and DISCOMs while granting the relief to the aggrieved party(SPDs), as follows:-

> "*146. Therefore, the Commission directs that the Petitioners have to exhibit clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services backed by auditor certificate. The certification should include 'Certified that all the norms as per 'GST Laws' have been complied with by the Petitioner and the claim of the amount being made by the Petitioner are correct as per the effective taxes in pre and post 'GST regime'. The Petitioners should then make available to the Respondents, the relevant documents along with the auditor certification who may reconcile the claim and then pay the amount so claimed to the SPD w.e.f. 01.07.2017 qua EPC cost on the basis of the auditor's certificate as per the methodology discussed in para no.133 above.*"

24. The Petitioners have submitted that from the above it follows that only the following three conditions are required to be satisfied by the Petitioner for claiming benefits/ reliefs on account of change in law from the Respondents:-

a. Documents and invoices for the procurement of goods and services by the Solar Power Developer i.e. the Petitioner with a one to one co-relation with the corresponding solar power projects;
b. Auditor certificate certifying that the claim of amounts as change in law are correct and as per the effective taxes in the pre-GST and post-GST regime;
c. Making available all the documents and the auditor certificate to the Respondents for reconciliation by the Respondents and consequent pay out of the amounts by the Respondents.

25. The Petitioners have submitted that as per the directions of the Commission in its Order dated 19.09.2018 the Respondents have been conferred with the limited task of reconciliation of the documents, invoices, etc. with the claims submitted by the SPD, before making payments. In other words, the writ of the Respondents is restricted to the reconciliation of the claims with the documents submitted but does not extend to questioning the rates of taxes factored by the Petitioners in making its procurements. Thus, once the afore-mentioned conditions are satisfied by the Petitioners and proper reconciliation has been made, the Respondents have to necessarily disburse the amounts claimed as change in law on account of GST.

26. The Petitioners have submitted that the Commission may clarify that the Respondents ought not to travel beyond the task conferred on them i.e. task of reconciliation of the documents with the claims submitted by the SPD, and sit in judgment over the methodology of tax rates employed by the Petitioners in making its procurements. This is on the basis that the Respondents do not possess any power either under the PPAs or in terms of the extant laws to opine on the veracity of the rate of taxes factored by the Petitioner as the same is the domain of the Department of Revenue in the Ministry of Finance.

27. The Petitioners have submitted that permitting the Respondents to question the rate of taxes factored by them would render the Auditor's certificate nugatory. As per the Order dated 19.09.2018, the responsibility of Auditor is to certify that the Petitioners have complied with all the GST norms and that the claim of the amount being made by the Petitioners are correct as per the effective taxes in pre and post GST regime. Such certification of the auditor is premised on the relevant details of procurement of goods/services along with the details of invoices raised by the Supplier, the date on which Purchase Order/s was/were placed, dates on which goods were delivered, details of bill of lading in case of imported goods, dates on which custom clearances were obtained in case of imported goods, dates on which the goods were received at the project site, dates on which the actual services have been rendered, dates on which the actual commissioning took place. Per contra if the Respondents are permitted to question the tax rates employed by the Petitioners and deny payment of claims based on its own judgment, then this entire exercise of furnishing the documents and auditor certification thereafter would be rendered otiose. Further, the auditor being an expert in this field, would be an independent and impartial person for determining the increase in tax cost on account of GST as opposed to the Respondents which may take a view which favours them and thus their judgment may be open to challenge on the ground of arbitrariness.

28. The Petitioners have submitted that under Para 146 of the Order dated 19.09.2018 of the Commission the word 'may' is used while stating the task of the Respondents (DISCOM) which is reproduced as under:

> "146. … *The Petitioners should then make available to the Respondents, the relevant documents along with the auditor certification who may reconcile the claim and then pay the amount so claimed to the SPD w.e.f. 01.07.2017 qua EPC cost on the basis of the auditor's certificate as per the methodology discussed in para no.133 above."*

29. The Petitioners have submitted that the usage of the word 'may' in Para 146 of the Order dated 19.09.2018 ought to be construed as 'shall' and the Respondents would have to disburse the amounts claimed once they have reconciled the said claims with the document/ invoices made available by the Petitioner. This is on the basis that the Respondents obligation to make payment of amounts claimed as change in law is subject to the fulfilment of the three conditions mentioned in paragraph 24 hereinabove. The Petitioners have placed its reliance on the decision of the Hon'ble Supreme Court of India in the case of *The Official*

*Liquidator Vs. Dharti Dhan Pvt. Ltd.*, reported at [1977 (2) SCC 166] wherein, it has been held that in certain cases the word 'may' shall be read as being mandatory in its import. The relevant portion of the decision is as under:-

> *"8. Thus, the question to be determined in such cases always is, whether the power conferred by the use of the word "may" has, annexed to it, an obligation that, on the fulfilment of certain legally prescribed conditions, to be shown by evidence, a particular kind of order must be made. If the statute leaves no room for discretion the power has to be exercised in the manner indicated by the other legal provisions which provide the legal context. Even then the facts must establish that the legal conditions are fulfilled. A power is exercised even when the Court rejects an application to exercise it in the particular way in which the applicant desires it to be exercised. Where the power is wide enough to cover both an acceptance and a refusal of an application for its exercise, depending upon facts, it is directory or discretionary. It is not the conferment of a power which the word "may" indicates that annexes any obligation to its exercise but the legal and factual context of it. This, as we understand it, was the principal laid down in the case cited before us: Frederic. Guilder Julius v. The Right Rev. The Lord Bishop of Oxford; The Rev. Thomas Thellusson Carter.*
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> *9. Dr. Julius, in the case mentioned above, had made an application to the Bishop of Oxford against the Rector of a parish, asking the Bishop to issue a commission under the Church Discipline Act to enquire against certain unauthorised deviations from the ritual in a Church by the Rector. The relevant statute merely conferred a power by laying down that "it shall be lawful" to issue a commission. The Courts of Queens Bench and of Appeal in England had differed on the question whether a mandamus from the Court could go to the Bishop commanding him to issue a commission for the purpose of making the enquiry. The House of Lords held that the power to issue the commission was not coupled with a duty to exercise it in every case although there may be cases where duties towards members of the public to exercise a power may also be coupled with a duty to exercise it in a particular way on fulfilment of certain specified conditions. The statute considered there had not specified those conditions. Hence, it was a bare power to issue or not to issue the commission. Lord Blackburn said: (at p. 241 ):*
>
> > *"I do not think the words 'it shall be lawful' are in themselves ambiguous at all. They are apt words to express that a power is given; and as, prima facie, the donee of a power may either exercise it or leave it unused, it is not inaccurate to say that, prima facie, they are equivalent to saying that the donee may do it; but if the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power, to exercise it for the benefit of those who have that right, when required on their behalf. Where there is such a duty, it is not inaccurate to say that the words conferring the power are equivalent to saying that the donee must exercise it. It by no means follows that because there is a duty cast on the donee of a power to exercise it, that mandamus lies to enforce it; that*

*depends on the nature of the duty and the position of the donee".*

> *10. The principle laid down above has been followed consistently by this Court whenever it has been contended that the word "may" carries with it the obligation to exercise a power in a particular manner or direction. In such a case, it is always the purpose of the power which has to be examined in order to determine the scope of the discretion conferred upon the donee of the power. If the conditions in which the power is to be exercised in particular cases are also specified by a statute then, on the fulfilment of those conditions, the power conferred becomes annexed with a duty to exercise it in that manner."*

30. The Petitioners have submitted that it is relevant to note that Para 146 of Order dated 19.09.2018 has laid down certain pre-conditions for exercise of the Respondents duty to make disbursements of claims on account of 'change in law' to the Petitioners. The purpose of the said duty of the Respondents is to grant such 'change in law' claims as have been legitimately made. In pursuance of the underlying purpose, the Respondents are required to match the claims as per the auditor's certificate with the documents/invoices made available by the Petitioners. Thus, once a proper reconciliation is made by the Respondents, a duty is cast upon it to make the payments since pre-conditions for exercise of its power have been satisfied.

31. The Petitioners have submitted that the Respondents have sought to contend that given the substantial difference in the GST rates on assets bought individually as opposed to assets bought as components of solar power generating system, the Petitioners have the duty to mitigate the costs. The said assertion of the Respondents is not borne out of the provisions of the PPAs in as much as the Petitioners are entitled to relief for 'change in law' when there is any increase in recurring/ non-recurring expenditure incurred by the Petitioners. Further, the reduced rate of 5% as applicable to solar power generating system depends upon a particular contract structure which may or may not be followed by the Petitioners. Accordingly, the duty to mitigate costs cannot be read into the PPAs since the reduced cost is a factor of the specific contracting structure of the Petitioners, which will vary on the basis of the contractual arrangements of the Petitioners with the Contractors. Further, in cases where the parties to the PPAs intended to include a duty to mitigate, it has been specifically done so, such as at clause 11.6 (Force Majeure) and Clause 14.6 (Indemnity). However, in relation to

'Change in Law', as there is no specific clause relating to mitigation of risk, the same cannot be read into the Change in Law clause under the PPA.

32. The Petitioners have submitted that the applicability of the reduced rate of 5% on solar power generating system is a nebulous concept and there is considerable ambiguity as to in what cases will the reduced rate of 5% be applicable. As per various decisions of the Authority for Advance Ruling under GST, the contracts have been read to be works contract leviable to GST at 18% and not the reduced rate of 5% as was sought to be contended. A snapshot of the advance rulings is reproduced below:-

| Applicant name, citation and date of Advance Ruling Order | Issue | Held |
|---|---|---|
| FERMI SOLAR FARMS PRIVATE LTD, reported at [2018-VIL-14-AAR], dated 03.03.2018 | Whether in case of separate contracts for supply of goods and services for a solar power plant, there would be separate taxability of goods as 'solar power generating system' at 5% and services at 18%. | The separate contracts for supply of goods and services for a solar power plant, is a single work contract of setting up of a solar power plant - rate of tax would be 18% under the IGST Act. |
| GIRIRAJ RENEWABLES PRIVATE LIMITED, reported at [2018-VIL-20-AAR], dated 17.02.2018 | Whether supply of turnkey Engineering, Procurement and Construction ('EPC') Contract for construction of a solar power plant wherein both goods and services are supplied can be construed to be a Composite Supply? | It was held that the determination of rate of tax depends on facts and circumstances of the case, nature of supply to be looked into in each case. Further, the present transaction is a Works Contract u/s 2(119) of the CGST Act, as deemed to be a supply of services, therefore, not a 'composite supply' u/s 2(30) the GST Act. Thus applicable rate of tax will be 18%. |
| M/s RFE SOLAR PRIVATE LIMITED, reported at [2018-VIL-143-AAR], dated 01.07.2018 | Whether contract for Erection, Procurement and Commissioning of Solar Power Plant shall be classifiable as Supply of Goods or Supply of Services under the provisions of the CGST Act 2017 / Rajasthan SGST Act 2017 | The scope of work in respect of "Turnkey EPC Contract" includes civil works, procurement of goods and erection and commissioning - falls under the ambit "Works Contract Services" (SAC 9954) of Notification no. 11/2017 Central Tax (Rate) dated 28 June, 2017 and attracts 18% rate of tax under IGST Act, or 9% each under the CGST and SGST Acts, aggregating to 18% |

| | | |
|---|---|---|
| M/s TAG SOLAR SYSTEM, reported at [2018-VIL-171-AAR], dated 18.08.2018 | Supply, commissioning, installation and maintenance of Solar Water Pumping System would be taxable as a composite supply or works contract? | The contract for supply, installation, commissioning and maintenance of 'Solar Water Pumping Systems' falls under the ambit of Works Contract Services as per Section 2(119) of CGST Act and attracts GST rate of 18% |
| M/s SOLAIREDIRECT INDIA LLP, reported at [2018-VIL-228-AAR], dated 15.09.2018/ | Whether EPC contract for set up of solar power generating system be considered as a composite supply with PV modules being the principal supply and be taxed at a rate of 5% (i.e. tax rate applicable on the P.V. modules) | The transaction for EPC Contract for the Solar Power Plant which includes engineering, design, procurement, supply, development, testing and commissioning is a Works Contract in terms of section 2(119) of the CGST Act - The contract for EPC of Solar Power Plant falls under the ambit Works Contract Services (SAC 9954) and attracts 18% GST |
| M/s FRIZO INDIA PRIVATE LIMITED, reported at [2018-VIL-229-AAR], dated 24.09.2018 | Applicable rate of GST on supply of Solar Power Generating System | The nature of work is of Erection, Procurement and Commissioning of Solar Generating System which falls under the ambit of Works Contract in terms of section 2(119) of the CGST Act and attracts 18% GST |
| GIRIRAJ RENEWABLES PRIVATE LIMITED, reported at [2018-VIL-11-AAAR], dated 05.09.2018 | Whether supply of turnkey Engineering, Procurement and Construction (EPC) Contract for construction of a solar power plant wherein both goods and services are supplied can be construed to be a Composite Supply | EPC Contract of supply of solar power plant is contract for erection of 'solar power generating system' which is immovable property and cover within the definition of Works Contract service - merely because a schedule entry is provided for the same does not mean that the product would be classified in the same - The question is answered in the positive as supply of the said turnkey EPC contract is a 'composite supply' u/s.2(30) of the CGST Act, 2017.The said composite supply falls within the definition of works contract u/s.2(119) of the CGST Act, 2017 and thus leviable to 18% GST |
| M/s FERMI SOLAR FARMS PRIVATE LIMITED, reported at [2018-VIL-13-AAAR], dated 04.09.2018 | Whether in case of separate contracts for supply of goods and services for a solar power plant, there would be separate taxability of goods as 'solar power generating system' at 5% and services at 18% and | In the absence of any written agreement showing the terms and conditions, it would be both difficult as well as incorrect for us to determine the same. The situation now is the same as it was before the Advance ruling authority - AAR Order stating the rate of GST to be applied is 18% -upheld |

| | | |
|---|---|---|
| | Whether benefit of concessional rate of 5% of solar power generation system and parts thereof would also be available to sub-contractors - | |

33. The Petitioners have submitted that it would be highly inappropriate to allow Respondents writ to run in determining the appropriate GST rates that ought to have been factored by the Petitioners.

34. The Petitioners have submitted that the Respondents also relied upon the decision of this Commission in Order dated 14.03.2018 in Petition No. 13/SM/2017 and averred that in case of any disputes on any of the taxes, duties and cess, the Respondents would have liberty to approach this Commission. In this regard, it is submitted that as opposed to the Order dated 14.03.2018, where it has been specifically granted the liberty to approach the Commission, no such direction was given by the Commission in terms of its Order dated 19.09.2018, in the case of Prayatna Developers Pvt. Ltd. v. NTPC Ltd. and Ors. The relevant portion of the aforesaid Order dated 14.03.2018 is reproduced below:-

> "*35. Accordingly, we direct the beneficiaries/ procurers to pay the GST compensation cess @ Rs 400/ MT to the generating companies w.e.f 01.07.2017 on the basis of the auditors certificate regarding the actual coal consumed for supply of power to the beneficiaries on basis of Para 28 and 31. In order to balance the interests of the generators as well as discoms/beneficiary States, the introduction of GST and subsuming/abolition of specific taxes, duties, cess etc. in the GST is in the nature of change in law events. We direct that the details thereof should be worked out between generators and discoms/beneficiary States. The generators should furnish the requisite details backed by auditor certificate and relevant documents to the discoms/ beneficiary States in this regard and refund the amount which is payable to the Discoms/ Beneficiaries as a result of subsuming of various indirect taxes in the Central and State GST. In case of any dispute on any of the taxes, duties and cess, the Respondents have liberty to approach this Commission.*"

35. The Petitioners have submitted that the clear departure of this Commission in its subsequent decision vide Order dated 19.09.2018 in the case of Prayatna Developers Pvt. Ltd. v. NTPC Ltd. And Ors., in relation to the finding that in case of any dispute of taxes, duties and cess the Respondents have the liberty to approach this Commission runs in favor of the Petitioners in as much as the Respondents cannot sit in judgment on the tax rates employed by the

Petitioners and that the duty of the Respondents is only limited to reconcile the claim of the Petitioners with the documents submitted by it alongwith the Auditor certificate.

36. The Petitioners have submitted that in the event the Respondents are granted the discretion to question the tax rates employed by the Petitioners, then any implications arising from exercise of said discretion ought to be borne by the Respondents. The Respondents ought to be directed to indemnify the Petitioners from payment of tax, interest and penalty if any adverse tax implications are borne out of the Respondents exercise of discretion.

**O&M expenses**

37. The Petitioners have submitted that in the Order dated 19.09.2018, this Commission in the case of Prayatna Developers Pvt. Ltd. v. NTPC Ltd. And Ors., has given clear finding that recurring expenses in terms of Article 12 of the PPA include *inter alia* estimated maintenance cost. The relevant portion of the said Order dated 19.09.2018 is reproduced hereunder:-

> "*149. The Commission is of the view that the recurring expenses referred to in Article 12 of the PPA includes activities like salary, tax expenses, estimated maintenance costs, and monthly income from leases etc. It is apparent that GST will apply in case of outsourcing of the 'Operation and Maintenance' services to a third party (if any). However, outsourcing of the 'Operation and Maintenance' services is not the requirement of the PPA/ bidding documents.*
>
> *The concept of the outsourcing is neither included expressly in the PPA nor it is included implicitly in the Article 12 of the PPA. It is a pure commercial decision of the Petitioners taken for its own advantage and any increase in cost including on account of taxes etc. in the event the Petitioners choose to employ the services of other agencies, cannot increase the liability for the Respondents. Therefore, the Commission holds that claim of the Petitioners on account of additional tax burden on operation and maintenance expenses (if any), is not maintainable.*"

38. The Petitioners have submitted that while on one hand the Commission has held maintenance activities to be a recurring expense in the hands of the Petitioners, however, since the O&M activities have been outsourced, the Commission has denied the change in law benefit on the ground that outsourcing was never contemplated within the terms of the PPA. In this context, the Petitioners have made two fold submissions as stated in the following paragraphs:-

**1. Entire O&M outsourced cost should be allowed**

39. The Petitioners have submitted that vide Order dated 19.09.2018 in the case of Prayatna Developers Pvt. Ltd. v. NTPC Ltd. And Ors and Order dated 09.10.2018, in the case of Acme Bhiwadi Solar Power Private Limited Vs. SECI, the Commission has sought to create an artificial distinction between self-performed activities and outsourced activities and the same is based on an erroneous interpretation of the PPA. The detailed submissions are as under:

a. It is a settled rule of interpretation of contracts that the words used in the contract must be given full effect to and unless something has been specifically excluded it must be treated as permitted under the contract. In this regard, the PPAs entered into between Respondents and the Petitioners specifically provide relief for any increase in recurring or non-recurring expenditure in terms of Article 12.1.1. The usage of the word 'any' signifies the wide ambit of the change in law clause and unless something is specifically excluded, the word 'any' ought to be read broadly. Thus, since the outsourcing of O&M activities has not been specifically excluded from the ambit of change in law clause, the said clause ought to be construed broadly to encompass expenses on account of the outsourcing of O&M activities.

b. None of the provisions of the PPAs seek to distinguish between the expenditure incurred on account of activities carried out by the Petitioner in its own capacity and the activities which have been outsourced by the Petitioner to third parties. Therefore, the averment of the Respondents that the Petitioner cannot claim relief of Change in Law with respect to expenses pertaining to activities outsourced to third party is erroneous and cannot be read into the PPA in the absence of any such explicit provision under the PPA.

c. Certain clauses under the PPA, clause 17.9 *Taxes and Duties* and clause 17.10 *Independent Entity*, specifically make a reference to the Contractors of Petitioner SPD.

d. The O&M expenses being a recurring expenditure has to be inferred by necessary implication having regard to the quality and quantity of power to be supplied in terms of the PPAs. To supply the contracted capacity of power, the Petitioners are required to engage third party vendors, possessing requisite expertise, to efficiently operate and maintain the project so as to ensure international perspective of the best practices in plant inspection procedures, quality assessment plans and checklists for maintenance.

Accordingly, such a specialized function cannot be undertaken by the Petitioners i.e. the Generator themselves and has to be necessarily outsourced to specialized agencies for delivering the contracted capacity of power to the Respondents.

e. Outsourcing of O&M by the Petitioner can also be inferred by having reference to the provisions of the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 (hereinafter referred to as "Regulations") issued under the Electricity Act, 2003 where O&M expenses are treated as a cost component of the tariff structure for renewable energy technologies as per Para 9 of the aforesaid Regulations. The relevant portions of the Regulations are extracted below:-

*"…9. Tariff Structure*

*(1) The tariff for renewable energy technologies shall be single part tariff consisting of the following fixed cost components:*

*(a) Return on equity;*
*(b) Interest on loan capital;*
*(c) Depreciation;*
*(d) Interest on working capital;*
*(e) Operation and maintenance expenses;"*

f. From the Regulations, it follows that the O&M expenses are factored as a cost component in arriving at the tariff structure for supply of power under Section 62 of the Electricity Act. The same logic is applicable in respect of tariffs quoted under bidding process in Section 63 of the Electricity Act as all bidders do factor such cost, even while quoting tariff under Section 63 of the Electricity Act, and given that O&M activity is a sine qua non for the solar power achieving the desired output efficiency. Thus, even if it is assumed that the PPAs are silent on the aspect of O&M expenses, the O&M cost can be necessarily inferred into the PPAs given that the O&M activity is essential for supply of the contracted capacity of power under the PPAs and this fact is also countenanced by the Regulations where O&M activity is treated as a cost component of the tariff structure. Accordingly, the additional expenditure as incurred by the Petitioner on account of O&M expenses ought to be allowed as 'change in law'.

g. The term 'recurring' and 'non-recurring' have not been defined under the PPAs. In common parlance, 'recurring' is understood to mean occurring again and on a repeated basis. Consequently, 'non-recurring 'would mean a one-time activity which is not repeated. In the present case, Article 12 of the PPA provides for relief under Change in Law on account of additional recurring and non-recurring expenditure. Since the PPAs have been signed with the Petitioners who will be undertaking the generation and sale of

power, the context of recurring and non-recurring expenditure has to be understood vis-à-vis the Petitioners. On this basis, in relation to a Solar Power Plant, the non-recurring expenditure would primarily mean the expenditure incurred for setting up of the Solar Power Plant for generation of power. Further, the recurring expenditure as incurred by the Petitioner would primarily mean the expenditure incurred for operating and maintaining the Solar Power Plant on a continuous basis. As the Project is a Solar Power Plant, which does not use any fuel (coal), the only recurring expenditure which would be incurred by the Petitioners would be Operation and Maintenance and Land related expenses. Thus, the additional recurring expenditure as incurred by the Petitioners on account of GST on O&M ought to be treated as a change in law under Article 12 of the PPA.

h. Even construction activity in relation to the setting up of power plant is undertaken by the Petitioners through its EPC Contractor given the requisite expertise of the EPC Contractor in such activities. There is no specific requirement under the PPAs for construction of the Power Plant directly or through an EPC Contractor. However, the Commission vide Order dated 19.09.2018, in the case of Prayatna Developers Pvt. Ltd. v. NTPC Ltd. And Ors., has granted relief of GST as a change in law event even though the construction activity has been outsourced to an EPC Contractor possessing the requisite expertise. There is no reason for adopting a different logic for O&M activities and denying relief on account of GST. Outsourcing of O&M is a prudent industrial practice to ensure international perspective of the best practices in plant inspection procedures, assessment plans and checklists for maintenance. The outsource partner provides O&M services that include periodic and preventive maintenance checks with IV curve analysis and thermographic imaging. Physical O&M tasks, such as module cleaning, housekeeping and security are carried out through third parties under the supervision of the generator. Accordingly, it is submitted that merely because O&M activities have been outsourced as a prudent industrial practice, the benefit of change in law cannot be denied especially when such rationale has not been adopted in respect of the construction of the Power Project being outsourced to an EPC Contractor. Accordingly, in the present case, the additional expenditure as incurred by the Petitioners on account of O&M expenses ought to be allowed as change in law.

i. The interpretation adopted by the Commission in relation to the O&M expenditure in the case of *Prayatna Developers Pvt. Ltd. v. NTPC Ltd.* And Ors vide its Order dated 19.09.2018, is erroneous in as much as the purpose for which Article 12 has been provided for in the PPA should be followed and any interpretation defeating the purpose of Article 12 of the PPA ought to be rejected. The PPAs have to be interpreted in such a manner as to keep the purpose for which Article 12 is present in the PPA intact. Giving an interpretation which defeats the sole purpose of the Article 12 by denying the relief of additional recurring expenditure incurred in relation to the O&M activity is bad in law. Reliance in this regard is placed on the decision of the Hon'ble High Court of Delhi in the case of *M/s Sramajibi Stores, Calcutta Vs. Union of India*, reported at [AIR 1982 Del 76], wherein the appellant was required to supply waterproofed coats with and without capes, which were required to be made from a specific type of cotton canvass. Subsequent to the execution of contract for supply of the said goods the rate of excise duty on the required cotton canvass increased. Thereafter, the appellant demanded the increased cost of production on account of the increase in excise duty rate which was rejected by the Respondents. The issue was then referred to the arbitrator who denied the claim of the appellant stating that the duty has been increased on the raw material and not the finished good. The appellant thereafter went into appeal against the said award of arbitrator which was also rejected, however two different opinions were given by the two judges involved in the adjudication of the matter. Consequently the matter was referred to the CJ of the Hon'ble Delhi High Court, who upon adjudication held as follows:-

> "*(5) Both my learned brothers are agreed that Section 15 of the Sale of Goods Act would govern the contract in question. The goods agreed to be sold by the appellant were goods which were to be identified by description. It is, Therefore, necessary to keep in mind the description of the goods in the contract. What is agreed to be sold by the appellant to the Respondents are the items reproduced above. The appellant could not supply coats and capes which were merely waterproofed but had to supply waterproofed coats with and without capes, as well as coats, made from Cotton Canvas of a particular kind. If the appellant merely supplied waterproofed coats and capes, the goods could rightly be rejected. He had to supply water-proofed coats and capes made of cotton canvas, special (Chemically) treated and made waterproofed by this Chemical treatment. Coats and capes of any other material which may be waterproofed could have been rejected as not answering to the description of the goods agreed to be sold. Therefore, though cotton canvas, special (Chemically) waterproofed was no doubt the raw material from which the coats and capes had to be fabricated only these coats and capes which were fabricated from cotton canvas,*

*special (Chemically) waterproofed could answer the description of the contracted goods. In such a situation if the excise on raw material went up, in my opinion, it could not be said that Section 64A of the Sale of Goods Act was not attracted. One may look at it from another point of view. Suppose the ban was imposed on production of cotton canvas, special (Chemically) waterproofed, in such a situation, it could not be said that the contract had to be performed as there was no ban on the production of coats and capes made of cotton canvas of that type. The contract in such an event would be frustrated. If that be the correct proposition, then increase in the excise duty on the principle or dominant raw material would certainly attracted Section 64A of the Sale of Goods Act.*

*(6) In interpreting statutes, one does not have to give a literal interpretation. The object of the statute has to be looked into. Unreal interpretation would defeat the object of a provision like Section 64A of the Sale of Goods Act. The interpretation has to be purpose-full.*

*……*

*(9) In my opinion keeping in view Article 14 of the Constitution, a purposeful or a fair approach has to be adopted in contracts between the State and citizens. In any case the purpose for which Section 64A was enacted has to be kept in view. The purpose obviously was that increase or decrease in duty should be taken not of in the case of contracts concluded prior to the increase or decrease. No party should be made to unnecessarily gain or suffer on account of State action in increasing or decreasing duty. I, therefore, agree with the view expressed by my learned brother Kumar, J. and will, Therefore, accept the appeals. The result would be that the award will be set aside and the objections filed by the appellant would be accepted.*"

j. From a reading of the above extract, it follows that the Hon'ble Delhi High Court allowed the benefit of increased excise duty on raw material since it was essential for performance of the contract of supply of waterproofed capes. The ratio of the aforesaid decision squarely applies to the present PPA in as much as O&M activities are an essential pre-requisite for the supply of the requisite quality and quantity of power under the PPA.

k. Further, reliance is also placed on the decision of the Hon'ble Delhi High Court in the case of Pearey Lal Bhawan Association v. M/s Satya Developers Private Limited, reported at [2010 SCC online Del 3649], wherein the plaintiff and defendant entered into a lease agreement in the capacity of Plaintiff being the lessor and the Defendant being the lessee. Pursuant to the entering of the contract for lease of land, leviability of service tax on the activity of renting of immovable property was introduced for the first time.

l. Thus, the Commission ought to grant relief of the additional recurring expenditure incurred by the Petitioners in relation to entire O&M activities.

**2. Alternatively, the Petitioners are entitled to relief of expenditure incurred in relation to procurement of materials required for carrying out the O&M activity**.

a. Alternatively, they are entitled to relief of GST incurred on the goods portion of the bill raised by the O&M contractors.

b. They will have to necessarily source the goods required in carrying out O&M activities from a third party vendor, given that the Petitioners are not a manufacturer of goods but are solar power developers. Thus, if the Petitioners were to carry the O&M activity on its own accord and not outsource the same, even then it would need to procure materials for its O&M activities from an Original Equipment Manufacturer ('OEM'). The materials sourced from such third party would have an increased tax component on account of introduction of GST, leading to additional expenditure for the Petitioner. Thus, in a scenario where O&M activity is undertaken by the Petitioner, it would be eligible for the recurring expenditure in the form of increased tax incurred on material procurements made from OEM vendors.

c. Where, however, the O&M activity is outsourced, nothing materially changes insofar as procurement of material is concerned, except that in case of in-house O&M activity, material will be required to be procured from an OEM, whereas in case on outsourcing of O&M activity, the material will be procured from O&M contractor. In other words, in both the cases material will always be required to be procured on an outsourced basis, given that the Petitioner is not a manufacturer of such materials required. Therefore, if outsourcing logic is applied to deny the benefit of Change in Law on O&M cost, it would be fatal even where O&M is not outsourced, since for in-house O&M activity also, the procurement of material will always be outsourced. Therefore, the very logic of denial of relief of Change in Law in relation to O&M activity being premised on it being outsourced to third party, is illogical and uncalled for as such reasoning is neither borne out of the contractual terms and in itself leads to an absurd outcome and therefore must be shunned.

d. Accordingly, GST incurred on procurement of materials, regardless of whether the procurement of materials is done from an OEM or from an O&M contractor ought to be granted as Change in Law, more so because this Commission in Petition No. 50/MP/2018 in the case of Prayatna Developers Pvt. Ltd. v. NTPC Ltd. And Ors vide

Order dated 19.09.2018 under Para 149 of the said Order, has specifically held that estimated maintenance cost ought to be covered under the scope of recurring expenditure.

e. On basis of the above submissions, it is clear that in either of the scenarios material procurements made for carrying out O&M activity would suffer an increased tax cost on account of the introduction of GST laws leading to increase in recurring expenditure at the hands of the Petitioner. Further, it is to be noted that while granting the relief in terms of Article 12 of the PPA, the nature of transaction is necessary rather than the mode of transaction.

f. Therefore, the Petitioners have submitted that the Commission should grant relief of the GST incurred on the goods portion of the bill raised by the O&M contractors.

**Carrying Cost**

40. The Petitioners have submitted that they recognize the decision of the Commission in Petition No. 50/MP/2018 in the case of *M/s Prayatna Developers Pvt. Ltd. v. NTPC Ltd. & Ors.* vide Order dated 19.09.2018, wherein it has been held that carrying cost will not be allowed since there is no specific provision in the PPA for restoration of the parties to the same economic position, as if 'Change in Law' has not occurred. Thus, the underlying principle adopted in the above decision was that in the absence of an express provision providing for restitution, the affected party would not be entitled to carrying cost.

41. The Petitioners have submitted that in the Order dated 19.09.2018 the Commission has failed to appreciate the underlying principle of 'Change in Law' clause, as envisaged under Article 12 of the PPA. It is submitted that 'Change in Law' is a principal of restitution and equity and the very purpose of such a clause is to enable a party to seek contractual remedies for incremental cost that have arisen which was beyond its control post the Effective Date. Being a concept in restitution and equity, an equitable interpretation must necessary follow as opposed to a hair splitting approach as sought to be made by the Commission. Accordingly, while the words 'the parties must be restored to the same economic position' may not be present, the same must be read in having regard to the purpose of the 'change in law' clauses.

42. The very purpose of a Change in Law clause is to restore the affected parties to the same economic position as it was prior to such change. Therefore, even if specific words to that effect may not be couched in the provisions of Change in Law, the said concept of restoration of party to the same economic position has to be read into it by necessary implication.

***To illustrate:*** *where pre-change in law the price was INR 100/-, the yield for supplier being INR 100/-, post change in law if INR 20/- of taxes are incurred, then unless an extra INR 20/- is paid by the procurer, the yield of the supplier will diminish to INR 80/. Therefore, by making an additional payment of INR 20/- over and above INR 100 by the procurer through change in law, the yield of the supplier is maintained at INR 100 i.e. the supplier is put at same economic position of INR 100/- that it was before the imposition of tax of INR 20/-. Thus, it is evident that even without using the phrase "restoration of parties to the same economic position" the objective of change in law is nothing but restoring the parties to the same economic position.*

43. Further, restoration of the party to same economic position is not a concept over and above the concept of 'change in law', instead, it is deeply meshed into the very concept of change in law. By way of illustration, the Petitioner seeks to bring to the notice of the Commission a typical change in law clause found in the PPA for thermal power:-

> *"13.2 Application and Principles for computing impact of Change in Law*
> *While determining the consequence of Change in Law under this Article 13, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such Change in Law has not occurred.*
> *…".*

44. The Petitioners have submitted that the purpose of effecting the change in law was mentioned so as to put the affected party to the same economic position. In other words, putting the party to same economic position was not an additional aspect of change in law but the very essence of change in law. This is a matter of course and does not require insertion of an additional phraseology that a party needs to be restored to the same economic position and even if such a phraseology may not be present, it is a matter of course that it is always read into the change in law provisions of the PPA.

45. Further, "carrying cost" is a compensation for the time value of money and is an inherent provision under the change in law clause of a PPA. Since the 'Change in Law' clause is

based on the principles of restitution, relief of carrying cost on the additional cost incurred on account of 'Change in Law' is implicit in the PPA. The 'economic position' which is sought to be restored in terms of the 'Change in Law' clause does not limit itself to a simple correlation of increased expenditure and a corresponding compensation amount but ought to also include compensation in terms of carrying costs incurred with respect to the said Change in Law Events. This is also supported by the principle of business efficacy, in the case of Nabha Power Limited v. Punjab State Power Corporation Limited and Anr. [Civil Appeal No. 179 of 2017] which provides that a contractual term can be implied in light of the express terms of the contract, commercial common sense and the facts known to both parties at the time of entering into the contract. Further, a Change in Law clause being a restitution clause, demands that the Petitioners should be compensated for all necessary and reasonable extra costs including carrying cost and/or interest on the additional cost incurred on account of Change in Law. In this regard, the Petitioners have placed reliance on the case of Sumitomo Heavy Industries Limited v. ONGC Limited, reported at [2010 (1J) SCC 296J].

46. The Petitioners have submitted that even in the alternative scenario, they would be entitled to carrying cost under the principles of quantum meruit. Assuming the alternative argument that there is no implied clause in the PPA for payment of carrying cost and/or interest, the principles of quantum meruit as statutorily enshrined in Section 70 will be attracted and the Petitioners would be entitled to carrying cost. Section 70 provides that where a person lawfully does anything for another person and does not do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. In view thereof, since the Petitioners have not incurred additional capital cost on account of introduction of GST Law gratuitously, the Petitioners are entitled to compensation for the same and such compensation has to be for all reasonable costs, including carrying cost. In this regard, the Petitioners have placed reliance on the decision in the case of *Piloo Dhunji shaw Sidhwa v. Municipal Corporation of the City of Poona, reported at [(1970) 1 SCC 213]*.

47. The Petitioners have submitted that the Commission should grant relief to the Petitioner and declare GST as a 'change in law'

**Submissions of Respondents in the pleadings and during the hearings**

48. The Respondents have mainly made their submissions on the following issues:-

a) The Scope and Applicability of Article 12.1.1. of the PPA dated 30.08.2016;

b) Admissibility of the GST 'change in law' claim on the Operation and Maintenance Expenditure;

c) Admissibility of carrying cost;

d) Absence of documentation/information furnished by the Solar Power Developer;

e) Mitigation steps undertaken by the Petitioner

f) Claim which is held to be admissible to be allowed as through in the Power Sale Agreement (PSA); and

g) Miscellaneous issues

49. The Respondents have submitted that the Commission in the case of *Prayatana Developers Pvt. Ltd –v- NTPC Limited and Ors and Azure Power Venus Pvt. Ltd. v Solar Energy Corporation of India Limited and Ors*, in Petition No. 50/MP/2018 and 52/MP/2018 dealing with the GST Laws, has laid down the circumstances where the SPD shall not be entitled to claim the impact of change in law. Paragraph 133 of the said judgment reads as under:

> *"133. We will first discuss the impact of „GST laws" on the Engineering, Procurement and Construction (hereinafter referred to as "EPC") Stage. EPC stage can be also construed broadly to be "Construction Stage" which is covered under Goods under "GST Laws". "GST Laws" came into effect from 01.07.2017 and accordingly, the Commission is of the view that the GST in the context of the present petitions is applicable on all cases except in case of the generating company where "Scheduled date of Commissioning" or "the actual date of Commissioning" as per the respective PPA is prior to 01.07.2017. It is pertinent to note that under "GST Laws" it has been provided that "If point of taxation of Goods/Services before the GST implementation then it will be taxed under earlier law. GST will not be applicable. Any portion of any supply whose point of taxation is after GST implementation will be taxed under GST. The time of goods/supply of services shall be the earlier of the:- (a) The date of issuing invoice (or the last day by which invoice should have been issued) OR (b) The date of receipt of payment - whichever is earlier." A plain reading of the above implies that according to „GST Laws", in cases where the invoice is raised or consideration for the goods/supply of services have been received before 01.07.2017 and the tax has already been paid under the earlier law, the GST will not be applicable in such cases. It is immaterial whether the consideration for supply has been paid fully or partly. The Petitioners have claimed that on account of levy of "GST Laws", the construction cost of project has escalated*

*to the tune of few crores. The Petitioners have also given the description of the levy of "GST laws" on each component. The Commission is of the view that there has to be a clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services. Accordingly, the Commission directs the parties to reconcile the accounts as per discussion above."*

50. The Respondents have submitted that the Commission in the case of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. and Batch* in Petition No. 188/MP/2017 and Batch, vide order dated 09.10.2018, has laid down the circumstances where the SPD shall not be entitled to claim the impact of change in law in Paragraph 337 and 338 of the said judgment as under:

*"337. The Commission observes that "GST Laws" became effective from 01.07.2017. "GST Laws" provide for a tax slab (previously exempted) of 5% to 28% with respect to Goods & Services required for execution, construction and operation of Solar Projects w.e.f. 01.07.2017. The "Goods and Services" in the context of the present petitions can be broadly categorized under the following two heads:*

*a) EPC Stage i.e. Construction Stage which is covered under "Goods" and*
*b) O & M Stage i.e. Post Construction Stage which is covered under "Services".*

*338. We will first discuss the impact of "GST laws" on the Engineering, Procurement and Construction (hereinafter referred to as "EPC") Stage. EPC stage can be also construed broadly to be "Construction Stage" which is covered under Goods under "GST Laws". It is pertinent to note that under "GST Laws" it has been provided that "If point of taxation of Goods/Services is before the GST implementation then it will be taxed under earlier law. GST will not be applicable. Any portion of any supply whose point of taxation is after GST implementation will be taxed under GST. The time of goods/supply of services shall be the earlier of the:- (a) The date of issuing invoice (or the last day by which invoice should have been issued) OR (b) The date of receipt of payment - whichever is earlier." A plain reading of the above implies that according to "GST Laws", in cases where the invoice is raised or consideration for the goods/ supply of services have been received before 01.07.2017 and the tax has already been paid under the earlier law, the GST will not be applicable in such cases. It is immaterial whether the consideration for supply has been paid fully or partly. The Petitioners have claimed that on account of levy of "GST Laws", the construction cost of project has escalated to the tune of few crores. The Petitioners have also given the description of the levy of 'GST laws" on each component. The Commission is of the view that there has to be a clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services. Accordingly, the Commission directs the parties to reconcile the accounts as per discussion above."*

51. The Respondents have submitted that, in terms of the above, the GST Law implication cannot be claimed in the following circumstances:

a. where the Scheduled Date of Commissioning is prior to 01.07.2017; or
b. where the Actual Date of Commissioning is prior to 01.07.2017; or
c. where the point of taxation of Goods/Services is before 01.07.2017; or
d. when there is no clear/one-to-one co-relation between the projects, supply of goods or services and the invoices raised by the supplier of goods and services.

52. The Respondents have submitted that the combined effect of the above conditions specified in Para 338 of the above order of the Commission is that the GST implications will be applicable only if the point of taxation occurs on or after 01.07.2017 and not when the point of taxation has occurred prior to 01.07.2017, in which case the taxes shall be payable only under the pre-GST laws and therefore, there is no change in law.

53. The Respondents have submitted that similarly, if with reference to the SCoD, the goods or services ought to have been procured before 01.07.2017, there should be no implication of GST laws. Even if the Scheduled Commissioning Date is after 1.07.2017, for example such as on 20.07.2017 [as in the Present Petition], the actual procurement of goods would have been prior to 01.07.2017 assuming that the project achieves commissioning by the scheduled date of commissioning. There has to be a lead time for placing the purchase order, the delivery of the goods, the installation and commissioning of the power project. In terms of Article 4.1.1 (b), the Petitioner has to prudently undertake the above activities. Further, as held by the Commission in Para 133 in the Order dated 19.09.2018 in Petition No. 50/MP/2018 and 52/MP/2018, there has to be a one-to-one co-relation between the goods/services procured and the invoices raised.

**RELEVANT PROVISIONS OF THE PPAs:**

54. The Respondents have submitted that Article 1.1 of the PPAs defining the terms, Change in Law', 'Consents, Clearances and Permits', 'Due Date', 'Indian Government Instrumentality', 'Late Payment Surcharge', 'Law', 'Prudent Utility Practices'), Scheduled Commissioning Date reads are relevant

55. The Respondents have submitted that Article 4.1.1(b) of the PPAs dealing with SPD's obligations to design, construct, erect, commission etc. the Power project in accordance with prudent utility practices reads as under:

*"ARTICLE 4: CONSTRUCTION AND DEVELOPMENT OF THE PROJECT*
*4.1 SPD's Obligations*
*4.1.1 the SPD undertakes to be responsible, at SPD's own cost and risk, for:*
*……*
*(b) Designing, constructing, erecting, commissioning, completing and testing the Power Project in accordance with the applicable Law, the Grid Code, the terms and conditions of this Agreement and Prudent Utility Practices."*

56. The Respondents have submitted that Article 10 of the PPAs dealing with Billing and Payment reads as under:

*"ARTICLE 10 : BILLING AND PAYMENT*
*10.3Payment of Monthly Bills*
*10.3.1 NTPC shall pay the amount payable under the Monthly Bill/Supplementary Bill by the (fifth) 5th day of the immediately succeeding Month (the Due Date) in which the Monthly Bill/Supplementary Bill is issued by the SPD to the NTPC to such account of the SPD, as hall have been previously notified by the SPD in accordance with Article 10.3.2 (iii) below. In case the Monthly Bill or any other bill, including a Supplementary Bill is issued after the (fifteenth) 15th day of the next month, the Due Date for payment would be (fifth) 5th day of the next month to the succeeding Month.*

*10.3.3 Late Payment Surcharge*
*In the event of delay in payment of a Monthly Bill by NTPC within thirty (30) days beyond its Due Date, a Late Payment Surcharge shall be payable to the SPD at the rate of 1.25% per month on the outstanding amount calculated on day to day basis subject to such late payment is duly received by NTPC under the PSA. The Late Payment Surcharge shall be claimed by the SPD through the Supplementary Bill.*
*……*
*10.7 Payment of Supplementary Bill*
*10.7.1 SPD may raise a "Supplementary Bill" for payment on account of:*
*i) Adjustments required by the Energy Accounts (if applicable); or*
*ii) Change in Law as provided in Article 12,*

*and such Supplementary Bill shall be paid by the other party.*

*10.7.2 NTPC shall remit all amounts due under a Supplementary Bill raised by the SPD to the SPD's Designated Account by the Due Date. For such payments by NTPC, Rebate as applicable to Monthly Bills pursuant to Article 10.3.4 shall equally apply.*

*10.7.3 In the event of delay in payment of a Supplementary Bill by either Party beyond its Due Date, a Late Payment Surcharge shall be payable at the same terms applicable to the Monthly Bill in Article 10.3.3."*

57. The Respondents have submitted that Article 12 of the PPAs dealing with 'Change in Law' reads as under:

*"ARTICLE 12: CHANGE IN LAW*
*"12. ARTICLE 12: CHANGE IN LAW*
*12.1 Definitions*
*In this Article 12, the following terms shall have the following meanings:*
*12.1.1 "Change in Law" means the occurrence of any of the following events after the Effective Date resulting into any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD:*

- *the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such law;*
- *a change in interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- *the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- *a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the SPD;*
- *any change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement.*

*but shall not include (i) any change in any withholding tax or income or dividends distributed to the shareholders of the SPD, or (ii) any change on account of regularity measures by the Appropriate Commission.*

*12.2 Relief for Change in Law*
*12.2.1 The aggrieved Party shall be required to approach the Central Commission for seeking approval of Change in Law.*
*12.2.2 The decision of the Central Commission to acknowledge a Change in Law and the date from which it will become effective, provide relief for the same, shall be final and governing on both the Parties;"*

A. **The scope and applicability of Article 12.1.1 of the PPA**

58. The Respondents have submitted that the Hon'ble Appellate Tribunal by the Judgment dated 14.08.2018 in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited –v- Central*

*Electricity Regulatory Commission and Ors* and in the case of *Adani Power Rajasthan Limited –v- Rajasthan Electricity Regulatory Commission and Ord and others* has interpreted the term '*any change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement'* and the scope of the first bullet under Article 12.1.1 as under:

> *"iv. Before dealing the issues there is need to deal one major issue related to tax which will settle many of the issues raised by the Discom. This issue is related to fifth bullet of Article 10.1.1 of the Change in Law event. The Discom/ MSEDCL/ Prayas Energy Group have contended that the any change in tax or levy of new tax is to be seen as tax on supply of power and not the taxes on the input costs for generation of electricity.*
>
> *v. Thus, we hold that this issue has been dealt by this Tribunal in detail in the judgement dated 14.8.2018 of this Tribunal in Adani Judgement. The issue has been decided in favour of the Adani (generator/Seller) in the said judgement. The relevant extract from the Adani Judgement is reproduced below:*
>
> > *"11. ... d) Before discussing the issues there is a need to address a common issue raised by the Discoms related to allowance of tax under Change in Law in terms of the PPA. According to the Discoms that as per the 5th bullet of the Article 10.1.1 of the PPA change in tax or introduction of any new tax is only applicable to supply of power which also means sale of power if definition of supply is taken in terms of the Act. The Discoms have contended that if there is specific provision dealing with the tax under Change in Law then other provisions of Change in Law Article are not allowed to deal with the tax and as such no other tax implications are allowed to be covered under Change in Law under the PPA. The Discoms have also relied on some judgements of Hon'ble Supreme Court on this issue. We have gone through the said judgements and we observe that according to the judgements relied by the Discoms, the taxes once dealt in a particular clause of a contract then there is no scope for considering taxes under other clauses of a contract.*
> >
> > *e) APRL has submitted that the generator undertakes many activities to ensure supply of power to the Discoms. APRL has relied on the judgement of Hon'ble Supreme Court in case of State of A.P. v. NTPC (2002) 5 SCC 203 wherein it has been held that the production (generation), transmission, delivery and consumption are simultaneous, almost instantaneous. According to the said judgement, the applicable taxes on inputs for generation of power can be construed to be taxes on supply of power. APRL has further contended that if the contention of the Discoms is accepted than the Change in Law provision would be applicable during the Operating Period and*

*the applicability of the said provision will become redundant during Construction Period. There is some strength in the contention of APRL as there will be no applicability of Change in Law provisions if there are changes in tax/duties/levies etc. rates or imposition of new tax/duties/levies etc. during Construction Period and on input costs related to power generation.*

*f) APRL has further contended that the reliance of the Discoms on the maxim 'reum facit cessare tactium' meaning when express inclusions are specified, anything which is not mentioned explicitly is excluded is misplaced as the Hon'ble Supreme Court in case of Assistant Collector of Central Excise Calcutta Division v. National Tobacco Company of India Ltd. (1972) 2 SCC 560 has held that the rule of prohibition by necessary implication could be applied only where a specified procedure is laid down for performance of duty or where there is an express prohibition.*

*h) The Discoms have also reproduced the definition of Change in Law under different PPAs under Section 63 of the Act. We have gone through the said provisions and we find that the other provisions of the PPA are similar to that in the other PPAs under Section 63 of the Act except the fifth bullet which is additional specifically covering tax on supply of power. The judgements of the Hon'ble Supreme Court relied upon by the Discoms were under different context and could not be equated to the scheme of power procurement by Discoms under Section 63 of the Act which is based on guidelines issued by GoI under different scenarios wherein the treatment of taxes depends upon the specific conditions of the RFP and tariff quotes by the bidders.*

*h) In view of our discussions as above and duly considering the earlier judgments of this Tribunal, we are of the considered opinion that any change in tax/levies/ duties etc. or application of new tax/levies/ duties etc. on supply of power covers the taxes on inputs required for such generation and supply of power to the Discoms.'*
*……"*

59. The Respondents have submitted that as regards the scope of Article 12.1.1 of the PPA, the Commission in its order dated 19.09.2018 in Petition No. 50/MP/2018 and Petition No. 52/MP/2018 in the case of *Prayatana Developers Private Limited –v- NTPC Limited and Ors.*, was pleased to hold as under:

*"125. The Commission observes that as per Article 12, "Change in Law" means the enactment/ adoption/ promulgation/ amendment/ modification or repeal of any Law in India; Change in the interpretation of any Law in India; Imposition of a requirement for obtaining any consents or Change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement,*

*resulting into any additional recurring/ non-recurring expenditure or any income to the SPD. The Commission is of the opinion that harmonious construction of the bullet points under Article 12 makes it clear that bullet point one is wider in scope and refers to the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal of any Law in India, including rules and regulations framed pursuant to such Law whereas bullet point sixth in seriatim refers specifically to any change in tax or introduction of any tax made applicable for "supply of power" by the SPD as per the terms of Agreement. It implies that bullet point sixth in seriatim would be applicable as "Change in Law" to the cases where the change in tax or introduction of any tax directly impacts "supply of power" only. Thus, the ambit of the sixth bullet point is limited in that if any change in Tax is made or any tax is introduced having its impact specifically on the "supply of power" in that case the remedy of "Change in Law" is available to the Petitioners under bullet point number six only. Clearly, the "GST laws" enacted are not in the nature of a mere change in the tax having limited applicability on supply of power rather it is in the nature of an enactment having wide ranging implication on the entire indirect taxation regime in India. It is a comprehensive indirect tax reform which created a common national market by dismantling inter-State trade barriers. Various laws were subsumed and repealed. Hence, the Commission holds that the enactment of "GST laws" is covered as "Change in Law" under the first bullet of Article 12 of the PPA."*

60. The Respondents have further submitted that the Commission in the case of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch,* in Petition No. 188/MP/2017 and Batch was pleased to hold as under:

*"311. The Commission observes that as per Article 12, "Change in Law" means the enactment/ adoption/ promulgation/ amendment/ modification or repeal of any Law in India; Change in the interpretation of any Law in India; Imposition of a requirement for obtaining any consents or Change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement, resulting into any additional recurring/ non-recurring expenditure or any income to the SPD. The Commission is of the opinion that harmonious construction of the bullet points under Article 12 makes it clear that bullet point one is wider in scope and refers to the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal of any Law in India, including rules and regulations framed pursuant to such Law whereas bullet point sixth in seriatim refers specifically to any change in tax or introduction of any tax made applicable for "supply of power" by the SPD as per the terms of Agreement. It implies that bullet point sixth in seriatim would be applicable as „Change in Law" to the cases where the change in tax or introduction of any tax directly impacts „supply of power" only. Thus, the ambit of the sixth bullet point is limited in that if any change in Tax is made or any tax is introduced having its impact specifically on the „supply of power" in that case the remedy of „Change in Law" is available to the Petitioners under bullet point number six only. Clearly, the „GST laws" enacted are not in the nature of a mere change in the tax having limited applicability on supply*

*of power rather it is in the nature of an enactment having wide ranging implication on the entire indirect taxation regime in India. Various laws were subsumed and repealed. The Commission has further observed that the Appellate Tribunal for Electricity by the Judgment dated 14.08.2018 in Appeal No. 111 of 2017 in M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors. has decided on interpretation of "Change in Law" provision similar to the present PPA as under:*

*……*

*313. From the above it is apparent that the Hon'ble Appellate Tribunal for Electricity has already held that any tax levied through an Act of Parliament after the cut-off date which results in additional expenditure by the Petitioner, the same is covered as "Change in Law". In the same judgment it is also held that and any tax or application of new tax on "supply of power" covers the taxes on inputs required for such generation and supply of power to the Distribution Licensees. In the instant case the "GST Laws" have been enacted by the Indian Government Instrumentalities i.e. by the Act of Parliament and the State Government. The change in duties/ tax imposed by various Government Instrumentalities at Centre and State level has resulted in the change in cost of the inputs required for generation and hence the same is to be considered as "Change in Law". Hence, the Commission holds that the enactment of "GST laws" is squarely covered as "Change in Law" under the first, second and sixth bullet in seriatim of Article 12 of the PPA."*

61. The Respondents have submitted that the scope of Article 12.1.1 of the PPA has been interpreted and decided by the Commission vide order dated 19.09.2018 in *Prayatana Developers Pvt. Ltd –v- NTPC Limited and Ors* and *Azure Power Venus Pvt. Ltd. -v -Solar Energy Corporation of India Limited and Ors,* in Petition No. 50/MP/2018 and 52/MP/2018; and Order dated 09.10.2018 in Petition No.188/MP/2018 and Batch in the matter of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch* and by the Hon'ble Tribunal in the decision dated 13.04.2018 in the case of *Adani Power Limited –v- Central Electricity Regulatory Commission and Others,* in Appeal No. 210 of 2017 and Judgment dated 14.08.2018 in Appeal No. 119 of 2016 and Batch in *M/s Adani Power Rajasthan Private Limited –v- Rajasthan Electricity Regulatory Commission and Ors.*(and as followed in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited -v- Central Electricity Regulatory Commission and Ors).* The Respondents have submitted that the views taken in these cases have been somewhat in variance. The Respondents have submitted that on the scope and applicability of Article 12.1.1 particularly in the context that some of the arguments have not been fully addressed or dealt with.

a. The intention behind the fifth bullet in Article 12.1.1 of the PPA is clear. While considering the taxes as change in law, the scope is restricted to the taxes which are imposed for 'supply of power'. If the incidence of tax is on events or transactions other than the supply of power, the conditions in the said provision is not satisfied and the relief is not admissible.

b. The harmonious construction of the provisions would require some meaning to be given and a purpose to be attached to the fifth bullet of Article 12.1.1. The intention behind incorporating a specific clause on taxes is to carve out a separate clause to restrict the nature of taxes which would be considered as change in law, unlike other four bullets dealing with matters other than taxes.

62. The Respondents have submitted that the basic aspect is that if the taxes are said to be dealt under clauses other than the fifth bullet, the incorporation of the fifth bullet is rendered redundant as all taxes can be covered under the First or Second bullet. The Respondents have placed their reliance on *JSW Infrastructure Ltd. v. Kakinada Seaports Ltd., (2017) 4 SCC 170* and *Life Insurance Corporation of India v. Dharam Vir Anand, (1998) 7 SCC 348* where it is settled that as per principle of interpretation no provision can be ignored as redundant or superfluous. The idea of carving out a separate bullet for dealing with taxes and thereafter restricting its ambit by specific stipulation therein, unequivocally establishes that any and every tax needs to be considered under the fifth bullet and not otherwise.

63. The Respondents have submitted that the claims which are to be considered on account of statutory taxes etc. should squarely fall within the scope of fifth bullet. The fifth bullet is the entire repository of dealing with taxes. When there is a specific clause relating to taxes, the general clauses dealing with laws in general have to be interpreted as necessarily excluding taxes. The Respondents have placed its reliance on the judgment passed in case titled *South India Corporation (P) Ltd -v- Secretary, Board of Revenue Trivandrum and Another, (1964) 4 SCR 280*. In the above decision, the Hon'ble Supreme Court was dealing with the entries in Article 277 and Article 372(1) of the Constitution of India, which saved the existing laws. Article 372(1) dealt with laws in general whereas Article 277 dealt with tax laws specifically.

64. The maxim *expressum facit cessare tacitum*: The Respondents have submitted that when there is express mention of certain things, then anything not mentioned is excluded. It has been held that the maxim is the principle of logic and common sense and not merely a technical rule of construction. Reference in this regard has been made to the decision of the Constitution Bench of the Hon'ble Supreme Court in the case of *Union of India v. Tulsiram Patel, (1985) 3 SCC 398.*

65. The Respondents have submitted that the principles that emerge can be summarized as under:

a) When a specific clause deals with taxes i.e. Clause 12.1.1 – fifth Bullet, the general clauses dealing with laws in general do not cover taxes, namely the Clause 12.1.1 – First Bullet.

b) Clauses in the Agreement cannot be interpreted in a manner to render a clause otiose, redundant or surplusage.

c) The purpose of a specific clause on tax is to make it restrictive.

d) When there is a specific clause relating to taxes, the general clauses dealing with laws in general have to be interpreted as necessarily excluding taxes. This is because there is a special entry on taxes whereas the laws other than taxes are dealt with in a general clause.

**Scope of Article 12.1.1 of the PPA – Fifth Bullet**

66. The Respondents have submitted that the scope of Article 12.1.1 - fifth Bullet is clear and specific.

a. It relates to the supply of power. Thus, every change in tax or introduction of tax was not intended to be covered by the Change in Law provisions of the PPA. It cannot, therefore, be that the 'supply of power' be extended to other aspects such as taxes on input goods and services.
b. The term "for" used in Article 12.1.1 – fifth bullet needs to be given a meaning that naturally flows from the scheme under which the expression is used, namely *'tax made*

*applicable for supply of power'.* The expression clearly confines within its scope the incidence of tax on the supply of power. The expression 'for' cannot be given a wider interpretation to cover taxes on input material and services.

c. The use of the expression 'For' does not necessarily mean that it encompasses all activities relating to the generation of electricity prior to the sale of power.

67. The Respondents have submitted that the natural meaning of the term `Taxes made applicable for supply of power' is that it relates to taxes on the transaction for supply/sale of power. It cannot include the taxes paid at different stages by different persons for supply of input material and services to the Petitioner. In this regard, the expression `For' was considered in the context of taxes in the decisions of the House of Lords in *Sir W.J.R Cotton v Vogan and Company (Judgment dated 19.05.1896 by the House of Lords)*;

> *"It is said that this construction necessitates the insertion of words into the statute — that you have to introduce these words, "grain brought in to be sold as grain." No doubt the effect is the same as if those words were there; but it is not necessary to introduce any such words. The result arises from the language used. Sir Edward Clarke, who argued in the first instance for the appellant, admitted that if it had been brought into this country in the form in which (treating it as the same thing for the moment) it was sold, it would not have been "grain" within the Act. Then, if so, if the thing sold was not "grain" within the meaning of the Act, and if the grain imported was imported for the purpose of being turned into that thing which was ex hypothesi not grain, and if that thing which was not "grain" within the meaning of the Act was the only thing to be sold, how can it be said that the grain was imported for the purpose of being sold? It seems to me that when once the admission is made that the thing sold was not "grain" within the meaning of this statute the case is at an end.*
> *Mr. Danckwerts half argued that the thing sold might come within the definition of "grain" contained in this statute; but I do not think that that contention is really a possible one. The Legislature was dealing with commercial matters in the City of London, with imports the nature of which was well known, and if it had intended to include what had been always regarded and treated as manufactured articles, such as flour and meal, as distinguished from the natural products of the earth untreated except by gathering, the language would have been altogether different to that which is to be found in this statute. Therefore I think it is impossible to construe these words as including such products as those which were sold in the present case."*

68. The Respondents have submitted that the above decision has been noted with approval in the following cases:

a) *The Municipal Corporation, Tuticorin v T. Shanmuga Moopanar AIR 1926 Mad 219; and*

b) *C. Gangadharan v Alandur Municipality, represented by its Commissioner (1977) 2 MLJ 159*

69. The Respondents have submitted that in *State of U.P v. Ramkrishan Burman, (1970) 1 SCC 80*, the Hon'ble Supreme Court has considered the implications of the term `For' as under:

> "*5. In all these clauses the expression "for" is used as meaning for obtaining a decree ordering payment or recovery of". If the expression "for" occurring for the first time in Section 7(IV-A) means in the context in which it occurs obtaining a decree for cancellation of or adjudging void or voidable a decree, it would be difficult to hold that the expression "decree for money or other property" has a wider connotation and means a decree which concerns or relates to money or other property.*
>
> *6. A decree for declaration of title to money or other property is not a decree for money or other property. In our judgment the expression "decree for money or other property" means only a decree for recovery of money or other property. It does not include a decree concerning title to money or other property*."

70. The Respondents have submitted that in view of the above it can be seen that expression 'for' has been interpreted in a restricted sense. Further, The PPAs entered into between the parties in the definition clause i.e. Article 1.1 provides that any term used in the PPA but not defined would have the meaning as applicable under the Electricity Act, 2003. The term 'Supply' is defined in Section 2 (70) of the Electricity Act, 2003 as:

> *"supply in relation to electricity means, the sale of electricity to a licensee or consumer"*

71. The Respondents have submitted that in terms of the above, incidence of tax recognised under Article 12.1.1 – fifth Bullet is only on the transaction of sale of electricity and not on any other transaction preceding it. The said interpretation has been upheld by the Commission in its Order dated 19.09.2018 and it has been held that the scope of the fifth Bullet is restricted to those taxes which directly impact *'supply of power'* only. The above interpretation stands fortified by the fact that the Change in Law provision of the present

PPA stands on a different footing in comparison to the provisions of Change in Law, as incorporated in other Standard Bidding Document issued by Government of India as well as in other Power Purchase Agreements:

a) The Change in Law provision in the standard PPA issued by the Central Government as a part of the guidelines under Section 63 of the Electricity Act reads as under:

*"13.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:*
*(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurers under the terms of this Agreement, or (iv) any change in the (a) Declared Price of Land for the Project or (b) the cost of implementation of the resettlement and rehabilitation package of the land for the Project mentioned in the RFP or (c) the cost of implementing Environmental Management Plan for the Power Station (d) the cost of implementing compensatory afforestation for the Coal Mine, indicated under the RFP and the PPA (Only Applicable in case where coal block is allocated);*

*but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission."*

The Respondents have submitted that in the above, there was no separate provision for taxes to be considered within the scope of change in law. Therefore, it can be deduced that the intention was to deliberately provide enlarged scope of the Change in law provision including within its ambit any event which *'results in any change in any cost of or revenue from the business of selling electricity by the Seller'*.

b) The change in law provision in the PPA dated 06.02.2007 entered into between *Adani Power Limited and Gujarat Urja Vikas Nigam Limited (GUVNL)* reads as under:

*"13.1.1 Change in Law- means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:*

*(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any stature, decree, ordinance or other law, regulation, notice, circular, code, rule, or direction by any Governmental Instrumentality or a change in its interpretation by a Competent Court of law, tribunal, government or statutory authority or any of the above regulations, taxes, duties, charges, levies, etc., or*

*(ii) the imposition of any Governmental Instrumentality, which includes the Government of the State, where the project is located, of any material condition in connection with the issuance, renewal, modification, revocation or non-renewal (other than for cause) of any Consent after the date of this Agreement.*

*(a) that in either of the above cases results in any change with respect to any tax or surcharge or cess levied or similar charges by the Competent Government on water, primary fuel used by the generating plant, the generation of electricity (leviable on the final output in the form of energy), sale of electricity and,*

*(b) relating to consents/ compliance pertaining to environment result in any change in costs or revenue;"*

From the above it emerges that the applicability of tax provision, besides sale of electricity has been extended to *water, primary fuel used by the generating plant, the generation of electricity (leviable on the final output in the form of energy).* Even in such a situation, the tax provisions will extend to limited inputs only. It cannot be extended to all input goods and services.

c) The draft of the Standard PPA issued by SECI in November, 2016 under the National Solar Mission Phase II, Batch IV, inter alia, provided for the following clauses:

"*12. ARTICLE 12: CHANGE IN LAW*
*12.1 Definitions*
*In this Article 12, the following terms shall have the following meanings:*
*12.1.1 "Change in Law" means the occurrence of any of the following events after the Effective Date resulting into any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD:*

- *the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such law;*
- *a change in interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- *the imposition of a requirement for obtaining any Consents, Clearances and*
- *Permits which was not required earlier;*

- *a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the SPD;*
- *any statutory change in tax structure or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power by the SPD, shall be treated as per the terms of this Agreement. For the purpose of considering the effect of this change in Tax structure due to change in law after the date of submission of Bid, the date such law comes in to existence shall be considered as effective date for the same.*

  *but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD, or (ii) any change on account of regularity measures by the Appropriate Commission.*

In view of the sixth bullet of Article 12 of the Standard PPA issued in November 2016, it emerges that the intention was to treat change in tax structure or introduction of any tax made applicable for setting up of the solar power project, in addition to the supply of power from the project as a Change in Law.

72. The Respondents have submitted that similarly, the scope of different bullets under Article 12.1.1 also has to be given due meaning. For instance: Under the Third and Fourth Bullet relating to imposition of and/or a change in the conditions of Consents/Clearances/Permits, the definition clause i.e. Article 1 defines Consents, Clearances and Permits as under:

> *"Consent, Clearances and Permits" shall mean all authorizations, licenses, approvals, registrations, permits, waivers, privileges, acknowledgements, agreements, or concessions required to be obtained from or provided by any concerned authority for the purpose of setting up of the generation facilities and/or supply of power;*

73. The Respondents have submitted that where it was intended that the input cost be allowed, it has been specifically incorporated in the PPAs. No such stipulation was made in respect of the Last Bullet which is confined to 'supply of power'. Thus, different versions of the PPAs cover different scopes. With regard to each PPA, the intention of parties should be gathered from the express language used in the contract. Therefore, if the words used in the PPAs are clear and unambiguous, it would be difficult to gather their intention different from the language used in the agreement.

74. The Respondents have submitted that it can be concluded that in the 'Change in Law' provisions of the PPA between the Solar Power Developers and the Respondents, a deviation was consciously made and a separate provision in the form of last bullet was incorporated restricting the taxes to those which are made applicable on supplying power. Even the Hon'ble Appellate Tribunal of Electricity, in its decision dated 13.4.2018 in the case of *Adani Power Limited v Central Electricity Regulatory Commission and Others*, in Appeal No. 210 of 2017 relating to the provisions of Article 13.1.1 of the PPA dealing with change in tax had confined the scope of the change in law in respect of tax to the bullet/provision dealing with tax. It was held that:

> *"From the above it can be seen that Change in Law provisions are applicable only in case if it results in any change with respect to any tax or surcharge or cess levied or similar charges by the Competent Government on water, primary fuel used by the generating plant, the generation of electricity (leviable on the final output in the form of energy) or sale of electricit*y."

75. The Respondents have submitted that the Hon'ble Appellate Tribunal in its Judgment dated 14.08.2018 in Appeal No. 119 of 2016 and Batch in *M/s Adani Power Rajasthan Private Limited –v- Rajasthan Electricity Regulatory Commission and Ors (and as followed in Appeal No. 111 of 2017 in M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors,)* has decided on the interpretation of a Change in Law provision. The term '*any change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement* has been interpreted to include the taxes on inputs required for generation and supply of power to the Distribution Licensees.

76. The Respondents have submitted that there are differences in the facts of the present case, as detailed herein below and therefore, the decision of *Adani and GMR Warora* is distinguishable and has no application to the present case.

77. The Respondents have submitted that the provision of the present PPA is different from the PPA in the case of Adani Rajasthan (and GMR Warora) wherein there was a specific clause, namely Article 10.3.1 dealing with the relief applicable during the Construction Period, which inter-alia reads as under:

> *"10.2 Application and Principles for computing impact of Change in Law*

*10.2.1 While determining the consequences of Change in Law under this Article 10, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through monthly Tariff Payment, to the extent contemplated in this Article 10, the affected Party to the same economic position as if such Change in Law has not occurred.*

*10.3 Relief for Change in Law*

*10.3.1 During Construction Period*

*As a result of any Change in Law, the impact of increase/decrease of Capital Cost of the Power Station in the Tariff shall be governed by the formula given below:*

*For every cumulative increase/ decrease of each Rupees Sixteen crore Five Lakh (Rs. 6.50 crore) in the Capital Cost during the Construction Period, the increase/ decrease in Non Escalable Capacity Charges shall be an amount equal to zero point two six seven (0.267%) of the Non Escalable Capacity Charges. In case of Dispute, Article 14 shall apply.*

*It is sufficient that the above mentioned compensation shall be payable to either Party, only with effect from the date on which the total increase/ decrease exceeds amount of Rupees Sixteen Crore Fifty Lakh (Rs. 16.50 Crore)."*

78. The Respondents have submitted that in the present PPAs, there is no such clause dealing with specific relief under the construction period and therefore, the entire basis of the Hon'ble Tribunal's judgment, namely that the change in law provision would be rendered redundant in respect of the 'Construction Period' if the fifth bullet is interpreted to be confined to the 'sale of power', is not applicable to the facts of the present case. Accordingly, the relief (if any) for taxes is admissible to the SPD if it squarely falls within the purview of Article 12.1.1 – fifth Bullet only and not otherwise. The SPD cannot claim the change in law effect for statutory taxes under any of the first four bullets under Article 12.1.1 of the PPAs.

B. **Outsourcing of Operation and Maintenance (O&M) - Implication under the GST law**

79. The Respondents have submitted that:

a) PPAs provision or the bid document did not mandate or prescribe or specifically provide for the outsourcing of O&M;

b) Outsourcing of O&M is an internal commercial decision of the SPD. NTPC does not have any implication if the SPD undertakes the O&M by itself or outsources the O&M;

c) If, for commercial expediency or benefit, the Petitioner outsources the O&M, the saving or additional expenditure is to the account of the SPD; and

d) SPD has a full right to take a decision on the above at its risk or reward.

80. The Respondents have submitted that the SPD is responsible for undertaking generation and supply of electricity. In terms of Article 4.1.1(g) – the SPD has undertaken to be responsible, at its own cost and risk for fulfilling all obligations undertaken by the SPD under this Agreement. Further, Article 17.9, 17.10 and 17.11 reads as under:

*"17.9 Taxes and Duties*
*17.9.1 The SPD shall bear and promptly pay all statutory taxes, duties, levies and cess, assessed/ levied on the SPD, contractors or their employees that are required to be paid by the SPD as per the law in relation to the execution of the Agreement and for supplying power as per the terms of this Agreement.*

*17.9.2 NTPC shall be indemnified and held harmless by the SPD against any claims that may be made against NTPC in relation to the matters set out in Article 17.9.1.*
*17.9.3 NTPC shall not be liable for any payment of taxes, duties, levies, cess whatsoever for discharging any obligation of the SPD by NTPC on behalf of SPD.*

*17.10. Independent Entity*

*17.10.1 The SPD shall be an independent entity performing its obligations pursuant to the Agreement.*

*17.10.2 Subject to the provision of the Agreement, the SPD shall be solely responsible for the manner in which its obligations under this Agreement are to be performed. All employees and representatives of the SPD or Contractors engaged by the SPD in connection with the performance of the Agreement shall be under the complete control of the SPD and shall not be deemed to be employees, representatives, contractors of NTPC and nothing contained in the Agreement or in any agreement or contract awarded by the SPD shall be construed to create any contractual relationship between any such employees, representatives or contractors and NTPC.*

*17.11 Compliance with Law*
*Despite anything contained in this Agreement but without prejudice to this Article, if any provision of this Agreement shall be in deviation or inconsistent with or repugnant to the provisions contained in the Electricity Act, 2003, or any rules and regulations made there under, such provision of this Agreement shall be deemed to be amended to the extent required to bring it into compliance with the aforesaid relevant*

*provisions as amended from time to time."*

81. The Respondents have submitted that change in law under the fifth bullet is admissible if the transaction which is assessed as tax is mandated or required to be performed and not when the transactions need not be there viz. outsourcing of O&M.

82. The Respondents have submitted that the O&M is the responsibility of the Petitioner and in the event of the Petitioner choosing to employ the services of other agencies, it cannot increase the liability of NTPC (and consequentially the Distribution Licensees) in terms of tariff. The outsourcing of the O&M to a third party is not a requirement of the PPA and is a commercial decision of the Petitioner for its own advantage and any increase in cost including on account of taxes etc. is entirely to the account of the Petitioner. This is particularly when the Solar Power Developer is employing the services of their own parent company –Renew Solar Energy Private Limited ( in Petition No. 187/MP/2018 and Petition No. 193/MP/2018) to carry out the Operation and Maintenance.

83. The Respondents have submitted that the Commission vide Order dated 16.03.2018 in Petition No. 1/MP/2017 in *GMR Warora Energy Limited -v- Maharashtra State Electricity Distribution Company Limited and Ors* has held that any increase in cost of O&M expenditure on account of increase in service tax cannot be considered as Change in Law. The aforementioned view was re-iterated by the Commission in its Order dated 09.10.2018 in Petition No.188/MP/2018 and Batch in the matter of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch*, wherein this Hon'ble Commission was pleased to hold as under: Similar view has been taken by the Commission in its Order dated 19.09.2018 In Petition No. 50/MP/2018 and Petition No. 52/MP/2018 in the case of *Prayatana Developers Private Limited v NTPC Limited and Ors.*

84. The Respondents have submitted that the reliance placed by Petitioners on Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 dated 06.02.2012 for determining the GST impact on O&M services is misplaced. The Tariff Regulations notified by the Commission for determination of tariff under Section 62 of the Electricity Act, 2003 for renewable energy have no application to the present case. In the present case, the tariff has been determined by

the Competitive Bid Process. The tariff (based on which the bid is given) is inclusive of all the costs and expenses including any taxes, levies etc. on the work to be undertaken by the Petitioner.

85. The Respondents have submitted that the reliance placed by the Petitioner on the judgment of the Hon'ble High Court of Delhi in the case of *M/s Sramajibi Stores, Calcutta v Union of India*, is misplaced. In the said case, waterproofing of the Cotton Canvas goods was a necessary requisite in the Agreement for supply and therefore, the increase in the cost of the raw material was allowed. In the present case, outsourcing of O&M services is not a necessary requirement in the PPA.

86. The Respondents have submitted that in the circumstances, the Petitioner is not entitled to any increase on account of the implications of the GST on the O&M Services that have been outsourced.

C. **Inadmissibility of Carrying Cost**

87. The Respondents have submitted that the contention of the Petitioner that it is entitled to carrying cost for the costs incurred due to change in law events is misconceived. There is no provision in the PPA regarding carrying cost or interest for the period till the decision of the Commission acknowledging the change in law and deciding on the amount to be paid for such change in law namely '*provide for relief for the same*', as specified in Article 12.2.2 of the PPA. The 'Change in Law' claim of the Petitioners is yet to be adjudicated and the amount if any, due to the Petitioners has to be determined/computed first. Only after the amount is determined, are the Petitioners required to raise a Supplementary invoice for the amount so computed as per Article 10.7 of the PPA. It is only in case of default on the part of the Respondents in not making the payment by the due date as per supplementary invoices, the issue of Late Payment Surcharge would arise i.e. for the period after the due date. The reference in Article 12.2.2 of the Commission deciding on the date from which the change in law will be effective, refers to the principal amount to be computed from the date on which change in law comes into force and not to the payment of interest and carrying cost.

88. The Respondents have submitted that, the provision of Article 10.3.3 of the PPA dealing with late Payment Surcharge and definition of the 'Due Date' in Article 1 read with Article 10.3.1 of the PPA are relevant. The due date is fifth ($5^{th}$) day of the immediately succeeding month in which Monthly Bill or a Supplementary bill is received and duly accepted by NTPC. In case the Monthly Bill or any other bill, including a Supplementary Bill is issued after the (fifteenth) 15th day of the next month, the Due Date for payment would be (fifth) 5th day of the next month to the succeeding Month. The supplementary bill needs to be raised by the Solar Power Developer for the adjustment of the Change in Law after the Change in Law claim is approved by the Commission. There cannot be any claim for late payment surcharge for the period prior to the due date.

89. The Respondents have submitted that the decision of the Hon'ble Appellate Tribunal in *SLS Power Limited -v- Andhra Pradesh Electricity Regulatory Commission and Others* (Appeal No. 150 of 2011) and Batch recognizes that the interest will be due from the date the payment is due. In the present case, the payment is due only after issuance of the Supplementary Bill after the decision of the Appropriate Commission. The PPA does not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Petitioner is not entitled to claim relief which is not provided for in the PPA.

90. The Respondents have submitted that in the Judgment of the Hon'ble Appellate Tribunal dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited –v- Central Electricity Regulatory Commission and Ors,* wherein it was held that since the Gujarat Bid-01 PPA has no provision for restoration to the same economic position, therefore, the carrying cost will not be applicable. The relevant extract of the Judgment dated 13.04.2018 reads as under:

> *"ISSUE NO.3: DENIAL OF CARRYING COST*
>
> *……*
>
> *x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of 'restitution' i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgment of the Hon'ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred.*

*Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA."*

91. The Respondents have submitted that with regard to carrying cost, the law stands settled by the Judgment of the Hon'ble Tribunal dated 14.08.2018 in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited –v- Central Electricity Regulatory Commission and Ors*. The Hon'ble Tribunal vide the above judgment has decided that if there is a provision in the PPA for restoration of the Seller to the same economic position as if no Change in Law event has occurred, the Seller is eligible for carrying cost for such allowed Change in Law event(s) from the effective date of Change in Law event until the same is allowed by the appropriate authority by an order/ judgment. In the present case also, there is no provision in the PPA for carrying cost or restitution and therefore the same, will not be applicable in the case of the Petitioner.

92. The Respondents have submitted that in its Order dated 09.10.2018 in Petition No. 188/MP/2018 and Batch in *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch*, the Commission reiterated the aforementioned findings of the Hon'ble Tribunal and hold as under:

*"373. ……..*

*From the above judgments the Commission observes that if there is a provision in the PPA for restoration of the Petitioners to the same economic position as if no Change in Law event has occurred, the Petitioners are eligible for "Carrying Cost" for such allowed "Change in Law" event (s) from the effective date of Change in Law event until the same is allowed by the appropriate authority by an order/ judgment. The Commission observes that the PPA does not have a provision dealing with restitution principles of restoration to same economic position. Further in the "Written Submissions" dated 17.09.2018 and 18.09.2018 on behalf of Petitioners in the Petition No. 188/MP/2017; 189/MP/20I7; 190/MP/2017; 201/MP/2017; 204/MP/2017; 230/MP/2017; 231/MP/2017; 232/MP/2017 and 233/MP/2017 the Petitioners have categorically stated that:*

*"3.3.3 Compensation Methodology:*
*The Petitioners submit that since the PPAs are silent on the compensation methodology, the discretion to formulate the same is with this Ld. Commission. The compensation can be made in either one of the following manners:*
*(i) One-time upfront lumpsum payment - this is the Petitioners' preferred option and is also favourable to the off-takers, as no carrying cost will have to paid on the upfront payment.*

*(ii) …."*

*374. The Commission further observes that it has been decided in Issue No. 5 that the Petitioners shall raise its claim based on discussions in paragraph 338 & 348 of this Order and the same shall be paid by the Respondents within sixty days of the date of this Order failing which it will attract late payment surcharge as provided under PPA. Therefore, the claim is to be raised as one-time upfront lumpsum payment which becomes due on the sixtieth date from the date of this Order by the Commission and after that the „late payment surcharge" as provided under PPAs is to be levied. Therefore, the Commission is of the view that the claim regarding separate "Carrying Cost" in the instant petitions is not attracted."*

93. The Respondents have submitted that in the absence of the express provision in the PPAs, it is not open for the Petitioner to claim relief under principles of equity. Reference in this regard may be made to the judgment – *Alopi Parshad and Sons Ltd. v. Union of India, (1960) 2 SCR 793 : AIR 1960 SC 588.*

94. The Respondents have submitted that the present case is not a case of amounts being denied at appropriate time or any deprivation of amount due to actions of the procurers. The Procurers cannot make the payment for change in law until the amount is determined by the Commission.

D. **Absence of Necessary Particulars - Adverse Inference**

(i) **Non-furnishing of details of taxes subsumed/withdrawn by reason of GST**

95. The Respondents have submitted that without prejudice to the above legal submissions, it is submitted that the Petitioner has not placed before the Commission in a transparent manner the taxes, duties and levies which stands withdrawn and no longer payable by reason of the introduction of the GST. Admittedly, there are number of taxes, duties, cess and levies which have been subsumed in the above Taxes which came into force on 01.07.2017. In this regard, the Commission in its Order dated 09.10.2018 in Petition No. 188/MP/2018 and Batch in *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch*, has quoted list of taxes subsumed in the GST as laid down in Goods And Service Tax (GST), Concept & Status, published by Central Board Of Indirect Taxes And Customs, Department Of Revenue, Ministry Of Finance, Government Of India

96. The Respondents have submitted that the Petitioners are required to place before the Hon'ble Commission the extent to which the Petitioner's project are subject to such taxes etc. existing prior to 01.07.2017 which have been subsumed in the GST. In the Order dated 19.09.2018, the Commission has taken note of the implications of the various taxes which were in existence prior to 1.07.2017 and were subsumed/reduced/remitted. These have to be taken into account to determine the net effect of GST Laws.

97. The Respondents have submitted that the Petitioners are proceeding on the assumption that the entire quantum of taxes under the GST are payable. This is contrary to the very scheme of the introduction of the GST and the intention of the Central Government is rationalising the tax structure in a manner that various existing taxes will get subsumed in the GST. Accordingly, true and faithful disclosure of existing taxes which have been subsumed by the GST needs to be furnished by the Petitioners.

98. The Respondents have submitted that it is incumbent on the Petitioners to place before the Commission in a transparent manner to the increase or decrease in the taxes on net basis. For instance, if pre-GST, the Petitioner was subjected to 4% Excise Rate and post-GST, the same became a cumulative 5%, then the Petitioner would be entitled to claim only the difference i.e. 1% as a change in law and not the entire 5%.

**(ii) Non-furnishing of all the relevant details**

99. The Respondents have submitted that before the amount is computed, the Petitioners should be directed to give the following particulars/documents in respect of each claim under GST Laws:

(a) Name of the Goods/Equipment
(b) Date of the Purchase Order (PO)
(c) Date of the Goods/Custom Clearance
(d) Date of the Goods being handed over to the Common Carrier.
(e) Date on which the goods were received at site
(f) Date on which the goods were installed at site
(g) The name of the manufacturer of the Goods

(h) The name of the intermediary between the Original Equipment Manufacturer and the SPD

(i) The GST/Tax Invoice raised

(j) The supporting documents in respect of each of the above

100. The Respondents have submitted that the above particulars/ documents are required to be given in respect of each item of goods/equipment/services. The Auditor Certificate in respect of the above is also to be provided in terms of the directions of this Commission in its Order dated 09.10.2018.

101. The Respondents have placed their reliance on the Judgment of Hon'ble Supreme Court in the case of *Official Liquidator –v- Dharti Dhan Private Limited, AIR 1977 SC 740* to contend that the expression 'may' occurring in Para 349 of the decision dated 09.10.2018 passed by the Commission (as quoted above) has been used to mean 'directory' and not 'mandatory', is misconceived. A judgment of a court cannot be made subject to the same rules of interpretation as the provisions of a statute, as sought to be contended by the Petitioners. Thus, it is not open for the Petitioners to contend that the role of the Respondents be restricted to mere arithmetical tallying without carrying out any independent diligence or verification of the claim made by the Petitioner. Reference in this regard may be made to the view taken by the Commission in its order dated 14.03.2018 in Petition No.13/SM/2017.

102. The Respondents have placed their reliance on the Order dated 09.10.2018 in the case of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India.* Accordingly, this Commission deemed it fit to grant a liberty to the parties to approach the Commission in case of any dispute during the reconciliation process.

103. The Respondents have submitted that it is a settled principle that an audited report only indicates the proof of expense and not whether the expense was prudently incurred. In this regard, the Judgment of the Hon'ble Supreme Court in the case of *West Bengal Electricity Regulatory Commission -v- CESC Ltd., (2002) 8 SCC 715* reads as under:

*"Auditor's report*

*93. Most of the findings of the High Court proceed on the basis that the accounts audited by the statutory auditors should be accepted by the Commission at their face value. This finding of the High Court is based on the following two reasons:*

*(a) the expenditure incurred by the Company falls under the definition of expenditure as defined in clause XVII(2)(b) of Schedule VI to the 1948 Act therefore these expenditures are to be statutorily accepted, hence the Commission is bound by the same; and*

*(b) there is no challenge as to the genuineness of the accounts of the Company, by the consumers therefore in the absence of any such challenge the Commission cannot go into the correctness of the accounts and the expenditure so reflected should be accepted on the basis of actuals as reflected in the accounts.*

*94. We notice that for the purpose of the 1948 Act, clause XVII of Schedule VI defines the various types of expenditures enumerated therein, as expenditure "properly incurred" therefore for the purpose of the 1948 Act it would have been sufficient for a licensee to bring his expenditure under that definition clause and the same was entitled to be counted for the purpose of determining the tariff under the said Act. But we have noticed hereinabove that though the principles of Schedule VI have been adopted by the Commission in its Regulations the same will have to be considered along with other principles enumerated in the Regulations which includes the principles encompassed in clauses (b) to (g) of Section 29(2) of the 1998 Act. We have also held that in the event of there being any conflict, it is the provisions of the 1998 Act which would prevail. The 1998 Act mandates the Commission to take into consideration the efficient management by the licensee of its Company, as also the interests of consumers while determining the tariff, therefore, if these two factors which go in favour of the consumers are in conflict with the definition of expenditure "properly incurred" in Schedule VI to the 1948 Act then it is for the Commission to reconcile this conflict and decide whether to accept the expenditure reflected in the accounts of the Company or not. In this process the Commission in our opinion is not bound by the auditors' report.*

*……*

*97. In this view of the matter we are of the opinion that the Commission is not bound by the opinion of the auditors as also the definition of the expenditure properly incurred under Schedule VI to the 1948 Act to the extent held by us hereinabove."*

104. The Respondents have submitted that all the above information is within the possession/control of the SPD and the Commission as well as the Procurers need to rely on the information furnished. The Authorised Officer of the SPD should file an undertaking that each of the information has been duly verified and is true and correct to his knowledge. There should also be a further direction that in case the information is found to be wrong, the SPD shall be liable to adjust the money recovered with penal interest of 18% per annum.

This is necessary to disincentivise the SPD making a wrong declaration and deriving unlawful benefit.

E. **Mitigating steps**

105. The Respondents have submitted that in terms of Article 4.1.1 (b) of the PPAs, the Solar Power Developer is responsible at its own cost and risk for designing, constructing, erecting, commissioning, completing and testing the Power Project in accordance with the Prudent Utility Practices. Therefore, it is the duty of the Solar Power Developer to prudently incur expenditure and mitigate the effect. In the order dated 19.09.2018, the Commission has taken note of the substantial difference in the GST, namely, 5% if the components are bought as a part of the Solar Generation System and 18% if the components are individually and directly purchased.

106. The Respondents have submitted that the above view has been reiterated by the Commission in its order dated 09.10.2018 passed in the case of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch*, in Petition No. 188/MP/2017 and Batch.

107. The Respondents have submitted that in terms of the above, as a Prudent Utility, the SPD ought to have considered the reduction in the impact of GST by arranging to buy the assets as a part of the Solar Generation System at the cost of paying GST at a lower rate instead of purchasing it individually by paying higher GST of 18%. The SPD had the duty to mitigate the costs. Any higher cost paid, without mitigating the cost, should not be allowed to be passed on to Respondents and thereby to the consumers at large.

108. The Respondents have submitted that the contention of the Petitioner that reduced rate of 5% as applicable to solar power generating system depends upon a particular contracting structure which may or may not be followed by the Petitioners is vague and incorrect.

F. **Back to Back basis – To be allowed as a pass through in Power Supply Agreement (PSA)**

109. The Respondents have submitted that the PPAs entered into by the Petitioner with Respondents envisages the status of Respondents as an intermediary company for the bulk purchase of electricity from the Petitioners for bulk supply of electricity to the Distribution licensees under a Power Sale Agreements (hereinafter referred to as 'PSAs'). Such purchase and resale of electricity is under a scheme envisaged under National Solar Mission. Respondents are in a position to discharge its obligations under the PPAs including the payment for any change in Law implication etc. only upon the distribution licensees remitting the amount to Respondents in terms of the respective PSAs. The obligation of the distribution licensee under the PSAs is therefore on a back to back basis with the obligation of NTPC to the Petitioners. Reference may be made to the Order dated 09.10.2018 in case of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch.*

110. The Respondents have submitted that the Commission has directed to implead the distribution licensees as parties in the petition. It is therefore appropriate that the Commission may give directions to the distribution licensees determining the amount payable to the SPD (if any) in the abovementioned petition, keeping in view the intermediary status and role of Respondents as a nodal agency to facilitate the Solar Power Project and for the Distribution Licensees to have an arrangement for generation and procurement of solar power and thereby, promote the solar power development in the country, as per the policy decisions of the Central Government. Any enforcement of the claim by the Petitioners against the Respondents without the distribution licensees being obligated to pay and discharge the corresponding claim under the PSAs in advance of the discharge of the obligation of the Respondents will result in serious financial issues to the Respondents and thereby, effect the implementation of the scheme.

111. The Respondents have submitted that the methodology that may be determined by the Commission for payment of the change in law implication by Respondents to the Solar Power Developer, namely one-time payment or increase in per unit tariff or in any other manner, should be directed to be implemented mutatis mutandis for the payment by the Distribution Licensee under the PSA to Respondents. The Commission may consider this aspect while deciding the abovementioned petition.

G. **Miscellaneous Issues**

**(a) Interest on Working Capital**

112. The Respondents have submitted that there cannot be any consideration for individual tariff elements such as interest on working capital or return on equity or any other in a competitive bid process under Section 63 of the Electricity Act, 2003 and there cannot be any computation of the same. There is no concept of interest on working capital or individual tariff elements in competitively bid process and bidders are required to give the bid based on all-inclusive tariff. Further, there cannot be any issue of return on equity on incremental working capital and margin. The issue has been decided by the Hon'ble Tribunal in its Order dated 19.04.2017 in Appeal No. 161 of 2015- Sasan Power Limited –v- Central Electricity Regulatory Commission wherein the Hon'ble Tribunal has, inter-alia, held as under:

> *"34. We must also bear in mind that we are concerned here with competitive bidding process under Section 63 of the said Act. We appreciate the submission of Mr. Ramachandran, learned counsel appearing for HPCC that tax on income cannot be considered as pass through in the competitive bidding process under Section 63 of the said Act. The tariff is a per unit tariff allowed on the electricity generated and supplied and such a bid submitted by bidder is inclusive of all elements. There is no separate return on equity or reasonable return. The quantum of return revenue/profit is not identified in the bid price nor assured by the procurers. Income Tax including MAT being on profit, there is no identification of tax payable at the time of cut-off date. It is, therefore, not possible at all to factor in the increase or decrease in the Income Tax - including MAT. The Commission cannot therefore speculate what return the company had assumed for submission of the bid. Therefore, it will not be possible to compute the tax to be allowed.*
>
> *35. As against this, in case of determination of tariff under Section 62 of the said Act, there is an assured return on equity of a specified percentage. The tariff regulations framed by the Central Commission / State Commissions provide for one of the components as tax on income. Regulation 25 of the CERC (Terms and Conditions of Tariff) Regulations, 2014 is cited as an example. It is rightly contended that this requires the procurers/beneficiaries of the generating company to bear the tax on income at the hand of the generating company. In case of competitive bidding scheme, there is no assured return and no provision for pass through of Income Tax."*

113. The Respondents have submitted that, in Order dated 14.08.2018 in Appeal No. 111 of 2017 in the case of GMR Warora v Central Electricity Regulatory Commission and Ors., the Hon'ble Tribunal rejected a similar claim, as under:

> "*After perusal of the RFP/PPA, we also observe that the tariff to be quoted was all-inclusive tariff and there is no provision for separately allowing IWC arising out of Change in Law events. GWEL has contended that it has to be restored to the same economic position and hence it is entitled for compensation on account of increase in IWC. We observe that the Change in Law provision is to restore GWEL to same economic position as if the Change in law event has not occurred by way of increase/decrease in tariff. This does not mean that the differential tariff (if any) is to be determined component wise as done for Section 62 based PPAs as the bidder was required to quote an all-inclusive tariff for a period of 25 years considering all relevant aspects. Hence, the contention of GWEL is unsustainable.*

114. The Respondents have submitted that the Petitioners are not entitled to interest on incremental working capital at normative interest rate or otherwise to put the Petitioner to the same economic position as if the change in law has not occurred.

(b) **Time bound payment within 60 days of the order**

115. The Respondents have submitted that so far as the amount payable to the Petitioners (if any) on account of GST Law, this Commission has stipulated a timeline of 60 days from the date of the passing of the Order, after which a Late Payment Surcharge shall be payable. In this regard, in its Order dated 19.09.2018 in Petition No. 50/MP/2018 and 52/MP/2018, this Commission directed as under:

> *"151. Also in view of the fact that the quantum of payment is not large, the relief, if any, for "Change in Law" should be allowed as a separate element on one time basis in a time bound manner. The Petitioners shall raise its claim based on discussions in paragraph 146 of this Order and the same shall be paid by the Respondents within sixty days of the date of this Order failing which it will attract late payment surcharge as provided under PPA."*

116. The Respondents have submitted that the timeline of 60 days should begin to run from the day the Petitioners provides the entire documentation in the required format to the Respondents.

117. The Respondents have submitted that the final decision by the Commission may be given after the Petitioners have submitted complete information and not before. Thus, any delay in the determination of the impact of change in law is on account of the Petitioners. The adverse consequences for not furnishing the full documentation/information at the first instance, ought to be borne by the defaulting party i.e. the Petitioners themselves.

118. The Respondent (RUVNL) has submitted that it is not party to the PPAs and therefore, is neither proper nor necessary party in the petition. Hence, it sought deletion from the array of parties for being improperly impleaded. It has further submitted that since the Petitioners have not furnished any document or supporting evidence to furnish the requisite details backed by auditor certificate for computation of impact of change in law, the present petition is not complete in all sense and hence may be dismissed.

**Analysis and decision:**

119. We have heard the learned counsels for the Petitioners and the Respondents and have carefully perused the records. Since the Petitions 187/MP/2018, 192/MP/2018, 193/MP/2018, 178/MP/2018 and 189/MP/2018 are likely worded and contains the similar issues to be adjudicated the same are clubbed together.

120. The Central Goods and Services Tax Act, 2017, The Integrated Goods and Services Tax Act, 2017 on 12.04.2017, The State(s) Goods and Services Tax Act, 2017 are hereinafter collectively referred as 'GST Laws'.

121. The brief facts of the case are that:

122. In Petition No. 187/MP/2018 and 193/MP/2018, the Respondent No. 1 (NTPC) in these two petitions issued RfS for setting up grid-connected solar projects of 350 MW capacity (project size being 10 MW each i.e. 35 MW x 10 Projects) in the State of Telangana, through e-bidding process. Pursuant to the RfS, M/s Renew Wind Energy (TN 2) Private Limited, was selected for setting up of a solar power generation facility with an installed capacity of 100 MW located in the State of Telangana. The Petitioner in these two petitions has entered into

10 separate PPAs with NTPC, each of which is for the setting up of solar power project of 10 MW capacity in the State of Telangana and for the consequent sale of solar power to NTPC.

123. In Petition No. 192/MP/2018, the Respondent (SECI) issued a RfS for setting up grid-connected Solar PV Projects in Bhadla Phase IV Solar Park, Rajasthan on "Build Own Operate" basis for an aggregate capacity of 250 MW capacity, project size being 50 MW each (i.e. 50 MW x 5 Projects), through an e-bidding process. The Petitioner M/s Phelan Energy India RJ Private Limited was selected and has entered into a PPA with SECI for setting up of solar power project of 50 MW capacity in the State of Rajasthan and for the consequent sale of solar power to SECI. SECI has entered into back to back agreement with Rajasthan Discoms for sale of power supplied by the Petitioner.

124. In Petition No. 178/MP/2018 & 189//MP/2018 the Respondent (SECI) issued a RfS of SPDs for setting up grid-connected Solar PV Projects in Bhadla Phase III Solar Park, Rajasthan on "Build Own Operate" basis for an aggregate capacity of 500 MW capacity through an e-bidding process based on guidelines issued by MNRE. Pursuant to the RfS, M/s ACME Jodhpur Solar Energy Private Limited and M/s ACME Rewa Solar Energy Private Limited were selected by SECI as a SPD for the setting up of a solar power generation facility. The Parties have entered into PPAs with SECI for setting up of solar power projects in the State of Rajasthan and for the consequent sale of solar power to SECI. SECI has entered into back to back agreement with Rajasthan Discoms for sale of power supplied by the Petitioner, i.e. M/s Acme Jodhpur Solar Energy Private Limited and M/s Acme Rewa Solar Energy Private Limited.

125. The Petitioners have submitted that on 12.04.2017, the Government of India introduced the Goods and Services Tax, replacing multiple taxes levied by the Central and State Governments and on 01.07.2017, the 'GST Laws' came into effect. The introduction of GST with effect from 01.07.2017 heralds a change in the topography of indirect taxation regime in India which has been brought about after the Effective Date of the PPAs. This has resulted in a paradigm shift, which subsumed a number of taxes and introduced new taxes. The Petitioners have placed their reliance on the Commission's Order dated 14.03.2018 in Petition 13/SM/2017, Order dated 19.09.2018 in Petition No. 50/MP/2018 & 52/MP/2018 &

Order dated 09.10.2018 in Petition No. 188/MP/2017 & Ors., wherein the Commission had allowed the introduction of GST Laws as a 'Change in Law'.

126. **Per Contra,** the Respondents have submitted that in terms of the Commission's Order the 'GST Laws' implication cannot be claimed when there is no clear/one-to-one co-relation between the projects, supply of goods or services and the invoices raised by the supplier of goods and services. The Respondents have submitted that there is no provision in the PPA regarding carrying cost or interest for the period till the decision of the Commission acknowledging the change in law and deciding on the amount to be paid for such change in law namely '*provide for relief for the same*', as specified in Article 12.2.2 of the PPA. The Respondents have placed reliance on the decision of the Hon'ble Appellate Tribunal in *SLS Power Limited -v- Andhra Pradesh Electricity Regulatory Commission and Others* (Appeal No. 150 of 2011) and Batch and judgment of the Hon'ble Appellate Tribunal dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited –v- Central Electricity Regulatory Commission and Ors*, wherein it was held that since the Gujarat Bid-01 PPA has no provision for restoration to the same economic position the carrying cost will not be applicable.

127. From the submissions of the parties, the following issues arise before this Commission:

128. ***Issue No.1: Whether the promulgation of the IGST Act, 2017, the CGST Act, 2017, the Rajasthan GST Act, 2017 and the State(s)GST Act, 2017 with effect from 01.07.2017 are covered under the scope of 'Change in Law' under Article 12 of the Power Purchase Agreements?***

129. ***Issue No. 2: Whether there will be incremental impact in the cost on account of promulgation of the GST Laws? And Whether there is a need to evolve a suitable mechanism to compensate the Petitioners for the increase in recurring and non-recurring expenditure incurred by the Petitioners on account of Change in Law?;***

130. ***Issue No. 3: Whether the claim of 'interest/ Carrying Cost' for delay in reimbursement by the Respondents is sustainable?***

131. No other issue was pressed or claimed.

132. We now discuss the issues one by one:

133. ***Issue No. 1: Whether the promulgation of the IGST Act, 2017, the CGST Act, 2017, the Rajasthan GST Act, 2017 and the State(s)GST Act, 2017 with effect from 01.07.2017 are covered under the scope of 'Change in Law' under Article 12 of the Power Purchase Agreements?***

134. The Petitioners have submitted that Article 12 of the PPAs provides for a list of five (5) events which would be considered as 'Change in Law'. They include *inter alia* the enactment, promulgation, adoption in India of any Law, as well as, any change in tax or introduction of any tax made applicable for supply of power.

135. The Petitioners have submitted that the event of enactment of 'GST Law' has occurred after the Effective Date and has resulted in additional recurring and non-recurring expenditure for the Petitioners. In terms of Article 12.2.1 of the PPA, an aggrieved party who has incurred additional recurring/ non-recurring expenditure is required to approach the Central Commission for seeking approval of such change in law event and thereby, claim relief for the same upon approval by the Central Commission. They have approached this Commission for seeking relief on account of introduction of GST as a change in law event, as per the first and fifth bullet of Article 12.1.1 of the PPAs, in as much as (i) it is in the nature of an enactment, coming into effect after the Effective Date and (ii) also qualifies as an introduction of a tax on the supply of power leading to additional recurring/ non-recurring expenditure for the Petitioners. Hence, it is claimed by the Petitioner that they are eligible for the benefit of GST as a change in law event in terms of the first and fifth bullet of Article 12.1.1 of the PPA.

136. The Petitioners have submitted that in the Order dated 09.10.2018 in the case of *Acme Bhiwadi Solar Power Private Limited Vs. SECI ,* the Commission had analyzed the change in law provision which is *parimateria* with the provision under the PPAs and held that introduction of GST apart from being an enactment, promulgation, etc. of a Law covered by the first bullet has also resulted in changes in taxes on inputs required for power generation and was thus also a tax on the supply of power covered by the sixth bullet therein.

137. Per Contra, the Respondents have submitted that as per Orders of Commission in Petition No. 50/MP/2018 & Another and in Petition No. 188/MP/2017, the 'GST Laws' implication cannot be claimed in the following circumstances:

(a) where the Scheduled Date of Commissioning is prior to 01.07.2017; or

(b) where the Actual Date of Commissioning is prior to 01.07.2017; or

(c) where the point of taxation of Goods/Services is before 01.07.2017; or

(d) when there is no clear/one-to-one co-relation between the projects, supply of goods or services and the invoices raised by the supplier of goods and services.

138. The Respondents have submitted that combined effect of the above conditions is that the GST implications will be applicable only if the point of taxation occurs on or after 01.07.2017 and not when the point of taxation has occurred prior to 01.07.2017, in which case the taxes shall be payable only under the pre-GST laws . Therefore, there is no change in law.

139. The Respondents have submitted that the intention behind the fifth bullet in Article 12.1.1 is to carve out a separate clause to restrict the nature of taxes which would be considered as change in law, unlike other four bullets dealing with matters other than taxes. If the taxes are said to be dealt under clauses other than the fifth bullet, the incorporation of the fifth bullet is rendered redundant as all taxes can be covered under the First or Second bullet. It is settled principle of interpretation that no provision can be ignored as redundant or superfluous. The Respondents have placed their reliance on judgment in case titled *JSW Infrastructure Ltd. v. Kakinada Seaports Ltd., (2017) 4 SCC 170 and Life Insurance Corporation of India v. DharamVir Anand, (1998) 7 SCC 348.*

140. The Respondents have submitted that maxim "*expressum facit cessare tacitum"* refers that when there is express mention of certain things, then anything not mentioned is excluded. The maxim is the principle of logic and common sense and not merely a technical rule of construction. The Respondents have placed their reliance on the decision of the Constitution Bench of the Hon'ble Supreme Court in the case of *Union of India v. Tulsiram Patel (1985) 3 SCC 398.*

141. The Respondents have submitted that the scope of Article 12.1.1 - fifth Bullet is clear and specific. It relates to the supply of power. Thus, every change in tax or introduction of tax was not intended to be covered by the Change in Law provisions of the PPA. The term "for" used in Article 12.1.1 – fifth bullet needs to be given a meaning that naturally flows from the scheme under which the expression is used, namely *'tax made applicable for supply of power'.* The expression clearly confines within its scope the incidence of tax on the supply of power. The expression 'for' cannot be given a wider interpretation to cover taxes on input material and services. The PPAs entered into between the parties provides in the definition clause i.e. Article 1.1 that any term used in the PPAs but not defined would have the meaning as applicable under the Electricity Act, 2003. The term 'Supply' is defined in Section 2 (70) of the Electricity Act, 2003 as: *"supply in relation to electricity means, the sale of electricity to a licensee or consumer."* In terms of the above, incidence of tax recognised under Article 12.1.1 – fifth Bullet is only on the transaction of sale of electricity and not on any other transaction preceding it.

142. The Respondents have submitted that the above interpretation stands fortified by the fact that the Change in Law provision of the present PPA stands on a different footing in comparison to the provisions of Change in Law, as incorporated in other Standard Bidding Document issued by Government of India as well as in other Power Purchase Agreements. Thus, different versions of the PPAs cover different scopes. With regard to each PPA, the intention of parties should be gathered from the express language used in the contract. Therefore, if the words used in the PPA are clear and unambiguous, it would be difficult to gather their intention different from the language used in the agreement. Similarly, the scope of different bullets under Article 12.1.1 also has to be given due meaning.

143. The Respondents have submitted that the relief (if any) for taxes is admissible to the SPD if it squarely falls within the purview of Article 12.1.1 – fifth Bullet only and not otherwise. The SPD cannot claim the change in law effect for statutory taxes under any of the first four bullets under Article 12.1.1 of the PPA.

144. The Commission observes that Article 12 of the Power Purchase Agreements stipulates as under:-

*"12. ARTICLE 12: CHANGE IN LAW*

*12.1 Definitions*

*In this Article 12, the following terms shall have the following meanings:*

*12.1.1 "Change in Law" means the occurrence of any of the following events after the Effective Date resulting into any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD:*

- *the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
- *a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- *the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- *a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the SPD;*
- *any change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement.*

*but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD, or (ii) any change on account of regulatory measures by the Appropriate Commission.*

*12.2 Relief for Change in Law*

*12.2.1 The aggrieved Party shall be required to approach the Central Commission for seeking approval of Change in Law.*

*12.2.2 The decision of the Central Commission to acknowledge a Change in Law and the date from which it will become effective, provide relief for the same, shall be final and governing on both the parties."*

145. The brief facts of the petitions with respect to bid dates, effective date of PPAs, SCoD and CoD are as under:

| Petition No. | Date of RFS | Date of Bid | Effective date of PPAs | SCoD | Actual CoD |
|---|---|---|---|---|---|
| 178/MP/2018 | 08.11.2016 | 19.04.2017 | 16.09.2017 | 16.09.2018 | As per schedule |
| 187/MP/2018 | 09.10.2015 | 08.02.2016 | 19.07.2016 | 18.08.2017 | As per schedule |
| 189/MP/2018 | 08.11.2016 | 19.04.2017 | 16.09.2017 | 16.09.2018 | As per schedule |
| 192/MP/2018 | 08.11.2016 | N.A. | 16.09.2017 | 16.09.2018 | As per schedule |
| 193/MP/2018 | 01.09.2015 | 23.02.2016 | 21.06.2016 | 20.07.2017 | As per schedule |

146. The Commission observes that the 'Date of Bidding' is before the date of coming into effect of the 'GST Laws' i.e. 01.07.2017. Further, the SCoD of all the Projects related to the Petitions are after the promulgation of the 'GST Laws'. The event of enactment of 'GST Law' has occurred after the 'Bidding' and it has been contended by the Petitioners that the enactment of the 'GST Laws' has resulted in additional recurring and non-recurring expenditure for the Petitioners and they have approached the Commission for seeking relief on account of introduction of GST as a change in law event, as per the first and fifth bullet of Article 12.1.1 of the PPA.

147. The Commission observes that as per Article 12, 'Change in Law' means the enactment/ coming into effect/ adoption/ promulgation/ amendment/ modification or repeal of any Law in India; Change in the interpretation of any Law in India; Imposition of a requirement for obtaining any consents or Change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement, resulting into any additional recurring/ non-recurring expenditure or any income to the SPD. The Commission is of the view that harmonious construction of the bullet points under Article 12 makes it clear that bullet point one is wider in scope and refers to the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal of any Law in India, including rules and regulations framed pursuant to such Law whereas bullet point sixth in seriatim refers specifically to any change in tax or introduction of any tax made applicable for 'supply of power' by the SPD as per the terms of Agreement. It implies that bullet point fifth in seriatim would be applicable as 'Change in Law' to the cases where the change in tax or introduction of any tax directly impacts 'supply of power' only. Thus, the ambit of the fifth bullet point is limited in that if any change in Tax is made or any tax is introduced having its impact specifically on the 'supply of power' , in that case the remedy of 'Change in Law' is available to the Petitioners under bullet point number five only. Clearly, the 'GST laws' enacted are

not in the nature of a mere change in the tax having limited applicability on supply of power. Rather, it is in the nature of an enactment having wide ranging implication on the entire indirect taxation regime in India. Various laws were subsumed and repealed. The Commission has further observed that the Appellate Tribunal for Electricity by the Judgment dated 14.08.2018 in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors.* has decided on interpretation of 'Change in Law' provision similar to the present PPAs. It was held as under:

*"This Tribunal has decided that any tax or application of new tax on supply of power also covers the taxes on inputs required for such generation and supply of power to the Distribution Licensees."*

148. It has further been decided by APTEL in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors.* that:-

*"vi. Now, we will consider the issues raised by the MSEDCL. Let us first consider the issues related to Construction Period. These issues are change in rates of Customs Duty/ Excise Duty/ Service Tax/ Other Taxes (WCT, VAT, CST). Let us first examine the findings of the Central Commission on these issues. The relevant extracts from the Impugned Order are reproduced below:*

*"44. We have considered the submissions of the Petitioner, MSEDCL and Prayas. The increase in Service Tax was affected through Finance Act, 2012. Since the enhanced rate of Service Tax is through an Act of Parliament after the cut-off date and has resulted in additional expenditure by the Petitioner, the same is covered as change in law under Article 10.1.1 of the MSEDCL PPA. Accordingly, the Petitioner is entitled to be compensated by MSEDCL for the impact of difference in the rate of service tax on the project cost.*

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*i. From the above it is crystal clear that the Central Commission has considered the tax on supply of power as tax on inputs for supply of power and allowed the*

*same under Change in Law. Further, the State Commission has considered that change in duties/ tax imposed by IGI under Act of the Parliament resulting in change in cost of the project is to be considered under Change in Law. We agree to this conclusion arrived at by the Central Commission as we have also concluded the same while allowing the Busy Season Surcharge and Development Surcharge imposed by MoR, IGI under the Act of the Parliament for transportation of coal which has resulted in change in cost to GWEL as such change in cost could not be factored in by GWEL at the time of bid submission."*

149. From the above, it is apparent that the Hon'ble Appellate Tribunal for Electricity has already held that any tax levied through an Act of Parliament after the cut-off date which results in additional expenditure by the Petitioner, the same is covered as 'Change in Law'. In the same judgment it is also held that any tax or application of new tax on 'supply of power' covers the taxes on inputs required for such generation and supply of power to the Distribution Licensees. In the instant case, the 'GST Laws' have been enacted by the Indian Government Instrumentalities i.e. by the Act of Parliament and the State Legislative Assemblies. The change in duties/ tax imposed by various Government Instrumentalities at Centre and State level has resulted in the change in cost of the inputs required for generation and hence the same is to be considered as 'Change in Law'. Hence, the Commission holds that the enactment of 'GST laws' is squarely covered as 'Change in Law' under the first, and fifth bullet in seriatim of Article 12 of the PPA. This view is in consonance with the view taken by the Commission in Order dated 09.10.2018 in Petition No. 188/MP/2018 & Ors. titled *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors*.

150. ***Issue No. 2: Whether there will be incremental impact in the cost on account of promulgation of the GST Laws? And, Whether there is a need to evolve a suitable mechanism to compensate the Petitioners for the increase in recurring and non-recurring expenditure incurred by the Petitioners on account of Change in Law?***

151. The Petitioners have submitted that the Commission vide Order dated 19.09.2018 in Petition No. 50/MP/2018 in the case of *Prayatna Developers Pvt. Ltd. v. NTPC Ltd. And Ors*., has clearly laid down the methodology which is required to be followed by the SPD's and

DISCOM's while granting the relief to the aggrieved party (SPDs), as follows:-

> *"146. Therefore, the Commission directs that the Petitioners have to exhibit clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services backed by auditor certificate. The certification should include 'Certified that all the norms as per 'GST Laws' have been complied with by the Petitioner and the claim of the amount being made by the Petitioner are correct as per the effective taxes in pre and post 'GST regime'. The Petitioners should then make available to the Respondents, the relevant documents along with the auditor certification who may reconcile the claim and then pay the amount so claimed to the SPD w.e.f. 01.07.2017 qua EPC cost on the basis of the auditor's certificate as per the methodology discussed in para no. 133 above."*

152. The Petitioners have submitted that from the above, it follows that only the following three conditions are required to be satisfied by the Petitioners for claiming benefits/ reliefs on account of change in law from the Respondents:-

    a. Documents and invoices for the procurement of goods and services by the SPD the Petitioner with a one to one co-relation with the corresponding solar power projects;
    b. Auditor certificate certifying that the claim of amounts as change in law are correct and as per the effective taxes in the pre-GST and post-GST regime;
    c. Making available all the documents and the auditor certificate to the Respondents for reconciliation by the Respondents and consequent pay out of the amounts by the Respondents.

153. The Petitioners have submitted that the Respondents have been conferred with the limited task/jurisdiction of reconciliation of the documents, invoices, etc. with the claims submitted by the SPD, before making payments. Thus once the afore-mentioned conditions are satisfied by the Petitioner and proper reconciliation has been made, the Respondents must necessarily disburse the amounts claimed as change in law on account of 'GST 'within a time-period of 60 days from the date when the documents were made available. The Commission may specifically clarify that the Respondents ought not to travel beyond the task conferred on

them i.e. task of reconciliation of the documents with the claims submitted by the SPD, and sit in judgment over the methodology of tax rates employed by the Petitioner in making its procurements. Permitting the Respondents to question the rate of taxes factored by the Petitioners, would render the Auditor's certificate nugatory.

154. The Petitioners have submitted that in Para 146 of the Order dated 19.09.2018 of the Commission, the word 'may' is used while stating the task of the Respondents which is reproduced as under: "146….*The Petitioners should then make available to the Respondents, the relevant documents along with the auditor certification who may reconcile the claim and then pay the amount so claimed to the SPD w.e.f. 01.07.2017 qua EPC cost on the basis of the auditor's certificate as per the methodology discussed in para no. 133 above."* The usage of the word 'may' ought to be construed as 'shall' and the Respondents would have to disburse the amounts claimed once they have reconciled the said claims with the document/ invoices made available by the Petitioners.

155. The Petitioners have submitted that during the course of the hearing, the Respondents contended that given the substantial difference in the GST rates on assets bought individually as opposed to assets bought as components of solar power generating system, the Petitioner had the duty to mitigate the costs. Said assertion of the Respondents is not borne out of the provisions of the PPAs in as much as the Petitioners are entitled to relief for 'change in law' when there is any increase in recurring/ non-recurring expenditure incurred by the Petitioners. Further, the reduced rate of 5% as applicable to solar power generating system depends upon a particular contract structure which may or may not be followed by the Petitioners. Accordingly, the duty to mitigate costs cannot be read into the PPA since the reduced cost is a factor of the specific contracting structure of the Petitioner, which will vary on the basis of the contractual arrangements of the Petitioner with the Contractors. In cases where the parties to the PPAs intended to include a duty to mitigate, it has been specifically done so, such as at clause 11.6 (Force Majeure) and Clause 14.6 (Indemnity). However, in relation to Change in Law, as there is no specific clause relating to mitigation of risk, the same cannot be read into the Change in Law clause under the PPA.

156. The Petitioners have submitted that the applicability of the reduced rate of 5% on solar power

generating system is a nebulous concept and there is considerable ambiguity as to in what cases will the reduced rate of 5% be applicable. As per various decisions of the Authority for Advance Ruling under GST, the contracts have been read to be works contract leviable to GST at 18% and not the reduced rate of 5% as was sought to be contended. The Respondents ought to be directed to indemnify the Petitioners from payment of tax, interest and penalty if any adverse tax implication is borne out of the Respondents exercise of discretion.

157. The Petitioners have submitted that vide Order dated 19.09.2018, this Commission in the case of *Prayatna Developers Pvt. Ltd. v. NTPC Ltd. And Ors.*, has given a clear finding that recurring expenses in terms of Article 12 of the PPA include *inter alia* estimated maintenance cost. The relevant portion of the said Order dated 19.09.2018 is reproduced hereunder: -

> *"149. The Commission is of the view that the recurring expenses referred to in Article 12 of the PPA includes activities like salary, tax expenses, estimated maintenance costs, and monthly income from leases etc. It is apparent that GST will apply in case of outsourcing of the 'Operation and Maintenance' services to a third party (if any). However, outsourcing of the 'Operation and Maintenance' services is not the requirement of the PPA/ bidding documents.*
>
> *The concept of the outsourcing is neither included expressly in the PPA nor it is included implicitly in the Article 12 of the PPA. It is a pure commercial decision of the Petitioners taken for its own advantage and any increase in cost including on account of taxes etc. in the event the Petitioners choose to employ the services of other agencies, cannot increase the liability for the Respondents. Therefore, the Commission holds that claim of the Petitioners on account of additional tax burden on operation and maintenance expenses (if any), is not maintainable."*

158. The Petitioners have submitted that from the above, it follows that the Commission has held maintenance activities to be a recurring expense in the hands of the Petitioner. However, in the said case, since O&M activities had been outsourced, this Commission had denied the change in law benefit on the ground that outsourcing was never contemplated within the terms of the PPAs. The Commission had sought to create an artificial distinction between

self-performed activities and outsourced activities and the same was based on an erroneous interpretation of the PPAs. It is a settled rule of interpretation of contracts that the words used in the contract must be given full effect to. Unless something has been specifically excluded, it must be treated as permitted under the contract. The PPAs entered into between the Respondents and the Petitioner specifically provide relief for any increase in recurring or non-recurring expenditure in terms of Article 12.1.1. The usage of the word "any" signifies the wide ambit of the change in law clause and unless something is specifically excluded, the word "any" ought to be read broadly. Thus, since the outsourcing of O&M activities have not been specifically excluded from the ambit of change in law clause, the said clause ought to be construed broadly to encompass expenses on account of the outsourcing of O&M activities.

159. The Petitioners have submitted that outsourcing of O&M by the Petitioner can also be inferred by having reference to the provisions of the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 issued under the Electricity Act, 2003 under which O&M expenses are treated as a cost component of the tariff structure for renewable energy technologies as per Para 9 of the aforesaid Regulations.

160. The Petitioners have submitted that alternatively, the Petitioners are entitled to relief of expenditure incurred in relation to procurement of materials required for carrying out the O&M activity. They will have to necessarily source the goods required in carrying out O&M activities from a third party vendor, given that the Petitioners are not a manufacturer of goods but is a solar power developer. Thus, if the Petitioners were to carry out the O&M activity on its own accord and not outsource the same, even then it would need to procure materials for its O&M activities from an Original Equipment Manufacturer ('OEM'). The materials sourced from such third party would have an increased tax cost component on account of introduction of GST, leading to additional expenditure for the Petitioner. Thus, in a scenario where O&M activity is undertaken by the Petitioner, it would be eligible for the recurring expenditure in the form of increased tax cost incurred on material procurements made from OEM vendors. Where, however, the O&M activity is outsourced, nothing materially changes insofar as procurement of material is concerned, except that in case of in-house O&M activity, material will be required to be procured from an OEM, whereas in case on

outsourcing of O&M activity, the material will be procured from O&M contractor. In other words, in both the cases, material will always be required to be procured on an outsourced basis. Therefore, if outsourcing logic is applied to deny the benefit of Change in Law on O&M cost, it would be fatal even where O&M is not outsourced, since for in-house O&M activity also, the procurement of material will always be outsourced. Therefore, the very logic of denial of relief of Change in Law in relation to O&M activity being premised on it being outsourced to third party, is illogical and uncalled for, as such reasoning is neither borne out of the contractual terms and in itself leads to an absurd outcome and therefore must be shunned.

161. Per Contra, the Respondents have submitted that in terms of Article 4.1.1 (b) of the PPAs, the Petitioners are responsible at their own cost and risk for designing, constructing, erecting, commissioning, completing and testing the Power Project in accordance with the Prudent Utility Practices. Therefore, it is the duty of the Petitioners to prudently incur expenditure and mitigate the effect.

162. The Respondents have submitted that in the order dated 19.09.2018 in Petition No. 50/MP/2018 & Another and in Petition No. 188/MP/2017 & Batch, the Commission has taken note of the substantial difference in the GST, namely, 5% if the components are bought as a part of the Solar Generation System and 18% if the components are individually and directly purchased. The relevant extract of the order dated 19.09.2018 reads as under:

> *"144. The Commission observes that as per Notification No. 1/2017-Central Tax (Rate) as contained at Sr. No. 234 Chapter heading 84, 85 or 94 the "renewable energy devices & parts for the manufacture …… (C) Solar Power Generation System" the concessional rate of 5% would also be available i.e. say inverters, cables, connectors etc. are under 28 per cent duty but whenever these products are used in the solar generation system, these will attract an effective levy of 5 per cent instead of 28 per cent. Further, in the case of the direct purchase of the mounting structures, power conditioning units etc. are under 18 per cent duty but in case these components are sold as part of Solar Power Generating system then the same will attract an effective levy of 5 per cent instead of 18 per cent. This fact gathers support*

*from the pleadings of the Petitioner M/s Azure Power Venus Private Limited in Petition No. 52/MP/2018 who has claimed the maximum „GST" levied at 5% (2.5% + 2.5%) in comparison to 18% (9% + 9%) being claimed by Petitioner M/s Prayatna Developers Private Ltd. in Petition No. 50/MP/2018.*

*……"*

163. The Respondents have submitted that in terms of the above, as a Prudent Utility, the SPD ought to have considered the reduction in the impact of GST by arranging to buy the assets as a part of the Solar Generation System at the cost of paying GST at a lower rate instead of purchasing it individually by paying higher GST of 18%. The SPD had the duty to mitigate the cost. Any higher cost paid, without mitigating the cost, should not be allowed to be passed on to Respondents and thereby to the consumers at large.

164. The Respondents have submitted that the contention of the Petitioner that reduced rate of 5% as applicable to solar power generating system depends upon a particular contracting structure which may or may not be followed by the Petitioners is vague and incorrect. The Petitioners have the opportunity to incur the reduced rate of 5% instead of 18% by choosing to purchase the equipments in form of solar power generating system. Instead, purchasing equipments separately and incurring a higher rate in terms of GST has been a commercial decision of the Petitioner and any increase in cost, including on account of taxes etc. is entirely to the account of the Petitioner. Further the petitioner can only claim relief for such increase in expenditure on account of Change in Law which has been prudently and reasonably incurred by the Solar Power Developer.

165. The Respondents have submitted that the PPAs entered into by the Petitioner with Respondents envisages the status of Respondents as an intermediary company for the bulk purchase of electricity from the Petitioner for bulk supply of electricity to the Distribution licensees under a Power Sale Agreement. Such purchase and resale of electricity is under a scheme envisaged under National Solar Mission. Respondents are in a position to discharge its obligations under the PPAs including the payment for any change in Law implication etc. only upon the distribution licensees remitting the amount to Respondents in terms of the respective PSAs. The obligation of the distribution licensee under the PSAs is therefore on a

back to back basis with the obligation of Respondents to the Petitioners. Reference may be made to the Commission's Order dated 09.10.2018 in case of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch.*

166. The Respondents have submitted that the methodology that may be determined by the Commission for payment of the 'change in law' implication by Respondents to the Petitioners, namely one-time payment or increase in per unit tariff or in any other manner, should be directed to be implemented mutatis mutandis for the payment by the Distribution Licensee under the PSA to Respondents.

167. The Respondents have submitted that:-

(a) PPAs provision or the bid document did not mandate or prescribe or specifically provide for the outsourcing of O&M;

(b) Outsourcing of O&M is an internal commercial decision of the SPD. Respondents do not have any implication if the Petitioners undertake the O&M by itself or outsources the O&M;

(c) If, for commercial expediency or benefit, the Petitioners outsources the O&M, the saving or additional expenditure is to the account of the SPDs; and

(d) SPD has a full right to take a decision on the above at its risk or reward.

168. The Respondents have submitted that the Petitioners are responsible for undertaking generation and supply of electricity. In terms of Article 4.1.1(g), the SPD has undertaken to be responsible, at its own cost and risk for fulfilling all obligations undertaken by the SPD under this Agreement. Further, Article 17.9, 17.10 and 17.11 reads as under:

> *17.9 Taxes and Duties*
>
> *17.9.1 The SPD shall bear and promptly pay all statutory taxes, duties, levies and cess, assessed/ levied on the SPD, contractors or their employees that are required to be paid by the SPD as per the law in relation to the execution of the Agreement and for supplying power as per the terms of this Agreement.*
>
> *17.9.2 NTPC shall be indemnified and held harmless by the SPD against any claims that may be made against NTPC in relation to the matters set out in Article 17.9.1.*
>
> *17.9.3 NTPC shall not be liable for any payment of taxes, duties, levies, cess*

*whatsoever for discharging any obligation of the SPD by NTPC on behalf of SPD.*

*17.10. Independent Entity*

*17.10.1 The SPD shall be an independent entity performing its obligations pursuant to the Agreement.*

*17.10.2 Subject to the provision of the Agreement, the SPD shall be solely responsible for the manner in which its obligations under this Agreement are to be performed. All employees and representatives of the SPD or Contractors engaged by the SPD in connection with the performance of the Agreement shall be under the complete control of the SPD and shall not be deemed to be employees, representatives, contractors of NTPC and nothing contained in the Agreement or in any agreement or contract awarded by the SPD shall be construed to create any contractual relationship between any such employees, representatives or contractors and NTPC.*

*17.11 Compliance with Law*

*Despite anything contained in this Agreement but without prejudice to this Article, if any provision of this Agreement shall be in deviation or inconsistent with or repugnant to the provisions contained in the Electricity Act, 2003, or any rules and regulations made there under, such provision of this Agreement shall be deemed to be amended to the extent required to bring it into compliance with the aforesaid relevant provisions as amended from time to time.*

169. The Respondents have submitted that the change in law under the fifth bullet is admissible if the transaction which is assessed as tax is mandated or required to be performed and not when the transactions need not be there viz. outsourcing of O&M. The O&M is the responsibility of the Petitioners and in the event of the Petitioners choosing to employ the services of other agencies, it cannot increase the liability of Respondents (and consequentially the Distribution Licensees) in terms of tariff. The outsourcing of the O&M to a third party is not a requirement of the PPAs and is a commercial decision of the Petitioners for its own advantage and any increase in cost including on account of taxes etc. is entirely to the account of the Petitioners. This is particularly when the Petitioners are employing the

services of their own parent company – M/s Renew Solar Energy Private Limited (in case of Petition No. 187/MP/2018 and 193/MP/2018) to carry out the Operation and Maintenance.

170. The Respondents have placed reliance on the Commission's Order dated 16.03.2018 in Petition No. 1/MP/2017 in *GMR Warora Energy Limited -v- Maharashtra State Electricity Distribution Company Limited and Ors.* It was held in the Order that any increase in cost of O&M expenditure on account of increase in service tax cannot be considered as 'Change in Law'. The aforementioned view was reiterated by the Commission in its Order dated 09.10.2018 in Petition No.188/MP/2018 & Ors. in the matter of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors.*

171. The Respondents have submitted that the reliance placed by Petitioners on Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 dated 06.02.2012 for determining the GST impact on O&M services is misplaced. The Tariff Regulations notified by the Commission for determination of tariff under Section 62 of the Electricity Act, 2003 for renewable energy have no application to the present case. In the present case, the tariff has been determined by the Competitive Bid Process. The tariff (based on which the bid is given) is inclusive of all the costs and expenses including any taxes, levies etc. on the work to be undertaken by the Petitioner. In these circumstances, the Petitioner is not entitled to any increase on account of the implications of the GST on the O&M Services that have been outsourced.

172. The Commission observes that in its Order dated 14.03.2018 in Petition No. 13/SM/2017 it had decided the following as regards settlement of dues arising on account of the introduction of GST under the respective PPAs:

> *"35. Accordingly, we direct the beneficiaries/ procurers to pay the GST compensation cess @ Rs 400/ MT to the generating companies w.e.f. 01.07.2017 on the basis of the auditors certificate regarding the actual coal consumed for supply of power to the beneficiaries on basis of Para 28 and 31. In order to balance the interests of the generators as well as discoms/beneficiary States, the introduction of GST and subsuming/abolition of specific taxes, duties, cess etc. in the GST is in the nature of change in law events. We direct that the details thereof should be worked out between generators and discoms/beneficiary States. The generators should furnish the requisite details backed by audit or certificate and relevant documents to the discoms/ beneficiary States in this regard and refund the amount which is payable to the*

*Discoms/ Beneficiaries as a result of subsuming of various indirect taxes in the Central and State GST. In case of any dispute on any of the taxes, duties and cess, the Respondents have liberty to approach this Commission."*

173. The Commission observes that 'GST Laws' became effective from 01.07.2017. 'GST Laws' provide for a tax slab (previously exempted) of 5% to 28% with respect to Goods & Services required for execution, construction and operation of Solar Projects w.e.f. 01.07.2017. The 'Goods and Services' in the context of the present petitions can be broadly categorized under the following two heads:

a) EPC Stage i.e. Construction Stage which is covered under 'Goods' and
b) O & M Stage i.e. Post Construction Stage which is covered under 'Services'.

174. The impact of 'GST laws' on the Engineering, Procurement and Construction (hereinafter referred to as 'EPC') Stage can be also construed broadly to be 'Construction Stage' which is covered under Goods under 'GST Laws'. It is pertinent to note that under 'GST Laws' it has been provided that *"If point of taxation of Goods/Services before the GST implementation then it will be taxed under earlier law. GST will not be applicable.* Any portion of any supply whose point of taxation is after GST implementation will be taxed under GST. *The time of goods/supply of services shall be the earlier of the:- (a) The date of issuing invoice (or the last day by which invoice should have been issued) OR (b) The date of receipt of payment-whichever is earlier."* A plain reading of the above implies that according to 'GST Laws', in cases where the invoice is raised or consideration for the goods/ supply of services have been received before 01.07.2017 and the tax has already been paid under the earlier law, the GST will not be applicable in such cases. It is immaterial whether the consideration for supply has been paid fully or partly. The Petitioners have claimed that on account of levy of 'GST Laws', the construction cost of project has escalated to the tune of few crores. The Commission is of the view that there has to be a clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services. Accordingly, the Commission directs the parties to reconcile the accounts as per discussion above.

175. The Commission observes that in the instant petitions, the tariff has been discovered under

transparent e-bidding process in accordance with the NSM guidelines issued by the Central Government. In the Competitive Bidding Scenario, the SPDs bid levellised tariff without disclosing the details of the calculations of the project cost including capital expenditure. The component wise details of the capital employed are not required to be declared by the bidders. The design of the bid levellised tariff is solely a decision of the SPDs.

176. The Commission observes that prior to the introduction of Goods & Service Tax Act (GST), the components were taxed at the time of production (Excise) and at the time of Sale (VAT). For sale of components between two States, CST was applicable. Moreover, for projects executed within certain Municipal Corporation limits, additional Octroi was applicable to the components. As per Goods And Service Tax (GST), *Concept & Status,* published by Central Board Of Indirect Taxes And Customs, Department Of Revenue, Ministry Of Finance, Government Of India, as on 1st August, 2018, the list of the taxes subsumed in the GST, 2017 is as under:

> *"10.21 Subsuming of taxes, duties etc.: Among the taxes and duties levied and collected by the Union, Central Excise duty, Duties of Excise (Medicinal and Toilet Preparations), Additional Duties of Excise (Goods of Special Importance), Additional Duties of Excise (Textiles and Textile Products), Additional Duties of Customs (commonly known as CVD), Special Additional Duty of Customs (SAD), Service Tax and cesses and surcharges insofar as they related to supply of goods or services were subsumed. As far as taxes levied and collected by States are concerned, State VAT, Central Sales Tax, Purchase Tax, Luxury Tax, Entry Tax, Entertainment Tax (except those levied by the local bodies), Taxes on advertisements, Taxes on lotteries, betting and gambling, cesses and surcharges insofar as they related to supply of goods or services were subsumed."*

177. The Commission observes that with the enactment of Central Goods and Services Tax Act, 2017, the following Acts were repealed by the Parliament:

i) *the Central Excise Act, 1944 (except as respects goods included in entry 84 of the Union List of the Seventh Schedule to the Constitution),*

ii) *the Medicinal and Toilet Preparations (Excise Duties) Act, 1955,*

iii) *the Additional Duties of Excise (Goods of Special Importance) Act, 1957,*

iv) *the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978, and*

v) *the Central Excise Tariff Act, 1985*

178. The Central Excise Tariff Act, 1985 (5 of 1986) and Exemption Notifications (other than general) the 'General Exemption No. 64' stipulates as under:

*"GENERAL EXEMPTION NO. 64*

*Exemption on all items of machinery, including prime movers, instruments, apparatus and appliances, control gear and transmission equipment and auxiliary equipment and components, required for initial setting up of a solar power generation project or facility. [Notifn. no. 15/2010-CE., dt. 27.2.2010 as amended by 26/12, 15/14]*

*In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944(1 of 1944), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts all items of machinery, including prime movers, instruments, apparatus and appliances, control gear and transmission equipment and auxiliary equipment (including those required for testing and quality control) and components, required for initial setting up of a solar power generation or solar energy production project or facility, from the whole of the duty of excise leviable thereon which is specified in the First schedule to the Central Excise Tariff Act, 1985 (5 of 1986), subject to the following conditions, namely:-*

*(1) that an officer not below the rank of a Deputy Secretary to the Government of India, in the Ministry of New and Renewable Energy recommends the grant of this exemption, indicating the quantity, description and specification of the goods and certifies that they are required for initial setting up of a solar power generation or solar energy production project or facility, as the case may be; and*

*(2) the Chief Executive Officer of the project furnishes an undertaking to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, having jurisdiction over the factory of the manufacturer, to the effect that-*

*(i) the said goods will be used only in the said project and not for any other use; and*

*(ii) in the event of non-compliance of sub-clause (i), the Project Developer of such project shall pay the duty which would have been leviable at the time of clearance of goods, but for this exemption."*

179. Similarly, the Commission observes that with the enactment of the Goods and Services Tax, 2017, by of Rajasthan and Telangana, Acts related to State VAT, Central Sales Tax, Purchase Tax, Luxury Tax, Entry Tax, Entertainment Tax (except those levied by the local bodies), Taxes on advertisements, Taxes on lotteries, betting and gambling, cesses and surcharges insofar as they related to supply of goods or services were subsumed.

180. The Commission observes that GST rates are ranging from 5% to 18%. In case of PV Modules, the applicable GST is 5%, as against 0% VAT applicable in various States pre-GST roll out. Excise duty on components required for initial setting up of a solar power generation or solar energy production project or facility was at 'Zero' rate and also enjoyed concessional Basic Customs Duty and Additional Customs Duty on imports. The imposition of VAT on solar power generating equipment has been diverse with some States offering complete exemption while on the other hand, few States have levied a concessional rate of tax at 4% (four per cent) and 5% ( five per cent) respectively, on the equipment and components used for setting up of solar power generating equipment. The GST rate on solar power generating systems and raw material used (including modules), has been notified at 5% (five per cent) of value of such goods. However, other goods such as inverter, cement and cables have been kept under the 18% (eighteen per cent) bracket. Further, the GST on various services such as works contract service, technology etc. which are typically used in setting up of a solar power plant has been kept at 18% (eighteen per cent). It is pertinent to mention here that Services, Commercial, Contractual, Erection and Commissioning, all attracted Service Tax @15%, Swachh Bharat Cess of 0.5% and Krishi Kalyan Cess of 0.5% before GST regime.

181. The Commission observes that as per Notification No. 1/2017-Central Tax (Rate) as contained at Sr. No. 234 Chapter heading 84, 85 or 94 of the *"renewable energy devices & parts for the manufacture …… (C) Solar Power Generation System"* the concessional rate of 5% would also be available i.e. say inverters, cables, connectors etc. are under 28 per cent duty but whenever these products are used in the solar generation system, these will attract an effective levy of 5 per cent instead of 28 per cent. Further, in case of direct purchase of the mounting structures, power conditioning units etc. are under 18 per cent duty but in case these components are sold as part of Solar Power Generating system then the same will attract an effective levy of 5 per cent instead of 18 per cent.

182. With the above facts in mind, the Commission now proceeds to determine the impact of GST on the projects under consideration in the present petitions. As regards the component wise details of the project and respective percentage share of each such component in the overall capital cost, the Commission observes that in the absence of any related references in the

projects selected through bidding, reliance could be placed on the Commission's Order dated 23.03.2016 passed in Petition No. 17/SM/2015 for the purpose of determining 'weightage of the Components of Capital cost' and the percentage impact of the taxation due to enactment of 'GST Laws' on the various components may be calculated accordingly. It is pertinent to mention here that in respect of PV Modules VAT (pre-GST regime) of 0-5% was charged on intra-State procurement. Further, in case of input by SPV or high sea sale by EPC, the effective rate also was 0%. Whereas, post enactment of 'GST Laws' 5% will be applicable on intra state procurement as well as import by EPC or SPV. The calculations for the escalation as based on Petition no. 17/SM/2015 are tabulated as below:-

| | | GST | | Comments |
|---|---|---|---|---|
| Particulars | Weightage of Component of Capital Cost As taken in Petition No. 17/SM/2015 | As claimed by the Petitioners | As per 'GST Laws' post 01.07.17 | |
| PV Modules | 61.96 % | 5 % | 5 % | |
| Land Cost | 4.72 % | 0 % | 0 % | |
| Civil and General Works<br><br>(Balance of Plant-Civil; EPC-Civil; Roads & Drainage Fencing Work) | 6.60 % | 9% | 9 % | The GST rate at 18%; However, in few Petitions the Petitioners have claimed 9%. |
| Mounting Structures<br><br>(Mounting Structure & Nut-Bolts; Clamp & Fasteners; Mounting Structure Foundation) | 6.60 % | 18 % | 5 % | The GST rate at 18% (SGST-9% + CGST-9%) in case of direct purchase. In case the structures are sold as part of Solar power generating system then 5% GST is applicable. |
| Power Conditioning Unit<br><br>(Inverter Transformer; DC Battery & Battery | 6.60 % | 28 % | 5 % | The GST rate at 18% (SGST-9% + CGST-9%) in case of direct purchase. In case the structures are sold as part of Solar power generating system then 5% GST is |

| | | | | |
|---|---|---|---|---|
| Charger) | | | | applicable. |
| Evacuation Cost up to Interconnection Point<br><br>(AC/DC Cables; Switchgears; PLC, SCADA; Connectors; Transmission line; AC/DC- Electrical Materials; Combiner Box;; Misc. Electricals) | 8.30 % | 18 % | 5 % | Post GST sold as part of Solar power generating system hence 5% GST rate. |
| Preliminary and Pre-Operative Expenses including IDC and Contingency<br><br>(Transmission & Logistic Services; Erection of MMS and Module; Electrical Erection; Pre-Op & other indirects; Safety; Security and IT services; EPC-Services) | 5.21 % | 18 % | 5 % | The GST rate at 18%; However, in few Petitions the Petitioners have claimed 5%. |
| | Weighted Avg. of Tax/GST | 9.16 % | 5.55 % | |

183. The Petitioners are directed to make available to the Respondents all relevant documents exhibiting clear and one to one correlation between the projects and the supply of goods or services, duly supported by relevant invoices and Auditor's Certificate. The Respondents are further directed to reconcile the claims for Change in Law on receipt of the relevant documents and pay the amount so claimed to the SPDs as per the methodology discussed in Para 174 and 182 above. It has been brought to our notice that in some cases, the Respondent Procurers are questioning the rationale of the commercial decisions taken by the SPDs in cases where the rates of GST are on the higher side. Since, the decision for project implementation including the mode of procurement of goods and services were taken by SPDs prior to the implementation of GST, it would not be appropriate to question such

commercial decisions on the basis of the differential rates of GST on certain goods and services, and payments should be made based on the invoices raised and supported by Auditor's Certificate. The Commission is of the view that since the quantum of compensation on account of introduction of GST w.e.f. 01.07.2017 is not large, it should be discharged by the Respondent-Procurers as one-time payment in a time bound manner. Accordingly, it is directed that the GST bills shall be paid within 60 days from the date of issue of this Order or from the date of submission of claims by the Petitioners, whichever is later, failing which it shall attract late payment surcharge in terms of the PPA. Alternatively, the Petitioners and the Respondents may mutually agree to mechanism for the payment of such compensation on annuity basis spread over such period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs. This will obviate the hardship of the Respondents for one-time payment.

184. The next issue is that of the impact of 'GST laws' on the 'Operations and Maintenance' (hereinafter referred to as "O & M") stage. The Commission is of the view that 'O & M' stage can be construed broadly to be 'Post-Construction Stage' which is covered under Services under 'GST Laws'. The following activities constitute O&M and there is no other significant activity covered by O&M for a solar plant: Site Security; Consumables and breakdown spares; Annual Maintenance Contract; and Module cleaning - labour and water supply.

185. The Petitioners have submitted that all of the aforementioned activities have been outsourced to agencies that are experienced in providing the said services in the most effective and cost-efficient manner. The Respondents have argued that the choice to outsource is that of the Petitioners and the Petitioners could have internalised these activities, in which case there would have been no GST impact. Therefore, the GST impact on outsourced activities is on account of the SPD's own convenience and choice and since there was an alternative to internalise these services, the burden of such GST impact has to be borne by the SPD itself. The Petitioners have submitted that this argument of Respondents is baseless for the reason that if the Petitioners had internalised the cost of the aforementioned constituents of O&M, the same would have to be factored into the quoted tariff. This would have inevitably resulted in a higher tariff. It is the case of the Petitioners that the concept of the 'O & M' expenses is

implicitly covered under Article 12. As per the PPAs, Clause 12.1.1 stipulates that *"Change in Law means the occurrence of any of the following events after the Effective Date resulting into any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD".* As 'O & M' expenses are recurring in nature, therefore the same are squarely covered under Article 12 of the PPAs and the same may be allowed. The Petitioners have submitted that O & M expenses being claimed are on the principles of normative parameters (escalation 5.85%) as specified by the Commission in the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 dated 06.02.2012 as amended on 31.03.2016.

186. The Commission observes that as per the GST Act, 2017, the supply of services include:

*"5. Supply of services*

*The following shall be treated as supply of services, namely:-*

*(a) renting of immovable property;*
*(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.*

*Explanation.-*
*For the purposes of this clause-*
*(1) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:-*
*(i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972 (Central Act No. 20 of 1972); or*
*(ii) a chartered engineer registered with the Institution of Engineers (India); or*
*(iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority;*
*(2) the expression "construction" includes additions, alterations, replacements or remodeling of any existing civil structure;*
*(c) temporary transfer or permitting the use or enjoyment of any intellectual property right;*
*(d) development, design, programming, customization, adaptation, up gradation, enhancement, implementation of information technology software;*
*(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and*

*(f) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration."*

187. The Commission is of the view that the recurring expenses referred to in Article 12 of the PPAs includes activities like salary, tax expenses, estimated maintenance costs, and monthly income from leases etc. It is apparent that GST will apply in case of outsourcing of the 'Operation and Maintenance' services to a third party (if any). The Commission is of the view that outsourcing of the 'Operation and Maintenance' services is not the requirement of the PPAs/ bidding documents. The concept of the outsourcing is neither included expressly in the PPAs nor it is included implicitly in the Article 12 of the PPAs. It is pertinent to mention here that the Petitioner in their petitions have categorically submitted that: *"Further, Article 12 also makes it abundantly clear that a statutory change in tax structure made applicable for setting up of Solar Power Projects resulting in an additional non-recurring and recurring expenditure for the Petitioner in the form of escalation of capital cost and operational cost of the Project also qualifies as 'Change of law'. The aforesaid additional non-recurring and recurring expenditure has not been factored into the tariff bid by the SPDs at the time of submission, taken into consideration the extant tax regime prevailing at the time.".* The Commission is of the view that in the Competitive Bidding Scenario, the SPDs bid levellised tariff without disclosing the details of the calculations of the project cost. It has already been held by the Commission in the earlier Orders and also appreciated above that it is a pure commercial decision of the Petitioners taken for its own advantage and any increase in cost including on account of taxes etc. in the event the Petitioners choose to employ the services of other agencies, cannot increase the liability for the Respondents. Therefore, the Commission holds that claim of the Petitioners on account of additional tax burden on operation and maintenance expenses (if any), is not maintainable. This view is in consonance with the view taken by the Commission Order dated 09.10.2018 in Petition No. 188/MP/2018 & Ors. case titled *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors.*

188. ***Issue No. 3: Whether the claim of 'interest/ Carrying Cost' for delay in reimbursement by the Respondents is sustainable?***

189. The Petitioners have submitted that they recognize the decision of this Commission in

Petition No. 50/MP/2018 in the case of *Prayatna Developers Pvt. Ltd. v. NTPC Ltd. And Ors.* vide Order dated 19.09.2018, wherein it has been held that carrying cost will not be allowed since there is no specific provision in the PPA for restoration of the parties to the same economic position, as if 'Change in Law' has not occurred. Thus, the underlying principle adopted in the above decision was that in the absence of an express provision providing for restitution, the affected party would not be entitled to carrying cost.

190. The Petitioners have submitted that in Order dated 19.09.2018 in the case of *Prayatna Developers Pvt. Ltd. v. NTPC Ltd. And Ors.,* the Commission had failed to appreciate the underlying principle of 'Change in Law' clause, as envisaged under Article 12 of the PPAs. 'Change in Law' is a principal of restitution and equity and the very purpose of such a clause is to enable a party to seek contractual remedies for incremental cost that have arisen which was beyond its control post the Effective Date. Accordingly, while the words 'the parties must be restored to the same economic position' may not be present, the same must be read in having regard to the purpose of the 'change in law' clauses. Restoration of the party to same economic position is not a concept over and above the concept of change in law. Instead it is deeply meshed into the very concept of change in law. A typical 'change in law' clause found in the PPAs for thermal power is as under:-

> *"13.2 Application and Principles for computing impact of Change in Law*:
>
> *While determining the consequence of Change in Law under this Article 13, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such Change in Law has not occurred."*

191. The Petitioners have submitted that from the above it can be seen that the purpose of effecting the change in law was mentioned so as to put the affected party to the same economic position. Putting the party to same economic position was not an additional aspect of change in law but the very essence of change in law and does not require insertion of an additional phraseology that a party needs to be restored to the same economic position and even if such a phraseology may not be present.

192. The Petitioners have submitted that "carrying cost" is a compensation for the time value of money and is an inherent provision under the change in law clause of a PPA. It is submitted that since the Change in Law clause is based on the principles of restitution, relief of carrying cost on the additional cost incurred on account of Change in Law is implicit in the PPA. The 'economic position' which is sought to be restored in terms of the Change in Law clause does not limit itself to a simple correlation of increased expenditure and a corresponding compensation amount but ought to also include compensation in terms of carrying costs incurred with respect to the said 'Change in Law' events. This is also supported by the principle of business efficacy, in the case of *Nabha Power Limited v. Punjab State Power Corporation Limited and Anr. [Civil Appeal No. 179 of 2017]* which provides that a contractual term can be implied in light of the express terms of the contract, commercial common sense and the facts known to both parties at the time of entering into the contract. Further, a Change in Law clause being a restitution clause, demands that the Petitioners should be compensated for all necessary and reasonable extra costs including carrying cost and/or interest on the additional cost incurred on account of Change in Law. In this regard, the Petitioners would like to place reliance on the case of *Sumitomo Heavy Industries Limited v. ONGC Limited, reported at [2010 (1J) SCC 296J]*.

193. The Petitioners have submitted that even in the alternative scenario, they would be entitled to carrying cost under the principles of 'quantum meruit'. Section 70 of the Indian Contract Act, 1872 provides that where a person lawfully does anything for another person and does not do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. In view thereof, since the Petitioners have not incurred additional capital cost on account of introduction of GST Law gratuitously, the Petitioners are entitled to compensation for the same and such compensation has to be for all reasonable costs, including carrying cost. In this regard, the Petitioners' have placed reliance on the decision in the case of *Piloo Dhunjishaw Sidhwa v. Municipal Corporation of the City of Poona, reported at [(1970) 1 SCC 213]*. Thus, basis the abovementioned submissions it is submitted that this Commission should grant the relief to the Petitioner in relation to the carrying cost.

194. Per Contra, the Respondents have submitted that there is no provision in the PPA regarding carrying cost or interest for the period till the decision of the Commission acknowledging the 'change in law' and deciding on the amount to be paid for such change in law namely '*provide for relief for the same*', as specified in Article 12.2.2 of the PPAs. The 'Change in Law' claim of the Petitioners is yet to be adjudicated and the amount if any, due to the Petitioner has to be determined/computed first. Thereafter, only after the amount is determined, are the Petitioners required to raise a Supplementary invoice for the amount so computed as per Article 10.7 of the PPA. It is only in case of default on the part of the Respondents in not making the payment by the due date as per supplementary invoices, does the issue of Late Payment Surcharge arise i.e. for the period after the due date. The reference in Article 12.2.2 of the Commission deciding on the date from which the 'change in law' will be effective, refers to the principal amount to be computed from the date on which change in law comes into force and not to the payment of interest and carrying cost.

195. The Respondents have submitted that the provision of Article 10.3.3 of the PPAs dealing with late Payment Surcharge and definition of the 'Due Date' in Article 1 read with Article 10.3.1 of the PPA are relevant. The due date is fifth ($5^{th}$) day of the immediately succeeding month in which Monthly Bill or a Supplementary bill is received and duly accepted by Respondents. In case the Monthly Bill or any other bill, including a Supplementary Bill is issued after the (fifteenth) 15th day of the next month, the Due Date for payment would be fifth ($5^{th}$) day of the next month to the succeeding Month. The supplementary bill needs to be raised by the Petitioners for the adjustment of the 'Change in Law' after the Change in Law claim is approved by the Commission. There cannot be any claim for late payment surcharge for the period prior to the due date. The Respondents have relied upon the decision of the Hon'ble Appellate Tribunal in *SLS Power Limited -v- Andhra Pradesh Electricity Regulatory Commission and Others (Appeal No. 150 of 2011)* and Batch that recognizes that the interest will be due from the date the payment is due. In the present case, the payment is due only after issuance of the Supplementary Bill after the decision of the Commission.

196. The Respondents have submitted that the PPA does not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Petitioner is not entitled to claim relief which is not provided for in the PPA.

197. The Respondents have submitted that in the Judgment of the Hon'ble Appellate Tribunal dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited –v- Central Electricity Regulatory Commission and Ors*, it was held that since the Gujarat Bid-01 PPA has no provision for restoration to the same economic position, therefore, the carrying cost will not be applicable.

198. The Respondents have submitted that the issue regarding Carrying Cost has been decided by the Judgment of the Hon'ble Tribunal dated 14.08.2018 in *Appeal No. 111 of 2017 in M/s. GMR Warora Energy Limited –v- Central Electricity Regulatory Commission and Ors.* The Hon'ble Tribunal vide the above judgment has decided that if there is a provision in the PPAs for restoration of the Seller to the same economic position as if no Change in Law event has occurred, the Seller is eligible for carrying cost for such allowed Change in Law event(s) from the effective date of Change in Law event until the same is allowed by the appropriate authority by an order/ judgement. In the present case also, there is no provision in the PPAs for carrying cost or restitution and therefore the same, will not be applicable in the case of the Petitioner. In its Order dated 09.10.2018 *in Petition No. 188/MP/2018 and Batch in Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch,* the Commission has also reiterated the aforementioned findings of the Hon'ble Tribunal.

199. The Respondents have submitted that in the absence of the express provision in the PPA, it is not open for the Petitioner to claim relief under principles of equity. Reference in this regard may be made to the judgment – *Alopi Parshad and Sons Ltd. v. Union of India, (1960) 2 SCR 793 : AIR 1960 SC 588.*

200. The Respondents have further submitted that there cannot be any consideration for individual tariff elements such as interest on working capital or return on equity or any other in a competitive bid process under Section 63 of the Electricity Act, 2003 and there cannot be any computation of the same. There is no concept of interest on working capital or individual tariff elements in competitively bid process and bidders are required to give the bid based on all-inclusive tariff. Further, there cannot be any issue of return on equity on incremental working capital and margin. Reference in this regard may be made to the issue decided by the

Hon'ble Tribunal in its Order dated 19.04.2017 in *Appeal No. 161 of 2015- Sasan Power Limited –v- Central Electricity Regulatory Commission* and *Order dated 14.08.2018 in Appeal No. 111 of 2017 in the case of GMR Warora v Central Electricity Regulatory Commission and Ors.*

201. The Respondents have submitted that in view of the above, the Petitioners are not entitled to interest on incremental working capital at normative interest rate or otherwise to put the Petitioner to the same economic position as if the change in law has not occurred.

202. The Respondents have submitted that the amount payable to the Petitioner (if any) on account of GST Law, the Commission has stipulated a timeline of 60 days from the date of the passing of the Order, after which a Late Payment Surcharge shall be payable. Respondents have submitted that the timeline of 60 days should begin to run from the day the Petitioner provides the entire documentation in the required format to the Respondents. It is further submitted that the final decision by the Commission may be given after the Petitioner has submitted complete information and not before. Thus, any delay in the determination of the impact of change in law is on account of the petitioner. The adverse consequences for not furnishing the full documentation/information at the first instance, ought to be borne by the defaulting party i.e. the Petitioner itself.

203. The Commission observes that in the judgment of the Hon'ble Appellate Tribunal for Electricity dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited v. Central Electricity Regulatory Commission and Ors*., it was held that since Gujarat Bid-01 PPA has no provision for restoration to the same economic position, the decision of allowing carrying cost will not be applicable. The relevant extract of the Judgment dated 13.04.2018 reads as under:

> *"ISSUE NO.3: DENIAL OF CARRYING COST*
>
> *x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of 'restitution' i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon'ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events*

*from the effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA."*

204. The Commission further observes that in the Judgment of the Hon'ble Tribunal dated 14.08.2018 in Appeal No. 111 of 2017 in *M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors.* it was held that if there is a provision in the PPA for restoration of the Seller to the same economic position as if no Change in Law event has occurred. Therefore, the Seller is eligible for carrying cost for such allowed Change in Law event(s) from the effective date of Change in Law event until the same is allowed by the appropriate authority by an order/ judgement. In the present case, there is no provision in the PPAs neither for carrying cost nor restitution. The relevant extract from the decision in GMR Warora case on the aspect of carrying cost reads as under:

*"ix. In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial. As pointed out by the Central Commission that the Appellant is only eligible for surcharge if the payment is not made in time by the Respondents Nos. 2 to 4 after raising of the supplementary bill arising out of approved Change in Law event and in PPA there is no compensation mechanism for payment of interest or carrying cost for the period from when Change in Law becomes operational till the date of its approval by the Central Commission. We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of redetermination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondents Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA. The relevant extract is reproduced below:*

*13.4 Tariff Adjustment Payment on account of Change in Law 13.4.1 Subject to Article 13.2 the adjustment in Monthly Tariff Payment shall be effective from:*
*the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or*

*the date of order/ judgment of the Competent Court or tribunal or Indian Government instrumentality, it the Change in Law is on account of a change in interpretation of Law. (c) the date of impact resulting from the occurrence of Article 13.1.1.*

*From the above it can be seen that the impact of Change in Law is to be done in the form of adjustment to the tariff. To our mind such adjustment in the tariff is nothing less then re-determination of the existing tariff.*

*x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of 'restitution' i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgment of the Hon'ble Supreme Court in case of Indian Council for Enviro Legal Action vs. Union of India & Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority.*

*This Tribunal vide above judgement has decided that if there is a provision in the PPA for restoration of the Seller to the same economic position as if no Change in Law event has occurred, the Seller is eligible for carrying cost for such allowed Change in Law event (s) from the effective date of Change in Law event until the same is allowed by the appropriate authority by an order/ judgment."*

From the above judgment the Commission observes that if there is a provision in the PPA for restoration of the Petitioners to the same economic position as if no Change in Law event has occurred, the Petitioners are eligible for 'Carrying Cost' for such allowed 'Change in Law' event(s) from the effective date of Change in Law event until the same is allowed by the Commission. The Commission observes that the PPAs do not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Commission is of the view that the claim regarding separate carrying cost is not admissible.

205. Our decisions in this Order are summed up as under:

a. *Issue No. 1:* The introduction of 'GST laws' w.e.f. 01.07.2017 is covered under 'Change in Law' in terms of Article 12 of the respective PPAs.

b. *Issue No. 2:* As regards the claims during construction period, the Petitioners have to exhibit clear and one to one correlation between the projects and the supply of goods and

services duly supported by the Invoices raised by the supplier of goods and services and auditors certificate. The amount determined by Petitioner shall be on 'back to back' basis shall be paid by DISCOMS to the Petitioners under respective 'Power Sale Agreements'. The Claim based on discussions in paragraph 174 & 182 above of this Order shall be paid within sixty days of the date of this Order or from the date of submission of claims by the Petitioners whichever is later failing which it will attract late payment surcharge as provided under PPAs/PSAs. Alternatively, the Petitioners and the Respondents may mutually agree to mechanism for the payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs. The claim of the Petitioners on account of additional tax burden on 'O&M' expenses (if any), is not maintainable.

c. *Issue No. 3:* The claim regarding separate 'Carrying Cost' and 'interest on working capital' in the instant petitions is not allowed.

206. Accordingly, the Petition No. 187/MP/2018, Petition No. 192/MP/2018, and Petition No. 193/MP/2018, Petition No. 178/MP/2018 and Petition No. 189/MP/2018 are disposed of.

Sd/
**डॉ एम के अय्यर**
**सदस्य**

Sd/
**श्री पी के पुजारी**
**अध्यक्ष**