

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 176/MP/2020**

**Coram:**

**Shri P.K. Pujari, Chairperson**

**Shri I. S. Jha, Member**

**Shri Arun Goyal, Member**

**Shri P. K. Singh, Member**

**Date of Order: 4<sup>th</sup> August, 2021**

**In the matter of**

Petition under Section 79 (1) (b) read with Section 79 (1) (f) of the Electricity Act, 2003 for allowing the claim of the Petitioner of increase/change in Central Excise Duty on account of changes in individual components as a Change in Law event relating to Power Purchase Agreement dated 18.12.2013 and 19.12.2013.

**And**

**In the matter of**

Adhunik Power and Natural Resources Limited,  
9B, 9<sup>th</sup> Floor, Hansalaya Building,  
15, Barakhamba Road, Connaught Place,  
New Delhi- 110001

**...Petitioner**

Vs.

1. Tamil Nadu Generation and Distribution Corporation Limited,  
NPKRR Maligai, 6<sup>th</sup> Floor, Eastern Wing, 144, Anna Salai,  
Chennai-600 002, Tamil Nadu

2. PTC India Limited,  
2nd Floor, NBCC Tower 15, Bhikaji Cama Place,  
New Delhi-110066

**...Respondents**

**Parties Present:**

Shri Deepak Khurana, Advocate, APNRL

Shri Tejasv Anand, Advocate, APNRL

Shri Ravi Kishore, Advocate, PTC

Shri Amit Griwan, APNRL

**ORDER**

The Petitioner, Adhunik Power and Natural Resources Limited, has filed the present Petition pursuant to the liberty granted by the Commission in the order dated 19.8.2019 in Petition No. 17/MP/2019 and has sought approval of the Commission to include Royalty, Sizing Charges, Stowing Excise Duty, contribution towards National

Mineral Exploration Trust ('NMET'), contribution towards District Mineral Foundation ('DMF'), Surface Transportation Charge, Chhattisgarh Development Tax and Chhattisgarh Environment Tax, etc., for the purpose of arriving at assessable value in calculating excised duty on coal. The Petitioner has made the following prayers:

*“(a) Hold and declare that the increase/change in Central Excise Duty on account of changes in individual components constitutes a Change in Law events as per the provisions of the PPAs and that the Petitioner is entitled to be restored to the same economic conditions prior to occurrence of the said Change in Law event;*

*(b) Direct the Respondents to make a payment of Rs. 2.96 crore to the Petitioner towards the additional expenditure incurred by the Petitioner on account of Change in Law as detailed in Para 13 of the Petition;*

*(c) Grant Carrying cost @ 1.25% per month from the date(s) on which the said amount(s) became due to the Petitioner till the actual realization of the same;*

*(d) Direct the Respondents to continue to make payments accrued in favour of the Petitioner on account of Change in Law events enumerated in the Petition upto the effect of the said Change in Law events; and*

*(e) In the interim pending final adjudication of the present Petition, direct the Respondents to make payment of Rs. 2.66 crore i.e. 90% of the already incurred amount by the Petitioner....”*

### **Brief Background of the Case**

2. The Petitioner, Adhunik Power and Natural Resources Limited ('APNRL') had filed Petition No.17/MP/2019 for seeking compensation on account of occurrence of certain Change in Law events under back-to-back Power Purchase Agreement dated 19.12.2013 entered into between the Petitioner and the Respondent No.2, PTC India Limited pursuant to Power Purchase Agreement dated 18.12.2013 entered into between the Respondent No.1, Tamil Nadu Generation and Distribution Corporation Limited and Respondent No.2, PTC India Limited (in short, 'PTC'). In the said Petition, the Petitioner had *inter alia* also sought compensation due to increase/change in Central Excise Duty on account of change in individual components on which it was being calculated. After considering the submissions of the parties, the Commission disposed of the Petition No. 17/MP/2019 vide its order dated 19.8.2019,

wherein in respect of the Petitioner's aforesaid Change in Law claim, the Commission noted that the Petitioner had not submitted any gazette notification issued by any Government body/ statutory authority regarding levy of Central Excise Duty on assessable value of coal on summation of base price of coal, Royalty, Stowing Excise Duty, Surface Transportation Charges, Sizing charge and Crushing Charge and in the absence of which, no view can be taken regarding its admissibility under Change in Law. However, the Commission granted a liberty to the Petitioner to claim the expenditure incurred under this Change in Law through an appropriate application with relevant details. Relevant portion of the order dated 19.8.2019 is extracted as under:

*"79. The Petitioner has submitted that as on the cut-off date i.e. 27.2.2013, the rate of Central Excise Duty @6.18% was applicable only on assessable value of coal on the summation of base price of coal, Royalty, Stowing Excise Duty, surface transportation charge and Sizing & Crushing charge as per the Central Excise Act, 1944. Ministry of Finance, Government of India vide its Notifications No. 14/2015 and 15/2015 dated 1.3.2015 revised the rate of Central Excise Duty from 6.18% to 6%. However, the overall burden in terms of the amount of money payable by the Petitioner towards Central Excise Duty has increased on account of increase in the components on which the Central Excise duty is calculated i.e. the summation of Central Excise Duty is leviable on summation of base price of coal, Royalty, Stowing Excise duty, Sizing and Crushing charge, Surface Transportation chare, contribution to District Mineral Foundation and Contribution to the National Mineral Exploration Trust.*

*80 We have considered the submission of the Petitioner. Perusal of Notifications dated 1.3.2015 submitted by the Petitioner reveals that the Ministry of the Finance exempted all goods falling within the First Schedule to the Central Excise Tariff Act, 1985 from the whole of the Education Cess and Secondary & Higher Education Cess leviable under Finance Act, 2004 and 2007. The Petitioner neither submitted the details regarding levy of Central Excise Duty nor any Gazetted Notification issued by any Govt. body/ statutory authority regarding levy of Central Excise Duty on assessable value of coal on the summation of base price of coal, Royalty, Stowing Excise Duty, Surface Transportation Charge and Sizing charge and Crushing charge, in the absence of which, no view can be taken as regards the admissibility under change in law. Accordingly, the Petitioner is granted liberty to claim this expenditure under change in law through an appropriate application with relevant details."*

3. The Petitioner has submitted that pursuant to the Commission's order dated 19.8.2019, it approached the Office of the Assistant Commissioner, Central GST and Central Excise, Division III, Jamshedpur, Jharkhand on 21.8.2019 for seeking

clarification regarding certain duties and taxes to be added in the assessable value of coal for the period from 27.1.2013 to 30.6.2017 for arriving at the assessable value of coal for payment of Centre Excise Duty. However, no response was received in this regard. Accordingly, the Petitioner sent a reminder letter dated 16.10.2019 regarding above clarification. In response, vide letter dated 22.10.2019, it has been clarified that the assessable value in the case of coal shall be normal transaction value as per Section 4 of the Central Excise Act, 1944 and includes Royalty, Stowing Excise Duty, contribution towards National Mineral Exploration Trust, contribution towards District Mineral Foundation, Sizing Charge, Surface Transportation Charge, Chhattisgarh Development Tax and Chhattisgarh Environment Tax. Based on the clarification of Office of the Assistant Commissioner, Central GST and Central Excise, Division III, Jamshedpur, Jharkhand, the Petitioner has approached this Commission by way of present Petition seeking a declaration that increase/ change in Central Excise Duty on account of changes in individual components constitutes a Change in Law event as per the provisions of the PPAs and prayed for compensation on account of additional expenditure incurred by it due to the aforesaid Change in Law event.

#### **Hearing dated 14.7.2020**

4. The Petition was admitted on 14.7.2020 and notices were issued to the Respondents to file their reply. Accordingly, the Respondent No.1, Tamil Nadu Generation and Distribution Corporation Limited ('TANGEDCO') has filed its reply to the Petition and the Petitioner has filed its rejoinder thereof, both of which have been dealt with in subsequent paragraphs.

### **Hearing dated 23.7.2021**

5. The matter was called out for virtual hearing on 23.7.2021. None was present on behalf of the Respondent No.1, TANGEDCO despite notice. During the course of hearing, the learned counsel for the Petitioner mainly reiterated the submissions made in the Petition and the same are not being reproduced herein for the sake of brevity. The learned counsel for PTC submitted that PTC is pro-forma Respondent in the present case and it has nothing to add.

### **Analysis and Decision**

6. We have considered the submissions of the Petitioner and the Respondents. The Respondent No.1, TANGEDCO in its reply has submitted that TANGEDCO did not receive any notice from the Petitioner claiming compensation against the aforesaid Change in Law within stipulated time. It has been further submitted by TANGEDCO that letter dated 10.2.2017 cannot be construed as a notice under Article 10 of the PPA as the Petitioner did not produce any particulars in respect of its Change in Law claim therein. This is also evident from the observation of the Commission in its order dated 19.8.2019 in Petition No. 17/MP/2019 that the Petitioner did not produce any documents supporting its claim therein.

7. *Per contra*, the Petitioner has submitted that the Petitioner vide its notice dated 10.2.2017 had apprised the Respondents of the occurrence of Change in Law events and their impact. In view of the aforesaid notice, the Commission in its order dated 19.8.2019 has held that the Petitioner has complied with the requirements of Article 10.4.2 relating to notice for Change in Law events as provided in the PPA. Also, similar objection was raised by TANGEDCO in the Petition No. 17/MP/2019, which was rejected by the Commission vide its order dated 19.8.2019. Therefore, it is not permissible for TANGEDCO to contend that the Petitioner has not given the

Change in Law notice in terms of Article 10 of the PPA qua claims raised in the present Petition. The Petitioner has submitted that it has complied with the requirements of Article 10.4.2 relating to notice for Change in Law events as provided in the PPA.

8. We have examined the submissions of the Petitioner and the Respondent, TANGEDCO. It has been submitted by TANGEDCO that the Petitioner has not complied with the requirement regarding notice for Change in Law in terms of Article 10.4.2 of the PPA and that its letter dated 10.2.2017 cannot be construed as Change in Law notice under the PPA. *Per contra*, the Petitioner has submitted that the aforesaid contention of TANGEDCO is misconceived as vide its letter dated 10.2.2017, the Petitioner had apprised the Respondents regarding occurrence of the Change in Law event in question and its impact. The Petitioner has also submitted that after considering the submissions of the parties therein, the Commission in its order dated 19.8.2019 has also held that the Petitioner has complied with the requirements of Article 10.4.2 relating to notice for Change in Law events under the PPA.

9. Undisputedly, the Petitioner had claimed compensation under Change in Law qua increase/ change in Central Excise Duty on account of change in individual components on which such duty is levied in the Petition No. 17/MP/2019. The issue as to whether the provisions of the PPA with regard to notice of Change in Law has been complied with by the Petitioner had been examined by the Commission in its order dated 19.8.2019. The relevant extract of the said order is reproduced below:

*“19. The Petitioner gave notice to the Respondent, PTC on 10.2.2017 regarding change in law events claimed in the Petition in respect of the PPA dated 19.12.2013 executed between the Petitioner and PTC and PPA dated 18.12.2013 executed between the TANGEDCO and PTC.*

20. *Under Article 10.4.2 of the PPA, the Petitioner is required to serve notice about occurrence of change in law events as soon as practicable after being aware of such events. The Petitioner has given notice as stated above to the Procurers indicating the above change in law events. Through the said notice, the Petitioner has appraised the Respondents about the occurrence of change in law events and the impact of such event of tariff. PTC vide its email dated 13.4.2017 informed the Petitioner to submit the change in law invoices after approval of the change in law events and relief by the Appropriate Regulatory Commission. Thereafter, the Petitioner has filed the present Petition for seeking approval for change in law events. In our view, the Petitioner has complied with the requirements of Article 10.4.2 of the PPA.”*

10. Thus, in the above quoted paragraphs from order dated 19.8.2019 in Petition No. 17/MP/2019, the Commission had observed that the Petitioner had given a notice regarding Change in Law events as claimed in the Petition No. 17/MP/2019 under the provisions of the PPA, appraising the Respondents about the occurrence of Change in Law events as well as their impact on tariff and consequently, complying with the requirement of Article 10.4.2 of the PPA. This Petition has been filed by the Petitioner subsequent to liberty granted by the Commission in Petition No. 17/MP/2019 and, therefore, in view of the aforesaid findings of the Commission in order dated 19.8.2019 in Petition No. 17/MP/2019, the objection of the Respondent that the Petitioner has not complied with requirement of notice is not sustainable and is rejected.

11. TANGEDCO has also raised an objection claiming that compensation claim of the Petitioner is beyond the limitation of three years from the date of notification and, therefore, claim made in this Petition is time barred. It has been further submitted that the liberty granted by the Commission cannot override the express provision of limitation of claiming Change in Law prescribed under the law.

12. *Per contra*, the Petitioner has submitted that since the Commission in its order dated 19.8.2019 in Petition No. 17/MP/2019 has already decided the issue of limitation, the same is not permissible for TANGEDCO to re-agitate in the instant

Petition. It has been further submitted by the Petitioner that the present Petition has been filed pursuant to liberty granted by the Commission along with supporting documents pertaining to increase/ change in Central Excise Duty on account of changes in individual components on which such duty is levied. The Petitioner has submitted that it has filed the present Petition along with the requisite supporting documents i.e. clarification dated 22.10.2019 issued by the Assistant Commissioner, Central GST and Central Excise, Division III, Jamshedpur, Jharkhand. It has been further submitted by the Petitioner that the present Petition is based on continuing cause of action as the supply of power is continuous in nature throughout the terms of the PPA and, therefore, on this ground also, the contention of TANGEDCO on limitation is without any merit.

13. We have considered the submissions of the Petitioner and TANGEDCO. It has been submitted by TANGEDCO that the claims of the Petitioner are time barred and beyond the period of limitation of three years. Per contra, the Petitioner has submitted that similar objection raised by TANGEDCO has already been dealt with by the Commission in its order dated 19.8.2019 and that the present Petition has been filed pursuant to liberty granted by the Commission in said order. It is noted that TANGEDCO had, in fact, raised this issue in Petition No. 17/MP/2019. The Commission after considering the submissions of parties dealt with the issue of limitation as under:

*“16. We have considered the submissions of the Petitioner and the Respondent. The Electricity Act, 2003 (hereinafter referred to as the Act) is a special statute which does not provide for any period of limitation for adjudication of claims by this Commission. Though no period of limitation has been prescribed in the Act for filing Petitions for adjudication of disputes, the Hon`ble Supreme Court in Andhra Pradesh Power Co-ordination Committee Vs. Lanco Kondapalli Power Limited [(2016) 3SCC 468] held that the claims coming for adjudication before the Commission cannot be entertained or allowed if otherwise the same is not recoverable in a regular suit on account of law of limitation. Relevant extract of the said judgment is as under:*



*“30...In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation. We have taken this view not only because it appears to be more just but also because unlike labour laws and the Industrial Disputes Act, the Electricity Act has no peculiar philosophy or inherent underlying reasons requiring adherence to a contrary view.”*

17. *In the light of the above judgment, the limitation period prescribed for money claims in the Limitation Act, 1963 i.e. 3 years will be applicable for filing the application before the Commission. However, under Section 5 of the Limitation Act, 1963, the delay may be condoned for sufficient cause. In the present case, supply of power under PPA commenced from 1.1.2016 and present Petition has been filed by the Petitioner on 11.1.2019. There is delay of 11 days in filing the present Petition. It is noted that the Petitioner vide its letter dated 10.2.2017 raised the invoices towards reimbursement of additional cost incurred on account of change in law events and requested to reimburse the same. In response, PTC vide its email dated 13.4.2017 rejected the claims of the Petitioner and informed that the Petitioner is required to raise the change in law invoices after approval of change in law events by the Appropriate Commission. Accordingly, the Petitioner has approached the Commission for approval of the Change in Law events in terms of the PPA. Since, claims of change in law event is based on continuing cause of action as the supply of power is continuous in nature throughout the term of the PPA, we feel it is a fit case for condonation of delay. Accordingly, we condone delay of eleven days for filing the present Petition for adjudication of dispute with regard to change in law events.”*

14. In light of the above decision, the contention of TANGEDCO that the claim of the Petition is barred by limitation deserves to be rejected.

15. Accordingly, we now proceed to examine the claim of the Petitioner for relief for Change in Law event, i.e. increase in Central Excise Duty.

16. Pursuant to the direction of the Commission in order dated 19.8.2019, the Petitioner approached relevant authority for seeking clarification regarding components to be included in the assessable value of coal for computation of Excise Duty. The Assistant Commissioner, Central GST and Central Excise, Division III, Jamshedpur, Jharkhand vide letter dated 22.10.2019 has given the following clarification:

*“Please refer to your letter dated 16.20.2018 on the above subject.*

*In this regard, it is to inform that for the period from 1<sup>st</sup> April, to 30<sup>th</sup> June, 2017 valuation of Goods cleared under the Central Excise Act, 1944 are governed by the Section 4 which inter alia states that in case where the goods are sold by the assessee, for delivery at the time and place of removal, the assessee and the buyer are not related and the price is the sole consideration for the sale, be the transaction value.*

*As per Explanation to the above, it is stated that the price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any.*

*Thus, the assessable value in the case of coal shall be the normal transaction value as per Section 4 of the Central Excise Act, 1944 and includes besides others Royalty, sizing charges, stowing Excise duty, National Mineral Exploration Trust (NMET), District Mineral Foundation (DMT), sizing charge, Surface Transportation Charge, CG Development Tax and CG Environment Tax etc. which is borne by the customer.*

*This is being issued without prejudice to any action that has been taken or may be taken under the Central Excise Act, 1944 or any other Act/law of the land for the time being in force.”*

17. The Assistant Commissioner, Central GST and Central Excise, Division III, Jamshedpur, Jharkhand has relied upon Section 4 of the Central Excise Act, 1944 in support of the decision for inclusion of the above-cited elements in the assessable value of coal. Section 4 of the Central Excise Act, 1944 provides as under:

*“Section 4. Valuation of excisable goods for purposes of charging of duty of excise.*

*(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then on each removal of the goods, such value shall-*

*(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;*

*(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.*

*Explanation. - For the removal of doubts, it is hereby declared that the price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.*

*(2) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.*

*(3) For the purpose of this section,-*

(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;

(b) persons shall be deemed to be "related" if –

(i) they are inter-connected undertakings;

(ii) they are relatives;

(iii) amongst them the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributor; or

(iv) they are so associated that they have interest, directly or indirectly, in the business of each other.”

18. As per the above-quoted provisions of the Central Excise Act, 1944, the price-cum-duty of excisable goods sold by an assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods. Such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.

19. The Petitioner has submitted that similar issue has already been dealt with and allowed by the Commission in its various decisions including in the order dated 29.3.2020 in Petition No. 327/MP/2018 (Dhariwal Infrastructure Ltd. v. TANGEDCO).

The relevant portion of the aforesaid decision is extracted as under:

*“70. The Commission has in earlier orders considered the issue of Central Excise Duty as Change in Law; relevant extract from order dated 12.6.2019 in Petition No. 118/MP/2018 (TRN Energy Pvt. Ltd. Vs. Paschimanchal Vidyut Vitran Nigam Ltd. & Ors.) is reproduced hereunder:*

*“71. We have considered the submissions of the Petitioner and the relevant documents placed on record. Pursuant to the Commission’s directions vide RoP dated 29.5.2018, the Petitioner approached the Office of the Assistant Commissioner, CGST & Central Excise, Division Bilaspur, Chhattisgarh seeking clarification with regard to the components to be included in the assessable value of coal for computation of Central Excise Duty for the Period from 1.4.2012 to 30.6.2017. The Assistant Commissioner, Office of the Assistant Commissioner, CGST & Central Excise, Division Bilaspur, Chhattisgarh vide its letter dated 25.6.2018 has clarified as under:*

*'Please refer your letter C. No. TRN/BSP/18/06/10079 dtd.14.6.2018 on the above subject. 2. In this regard, it is to inform that as per Section 4 of Central Excise Act, 1944, for the period 1st April 2012 to 30th June 2017 following elements should be added for arriving the assessable value of coal for payment of Excise duty:*

*i. Value of Coal*

*ii. Royalty*

*iii. Stowing Excise Duty*

*iv. National Mineral Exploration Trust (NMET)*

*v. District mineral Foundation (DMT)*

*vi. Sizing Charge vii. Surface Transportation Charge*

*viii. Niryatkar*

*ix. CG Development tax x. CG Environment Tax*

*3. Further, it is to inform that M/s. South Eastern Coalfields Limited, Bilaspur had been paying Central Excise Duty on above considerations under protest after issuance of various show cause notices. The show cause notices have also been confirmed by the Adjudicating Authority."*

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*74. The above decision is applicable in case of the Petitioner also. We, therefore, allow all the components mentioned by the Office of the Assistant Commissioner, CGST & Central Excise, Division Bilaspur, Chhattisgarh in its letter dated 25.6.2018 to be included in the assessable value of coal for the purpose of computation of Excise Duty. However, it is clarified that allowing these charges for inclusion in the assessable value for computation of Excise Duty shall not be construed that these charges are allowed under Change in Law. Further, inclusion of Royalty is allowed subject to the pending adjudication before the Hon'ble Supreme Court regarding whether royalty is in the nature of tax. The Office of the Assistant Commissioner, CGST & Central Excise, Division Bilaspur, Chhattisgarh has provided clarifications only for the period from 1.4.2012 to 30.6.2017 and the petitioner has not placed any documents for the applicability of Central Excise Duty after the GST Regime (i.e. from 1.7.2017). Therefore, the claim shall only be allowed until 30.6.2017. The Petitioner shall be entitled to recover the Excise Duty in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to the respondents. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Excise Duty."*

20. In the light of the above, all components indicated for computation of assessable value of coal such as the value of coal, Stowing Excise Duty, contribution to National Mineral Exploration Trust and District Mineral Foundation, Sizing Charges, Surface Transportation Charge, Chhattisgarh Development Tax and Chhattisgarh Environment Tax (except Royalty) are in the nature of "Price-cum-duty" and are considered as part of the assessable value of coal for the purpose of

computation of Central Excise Duty. As regard Royalty, it is noted that the issue whether royalty determined under Section 9/15(3) of the Mines and Minerals (Development and Regulations) Act, 1957 is in the nature of tax is pending for consideration of a Nine Judges Bench of the Hon'ble Supreme court on a reference by Five Judges Bench of the Hon'ble Supreme Court in Mineral Area Development Authority & Ors. v. Steel Authority of India & Ors. (2011 SCC 450). The specific reference is as under:

*“(a) Whether “royalty determined under Sections 9/15 (3) of the Mines and Minerals (Development and Regulation) Act, 1957 (67 of 1957, as amended) is in the nature of tax?”*

Therefore, Royalty shall be included in the assessable value of coal subject to the decision of the Hon`ble Supreme Court.

21. Based on the above discussion, we allow all the components mentioned by the Office of the Assistant Commissioner, Central GST and Central Excise, Division III, Jamshedpur, Jharkhand in its letter dated 22.10.2019 to be included in the assessable value of coal for the purpose of computation of Central Excise Duty. However, it is clarified that we are only allowing Central Excise Duty as Change in Law event and in no manner, it can be construed that the components included in the assessable value of coal for the purpose of computation of Central Excise Duty are Change in Law events. Further, inclusion of Royalty is allowed subject to pending adjudication before the Hon'ble Supreme Court regarding whether royalty is in the nature of tax.

22. It is further clarified that the Petitioner shall be entitled to recover the Central Excise Duty in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of this Commission or as per actual generation, whichever is lower, for supply of electricity

to TANGEDCO. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Excise Duty.

### **Carrying cost**

23. The Petitioner has sought a direction to TANGEDCO to pay carrying cost @1.25% per month from the date on which the said amount became due to the Petitioner till the actual realization of the same so as to restore the Petitioner to the same economic position as existed prior to the Change in Law event.

24. TANGEDCO has submitted that the Petitioner is not entitled to carrying cost with respect to its claim in the present Petition as there is no provision in the PPA for allowing carrying cost on the amount covered under Change in Law till its determination by the Commission. It has been submitted by TANGEDCO that liability for making carrying cost arises when the cost incurred is determined, supplementary invoice is raised and the due date lapses and in absence thereof, no carrying cost is payable. Therefore, the claim for carrying cost can only be post-clarification by the Office of the Assistant Commissioner, Central GST and Central Excise, Division III, Jamshedpur, Jharkhand.

25. *Per contra*, the Petitioner has submitted that the contentions of TANGEDCO are misconceived and contrary to decisions of this Commission, Appellate Tribunal for Electricity ('APTEL') and Hon'ble Supreme Court. The Commission in its order dated 19.8.2019 in Petition No. 17/MP/2019 while relying on the APTEL's judgment dated 13.4.2018 in Appeal No. 210 of 2017 (Adani Power Ltd. v. CERC & Ors.), as affirmed by the Hon'ble Supreme Court in Civil Appeal No. 5865 of 2018 with Civil Appeal No. 6190 of 2018 (Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. v. Adani

Power Ltd. & Ors.) and considering the provisions of the present PPA, has already held that the Petitioner is entitled to carrying cost arising out of approved Change in Law events from effective date of Change in Law till the actual payment to the Petitioner. Even otherwise, Article 10.5 of the PPA itself provides for the mechanism in which the Petitioner is to be compensated.

26. We have considered the submissions of the Petitioner and TANGEDCO. APTEL in its judgment dated 13.4.2018 in Appeal No. 210/2017 (Adani Power Limited v. Central Electricity Regulatory Commission & Ors.) has allowed the carrying cost on the claim under Change in Law and held 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 Respondent 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 re-determination 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 Respondent Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA.....”*

*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 than 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 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...”*

27. The aforesaid judgment of APTEL was challenged before the Hon'ble Supreme Court wherein the Hon'ble Supreme Court vide its judgment dated 25.2.2019 in Civil Appeal No. 5865 of 2018 with Civil Appeal No. 6190 of 2018 (Uttar Haryana Bijili Vitran Nigam Limited & Anr. v. Adani Power Ltd. & Ors.) has upheld the judgment of APTEL regarding payment of carrying cost to the generator on the principles of restitution and held as under:

*"10. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn. This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 04.05.2017 that the CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 01.04.2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal...*

*16...There can be no doubt from this judgment that the restitutionary principle contained in Clause 13.2 must always be kept in mind even when compensation for increase/decrease in cost is determined by the CERC."*

28. Article 10.2.1 of the PPA provides as under:

*"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."*

29. In view of the provisions of the PPA, the principles of restitution and the aforesaid judgment of the Hon'ble Supreme Court, we are of the considered view that the Petitioner is eligible for carrying cost arising out of approved Change in Law event from the effective date of Change in Law till the actual payment to the



Petitioner. Once a supplementary bill is raised by the Petitioner in terms of this Order, the provisions of Late Payment Surcharge in the PPAs would kick in if payment is not made by TANGEDCO within due date.

30. The Commission in its order dated 17.9.2018 in Petition No. 235/MP/2015 [AP(M)L v. UHBVNL & Ors.) had decided the issue of carrying cost as under:

*“24. After the bills are received by the Petitioner from the concerned authorities with regard to the imposition of new taxes, duties and cess, etc. or change in rates of existing taxes, duties and cess, etc., the Petitioner is required to make payment within a stipulated period. Therefore, the Petitioner has to arrange funds for such payments. The Petitioner has given the rates at which it arranged funds during the relevant period. The Petitioner has compared the same with the interest rates of IWC as per the Tariff Regulations of the Commission and late payment surcharge as per the PPA as under:-*

<i>Period</i>	<i>Actual interest rate paid by the Petitioner</i>	<i>Working capital interest rate as per CERC Regulations</i>	<i>LPS Rate as per the PPA</i>
<i>2015-16</i>	<i>10.68%</i>	<i>13.04%</i>	<i>16.29%</i>
<i>2016-17</i>	<i>10.95%</i>	<i>12.79%</i>	<i>16.04%</i>
<i>2017-18</i>	<i>10.97%</i>	<i>12.43%</i>	<i>15.68%</i>

*25. It is noted that the rates at which the Petitioner raised funds is lower than the interest rate of the working capital worked out as per the Regulations of the Commission during the relevant period and the LPS as per the PPA. Since, the actual interest rate paid by the Petitioner is lower, the same is accepted as the carrying cost for the payment of the claims under Change in Law.*

*26. The Petitioner shall work out the Change in Law claims and carrying cost in terms of this order. As regards the carrying cost, the same shall cover the period starting with the date when the actual payments were made to the authorities till the date of issue of this order. The Petitioner shall raise the bill in terms of the PPA supported by the calculation sheet and Auditor’s Certificate within a period of 15 days from the date of this order. In case, delay in payment is beyond 30 days from the date of raising of bills, the Petitioner shall be entitled for late payment surcharge on the outstanding amount.”*

31. In line with above order of the Commission, in the instant case, the Petitioner shall be eligible for carrying cost at the actual interest rate paid by the Petitioner for arranging funds (supported by Auditor’s Certificate) or the rate of Interest on Working Capital as per applicable CERC Tariff Regulations or the Late Payment Surcharge rate as per the PPA, whichever is the lowest.

32. Petition No. 176/MP/2020 is disposed of in terms of the above discussion.

Sd/-  
**(P.K. Singh)**  
Member

sd/-  
**(Arun Goyal)**  
Member

sd/-  
**(I.S. Jha)**  
Member

sd/-  
**(P.K. Pujari)**  
Chairperson