



नई दिल्ली  
NEW DELHI

याचिका संख्या./ Petition No.: 211/MP/2019

कोरम/ Coram:

श्री पी. के. पुजारी, अध्यक्ष/ Shri P. K. Pujari, Chairperson  
श्री आई. एस. झा, सदस्य/ Shri I.S. Jha, Member  
श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member

आदेश दिनांक/ Date of Order: 25<sup>th</sup> of January, 2021

**IN THE MATTER OF:**

Petition under Section 79 of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement dated 27.06.2016 executed between Rattan India Solar 2 Private Ltd. and Solar Energy Corporation of India Ltd. for seeking approval of Change in Law events due to enactment of the GST Laws

**AND IN THE MATTER OF:**

RattanIndia Solar 2 Private Ltd  
5th Floor, Tower-B, Worldmark 1 Aerocity,  
New Delhi- 110037.

...Petitioner

**VERSUS**

1. Solar Energy Corporation of India Ltd.  
D-3, First Floor, A Wing, District Centre, Saket,  
New Delhi 110017
2. Uttar Pradesh Power Corporation Limited  
Shakti Bhawan, 14- Ashok Marg  
Lucknow - 226001

**Parties Present:** Shri Vishrov Mukerjee, Advocate, RS2PL  
Shri Ameya Vikram Mishra, Advocate, RS2PL  
Shri Abhishek Goel, RS2PL  
Shri Rajeev Doharey, RS2PL  
Shri Damodar Prabhu, RS2PL  
Shri M. G. Ramachandran, Sr. Advocate, SECI  
Ms. Tanya Sareen, Advocate, SECI  
Ms. Poorva Saigal, Advocate, SECI  
Shri Manoj Mathur, SECI  
Shri Ajay K Sinha, SECI  
Shri Udaypavan Kumar Kruthiventi, SECI  
Shri Abhinav Kumar, SECI

### आदेश/ ORDER

The Petitioner, RattanIndia Solar 2 Private Ltd (RS2PL) is engaged in the business of developing 50 MW solar photo voltaic power project at Allahabad, as a part of the UP Solar Park being developed by the Solar Park Implementation Agency (SPIA) in the State of Uttar Pradesh. The Petitioner has filed the present petition under Section 79 of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement (PPA) dated 27.06.2016 along with amendment to PPA dated 13.02.2018 and 31.01.2019 executed between the Petitioner and Solar Energy Corporation of India Ltd, seeking appropriate relief on account of enactment of laws pertaining to Goods and Services Tax.

2. The Respondent No. 1, Solar Energy Corporation of India Ltd, (SECI) has been identified by the Government of India as the nodal agency for implementation of the Scheme for developing 2000 MW grid connected solar power capacity through VGF mode under Phase-II, Batch-III of the JNNSM of Government of India with viability gap funding support from National Clean Energy Fund (hereinafter referred to as “the MNRE Scheme”).
3. The Respondent No. 2, the Uttar Pradesh Power Corporation Limited (UPPCL) is operating as a Bulk Supply Licensee for electricity in the State of Uttar Pradesh.

4. The Petitioner has made the following prayers:
  - a) *Admit the Petition;*
  - b) *Hold and declare that the imposition of the GST Laws (including impact on O&M Expenses) is a Change in Law event under Article 12 of the PPA;*
  - c) *Restore the Petitioner to the same economic condition prior to occurrence of the Changes in Law by directing SECI to pay to the Petitioner the amount claimed under Change in Law in terms of Article 12 of the PPA along with carrying cost;*
  - d) *To pass such other and further order or orders as this Commission deems appropriate under the facts and circumstances of the present case.*

### **Background**

5. On 04.08.2015, MNRE issued Guidelines for implementation of the MNRE Scheme and SECI was designated as the nodal agency for implementation of the Scheme.
6. On 24.09.2015, SECI invited proposals by issuing a Request for Selection (“RFS”) for setting up Grid connected Solar-PV Power Projects in UP Solar Park with an aggregate capacity of 440 MW in the State of Uttar Pradesh.
7. On 19.02.2016, the Petitioner submitted its bid.
8. On 15.03.2016, e-Reverse Auction was conducted and the Petitioner was declared successful bidder for development of 50 MW capacity solar photo voltaic project at Allahabad with a tariff of Rs. 4.43/kWh and VGF support.
9. On 09.05.2016, SECI issued the Letter of Intent to RS2PL.
10. On 27.06.2016 (Effective Date 09.06.2016), the Petitioner entered into PPA for sale of power of 50 MW with SECI. As per the PPA, the Scheduled date of Commissioning was 09.07.2017.
11. 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 States Goods and Services Tax Act, 2017 were enacted for levy and collection of tax on intra-State supply of goods or services or both by the respective States. These taxes are hereinafter referred to as ‘the GST Laws’ collectively.

12. On 08.02.2018, the Petitioner successfully commissioned the 50 MW project and the same was authenticated by U.P. New & Renewable Energy Development Agency (UPNREDA) vide Commissioning Certificate dated 03.04.2018.
13. On 13.08.2018 and 31.01.2019, the Petitioner and SECI executed addendums to PPA dated 27.06.2016 for amending the details of the Solar Power Developer and that pertaining to increase in generation respectively.
14. The Petitioner has claimed that change in tax regime impacted the procurements (i.e. inter-State, intra-State and imports) that it undertook while procuring goods and/or services. Hence, the Petition.

#### **Submissions of the Petitioner**

15. The Petitioner has submitted that MNRE issued guidelines for implementation of the MNRE Scheme. The Petitioner was declared successful bidder and SECI issued the Letter of Intent to the Petitioner on 09.05.2016. Subsequently, the Petitioner executed the Power Purchase Agreements with SECI on 27.06.2016 for sale of power of 50 MW. It had commissioned 50 MW capacity on 08.02.2018.
16. The Petitioner has submitted that it is adversely impacted due to promulgation the GST Laws which has led to increase in its costs and that it needs to be compensated by the Respondents in terms of the Change in Law provisions of the PPA. The definition of “law” as per the PPA is wide and inclusive on account of use of the term ‘*all laws including*’. This is further expanded by the use of the term ‘*and shall include without limitation*’. The relevant provisions of the PPA are as under:

*“Law shall mean in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Government Instrumentality and having force of*

*law and shall further include without limitation all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders or the Appropriate Commissions;”*

*“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.”*

17. The Petitioner has submitted that enactment of the GST Laws is a Change in Law Event under Article 12 of the PPA since it has been enacted subsequent to 09.06.2016 (which is the Effective Date under the PPA). The words “supply of power” in sixth bullet of Article 12.1.1 includes all the taxes that are payable for the raw material or the inputs required for generation of power. The Petitioner has placed its reliance on Order dated 19.09.2018 issued by the Commission in Petition No. 50/MP/2018 wherein the Commission held that the enactment of GST Laws is a Change in Law.

18. The Petitioner stated that in terms of Clause 6.2 of the Revised Tariff Policy dated 28.01.2016 issued by the Ministry of Power, Government of India, change in taxes and levies has been acknowledged as Change in Law events and allowed as pass-through.
19. The Petitioner has submitted that the Change in Law provision in the PPA is not limited to tax on supply of power and includes all the taxes levied during construction of the solar power plant. The Petitioner has placed its reliance on the directions issued by the Ministry of Power *vide* letter dated 27.08.2018 under Section 107 of the Electricity Act, 2003.
20. The Petitioner has submitted that enactment of the GST Laws qualifies as a Change in Law under the PPA and it ought to be granted relief equivalent to the financial impact of the Change in Law on the costs and revenues of the Petitioner. It also submitted that it should be restored to the same economic condition prior to occurrence of the Change in Law.
21. The Petitioner has submitted that increase in rate of Service Tax on Operation & Maintenance Expenses (O&M Expenses) from 15% to 18% (9% CGST and 9% SGST) due to enactment of GST subsequent to the Effective Date resulted in an incremental impact of Rs. 2,85,05,146/- on the cost of the Project. The Petitioner further submitted that impact on O&M Expenses due to imposition of GST ought to be considered as Change in Law as well.
22. The Petitioner has submitted that impact of introduction of the GST Laws on it (excluding carrying cost) can be divided into intra-State procurement of goods and services, inter-State procurement of goods and services and import of goods.
23. The Petitioner has submitted that it is entitled to carrying cost in terms of Article 12 of the PPA and has been incurred due to the Change in Law event. Any compensation for Change in Law is incomplete if it does not come with carrying cost and is inherent to the very provision. The Petitioner further submitted that carrying cost is an integral part of the computation for change in law in order to ensure that the principle of restitution and time value of money is achieved.

### **Submissions of Respondent No. 1 (SECI)**

24. SECI has submitted that it has entered into PPA with the Petitioner for procurement of solar power from the Petitioner's project (50 MW) for a period of 25 years. The electricity procured by SECI from the Petitioner under the PPA is for onward sale on back-to-back basis to UPPCL (Respondent No. 2) under the Power Sale Agreement (PSA). SECI is acting as an intermediary utilizing its trading license to facilitate such purchase and resale of electricity. SECI is not acting as a merchant trader or otherwise independently purchasing the electricity from the Petitioner having the option to sell electricity to any person and on such terms and conditions as SECI can decide from time to time. SECI is also not retaining the powers to trade electricity so purchased in the open market or through the platform of Power Exchange or through another trader on a long term basis to earn a trading margin. It is constrained to the fixed trading margin of 7 paise/kWh.
  
25. SECI has submitted that its obligations and liabilities to the Petitioner are on back to back basis corresponding to the obligations to be performed and liabilities to be discharged by UPPCL to SECI. The Guidelines of MNRE Scheme were notified by MNRE on 04.08.2015, in pursuance to which the above transaction involving SECI is being undertaken with the Petitioner.
  
26. SECI has submitted that it issued the RfS document dated 25.09.2015 for selection of SPDs for development of cumulative capacity of 440 MW under the MNRE Scheme in UP Solar Park in the State of Uttar Pradesh. SECI has submitted that in pursuance of the RfS issued, upon selection of the Petitioner as successful bidder, PPA was entered into between the Petitioner and SECI. Various provisions of the PPA specifically deal with the back to back PSA between SECI and UPPCL. It is evident from the provisions of the PPA and the PSA that both the documents are inextricable and intertwined with each other. The clauses and provisions of the bidding documents, PPA and the PSA are sufficient indication of the back to back arrangement under the entire scheme. The provisions have been made in the PPA and the PSA recognizing that SECI, as an intermediary nodal agency cannot be required to pay the amounts becoming due to the Petitioner out of its own resources, till such time the amount is recovered by SECI from the distribution licensees.

27. SECI has submitted that the issue of the status of an intermediary nodal agency such as SECI/ NTPC has also been considered by the Commission in Order dated 09.10.2018 in Petition No. 188/MP/2017; Order dated 05.02.2019 in Petition No.187/MP/2018 in the case of *M/s. Renew Wind Energy (TN2) Private Limited –v- NTPC Limited*; Order dated 18.04.2019 in Petition No.187/MP/ in the case of *M/s. Parampujya Solar Energy Private Limited –v- NTPC Limited*.
28. SECI has submitted that in terms of the above-mentioned decisions, the Commission has rejected the claim of absence of privity of contract between generator and Discom when the generator sells electricity to an intermediary trader which in turn re-sells the electricity on a back to back basis to Discoms. The said two transactions being under two separate agreements, it has been held that the two agreements are inextricably linked to each other and the rights and obligations arising out of one agreement are also reflected in the other agreement.
29. SECI has submitted that it is in a position to and is also required to discharge its obligations under the PPA including the payment for any change in law implication only upon the distribution licensee remitting the amount to SECI in terms of the respective PSA. Any enforcement of the claim by the Petitioner against SECI without the Discom being obligated to pay and discharge the corresponding claim under the PSA in advance of the discharge of the obligation of SECI will result in serious financial issues to SECI and thereby affect implementation of the scheme.
30. SECI has submitted that the contention of the Petitioner that the GST Laws are ‘law’, as per the PPA is not disputed. However, in order to qualify for relief under the Change in Law provision contained in the PPA, the conditions mentioned in Article 12 of the PPAs dealing with Change in Law need to be satisfied, viz. each of the claim should fall within the scope of the said provision.
31. SECI has submitted that the scope of Article 12.1.1 of the PPA has already been interpreted and decided by the Commission vide Order dated 19.09.2018 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; Order dated 09.10.2018 in Petition No.188/MP/2018 the case of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors.*; and Order dated 05.02.2019 in Petition No.187/MP/2018 in the case of *M/s. Renew Wind Energy (TN2) Private Limited – v- NTPC Limited.*

32. SECI has submitted that neither the provisions of the PPA nor the bid documents mandate or prescribe or specifically provide for outsourcing of O&M. The Petitioner has full rights to decide on outsourcing of O&M as it is its internal commercial decision. SECI does not have any objection if the Petitioner undertakes O&M by itself or outsources O&M for commercial expediency or benefit. The saving or additional expenditure because of outsourcing of O&M is to the account of the Petitioner. SECI has submitted that 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 SECI (and consequentially the Distribution Licensee) in terms of tariff. The Petitioner has placed its reliance on the Commission's Order dated 16.03.2018 in Petition No. 1/MP/2017 in the case of *GMR Warora Energy Limited -v- Maharashtra State Electricity Distribution Company Limited and Ors*, where it was held that any increase in cost of O&M expenditure on account of increase in service tax cannot be considered as Change in Law.
33. SECI has submitted that there is no provision in the PPA regarding carrying cost or interest for the period till the decision of the Commission acknowledging 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 Petitioner is yet to be adjudicated and the amount, if any, due to the Petitioner has to be determined/computed first. Only after the amounts are determined, the Petitioner is 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 SECI in not making the payment by the due date as per supplementary invoices, does the issue of Late Payment Surcharge (LPS) 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.

34. SECI has 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 supplementary bill needs to be raised by the Petitioner for adjustment of Change in Law after it is approved by the Commission. There cannot be any claim for Late Payment Surcharge for the period prior to the due date.
35. SECI has submitted that the PPA does not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Petitioners are not entitled to claim relief which is not provided for in the PPA. SECI has placed its reliance on the Judgment of the 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, carrying cost will not be applicable.
36. SECI has 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 payment for Change in Law until the amount is determined by the Commission. The decision on the admissibility of the monetary claim can only be 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. Any adverse consequences for not approaching the Commission with full documentation/ information at the first instance ought to be borne by the defaulting party i.e. the Petitioner itself.
37. SECI has submitted that it has attached the process along with checklist (Annexure C) of documents for evaluation of claims of the Petitioner related to the GST Laws. Further, the Petitioner needs to furnish other details in accordance with the Orders of the Commission dated 09.10.2018, 05.02.2019 and 18.04.2019, which would be examined by SECI at appropriate stage for verification. SECI stated that the Commission may direct the Petitioner

to provide the details in terms of the methodology given in Annexure C and in accordance with the aforesaid orders of the Commission.

38. SECI has submitted that the Commission in its earlier order dated 18.04.2019, with regard to methodology of payment of compensation on account of the GST Laws, has proposed two kinds of mechanism for payment of compensation:
- a) One-time payment in a time bound manner; or
  - b) Payment on annuity basis, spread over such period not exceeding the duration of PPA as a percentage of tariff agreed in the agreements, as mutually agreed between SPDs and procurers (in the present case, SECI and consequentially the Discom- UPPCL).
39. SECI has submitted that one-time payment will be financially burdensome for the Distribution Company. Accordingly, SECI has proposed the following methodology for payment of compensation (if any) on account of the GST Laws on annuity basis:
- a) The total amount of compensation payable as determined by the Commission, subject to prudence check by SECI and the distribution company, in the present petition, shall form the basis of computation for ascertaining the per unit rate;
  - b) The above amount shall be divided over each year of the remaining duration of the PPA and PSA based on the discounting factor. In the present example (Annexure D), the discount factor as provided in Generic Tariff Order dated 19.03.2019 passed by the Commission for renewable energy projects is considered;
  - c) The above amount shall be converted to per unit rate based on the Capacity Utilisation Factor/ contracted energy agreed in the PPA; and
  - d) The per unit rate for change in law should be payable on actual generation subject to annuity value.

#### **Submissions of the Petitioner through Rejoinder**

40. The Petitioner has reiterated its submissions made in pleadings and as such, the same are not reproduced again for the sake of brevity. Additionally, the Petitioner has submitted that SECI has contended that since the present arrangement is a back-to-back arrangement, SECI's liability to pay arises only if the Discoms pay. This submission has been rejected by the Commission in the Order dated 27.03.2020 in Petition 388/MP/2018 – *Wardha Solar*

*(Maharashtra) Private Ltd. vs. Solar Energy Corporation of India and in the Order dated 15.08.2020 in Petition No. 158/MP/2019 – APNRL v. TANGEDCO, where the liability of intermediary / trader to pay is not contingent upon payment by Discoms.*

41. The Petitioner has submitted that MNRE vide letter dated 23.03.2020 has written to SECI stating that as CERC orders pertaining to compensation for enactment of GST as a Change in Law event are clear and unambiguous, there is no requirement for every developer to initiate/pursue fresh proceedings individually before CERC for the same issues wherein the principle has been settled. Pursuant to this letter, it has submitted all necessary documents to SECI on 02.07.2020 and 13.07.2020.

### **Analysis and Decision**

42. We have heard the learned counsels for the Petitioner and the Respondent SECI and have carefully perused the records. The following issues arise before us for adjudication:

*Whether the enactment of the GST Laws is a Change in Law event under Article 12 of the PPA?*

*and*

*Whether the Petitioner should be restored to the same economic condition prior to occurrence of the Changes in Law by directing the Respondents to pay to the Petitioner the amount claimed under Change in Law in terms of Article 12 of the PPA?*

43. The Petitioner has submitted that the enactment of the GST Laws constitutes Change in Law in terms of Article 12 of the PPA. *Per contra*, SECI has submitted that the Change in Law provisions as contained in Article 12 of the PPA is pari-materia to the Change in Law provision in various petitions decided by the Commission. SECI has further admitted that the Commission vide its various Orders has already approved the enactment of GST as a Change in Law event subject to submission of relevant documents. SECI has submitted that based on the position of law as on date, the GST Laws qualify as law under Article 12 of the PPA. However, in order to qualify for relief under the Change in Law provision contained in the PPA, the conditions mentioned in Article 12 of the PPAs dealing with Change in Law need to be satisfied, viz. each of the claim should fall within the scope of the said provision..
44. We observe that the Commission vide its combined Order dated 27.03.2020 in Petition No.

388/MP/2018 and Petition No. 395/MP/2018 had held as under:

*“96. 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 last 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. 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. In the instant case, the ‘GST Laws’ have been enacted by the Act of Parliament and the State Legislative Assemblies. The change in duties/ tax imposed by the Central Government and State Government(s) has resulted in the change in cost of the inputs required for generation and 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 last bullet in seriatim of Article 12.1.1 of the PPA.*

*97. The Commission notes that the Petitioners have placed their bids on 19.05.2016 & 29.03.2016 and even the PPAs were executed on 02.08.2016 & 04.08.2016 in Petitions No. 388/MP/2018 & 395/MP/2018 respectively i.e. before the introduction of GST Laws on 01.07.2017. Further, the SCoD of the projects were on 02.09.2017 & 18.08.2017 i.e. after 01.07.2017. Therefore, the Petitioners are entitled for relief under ‘GST laws’.*

....  
*100. 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.

....

103. The Commission notes that commissioning of the projects as defined in Article 1 read with Article 5 [along with Schedule 6 in Petition No. 388/MP/2018] of the PPAs implies that all the equipment as per rated project capacity has been installed and energy has flown into the grid. Further, the liability of the Respondents for payment of purchase of the power from the Petitioner starts from the Commercial Operation Date (COD). As per definition of Commercial Operation Date (COD) provided in Article 1 of the PPAs, COD will be the date 30 days subsequent to the actual date of commissioning of full capacity. Accordingly, the Commission holds that the liability of payment on account of impact of GST on procurement of Solar PV panels and associated equipment by the Petitioners shall lie with the Respondents till the Commercial Operation Date (COD) only. The Commission is also 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.

104. 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 levelled 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 levelled tariff is solely a decision of the SPDs.

105. The Commission observes that the Petitioners requested for the payment to be made in lumpsum by way of one-time payment whereas the Respondents SECI and NTPC have submitted that the payment by way of one-time payment will be financially burdensome for distribution companies. Instead the Respondents NTPC and SECI have proposed a methodology for payment of compensation (if any) on account of GST Laws on annuity basis. The Commission observes that it has already proposed an mechanism in various similar Orders as under: a. one-time payment in a time bound manner which shall be paid within 60 days from the date of issue of the 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. b. Alternatively, the Petitioners and the Respondents may mutually agree to a 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.

106. In view of above, 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 paragraph 100 & 103 above. 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 a 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. It is pertinent to mention here that the Petitioners will submit the required documentation to the Respondent No.1 which will satisfy itself and submit the same along with its recommendations to the Respondent Discoms.*

....

*114. From the above, the Commission observes that the billing and payment between the Petitioner and the Respondents SECI and NTPC are not conditional upon billing and payment between the Respondents SECI and NTPC and the Respondent Discoms. Although, the above provisions, namely, Article 10 of PPA and Article 6 of PSA, deal with regular monthly tariffs, the underlying philosophy that the billing and payment of one leg is not conditional upon the billing and payment of the other leg, can be equally applicable to the payment towards incremental impact on account of GST being a change in law, as well. In view of the above, the Commission holds that the Power Purchase Agreement and Power Sale Agreement being back to back in nature are interconnected implying thereby that the Respondent Discoms are liable to pay to the Respondents SECI and NTPC all that the said Respondents have to pay to the Petitioner. However, payment to the Petitioners by Respondents SECI and NTPC is not conditional upon the payment to be made by the Respondent Discoms to Respondents SECI and NTPC in view of the provisions of Article 10 of PPA and Article 6 of the PSA. . The Commission having held that GST is a change in law, the Respondents SECI and NTPC are liable to pay to the Petitioners as per discussion above. However, the Respondents SECI and NTPC are eligible to claim the same from the Respondent Discoms on back to back basis.*

....

*Summary of decisions:*

*128. 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 Petitioner has 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 as discussed in paragraph 106 above. The Respondents SECI and NTPC are liable to pay to the Petitioners, which is not conditional upon the payment to be made by the Respondent Discoms to Respondents SECI and NTPC as discussed in*

*paragraph 114 above. However, the Respondents SECI and NTPC are eligible to claim the same from the Respondent Discoms on 'back to back' basis as discussed in the said paragraph. The claim based on discussions in paragraph 100 and 103 above shall be paid within sixty days of the date of this Order or from the date of submission of claims by the Petitioner whichever is later, failing which it will attract late payment surcharge as provided under PPAs/PSAs. Alternatively, the Petitioner 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. The claim regarding separate 'Carrying Cost' and 'interest on working capital' in the instant petitions is not allowed.*

*129. With the above directions, Petition No. 388/MP/2018 and Petition No. 395/MP/2018 stand disposed of."*

45. The PPAs in Petition No. 388/MP/2018 and Petition No. 395/MP/2018 are pari-materia with the PPA in the instant case. We observe that the Petitioner submitted its bid on 19.02.2016 and was declared successful bidder on 15.03.2016. SECI issued the Letter of Intent on 09.05.2016. The contracting parties executed the PPA on 27.06.2016 (effective date being 09.06.2016). Subsequently, the GST Laws were enacted on 01.07.2017. Further, the SCoD of the project was on 09.07.2017 i.e. after 01.07.2017. The Petitioner successfully commissioned the project on 08.02.2018. Therefore, the above Order dated 27.03.2020 in Petition No. 388/MP/2018 and Petition No. 395/MP/2018 is also applicable in case of the Petitioner and the introduction of the GST Laws w.e.f. 01.07.2017 is covered under Change in Law in terms of Article 12 of the PPA.
46. The Petitioner is directed to make available to the Respondents, all relevant documents exhibiting clear and one to one correlation between the projects and the supply of imported goods till the COD as per PPA or till the COD upon extension of SCOD in terms of PPA, 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 from the petitioner and pay the amount so claimed to the Petitioner. The compensation on account of introduction of the GST Laws should be discharged by the Respondents within 60 days from the date of issue of this Order or from the date of submission of claims by the Petitioner, whichever is later, failing which it shall attract late payment surcharge at the rates provided for in the PPA. Alternatively, the Petitioner and the Respondents may mutually agree to a



mechanism for the payment of such compensation on annuity basis spread over a period not exceeding the duration of the PPA as a percentage of the tariff agreed in the PPA.

47. The billing and payment between the Petitioner and SECI are not conditional upon billing and payment between SECI and UPPCL. The Power Purchase Agreement (between the Petitioner and SECI) and Power Sale Agreement (between SECI and UPPCL) being back to back in nature are interconnected implying thereby that UPPCL are liable to pay to SECI all that SECI has to pay to the Petitioner.
48. The Petitioner has claimed that it is adversely impacted due to imposition of GST on the O&M expenses and that it should be compensated for the same in terms of the provisions of the PPA. *Per Contra*, SECI has submitted that the impugned PPA does not contemplate outsourcing of O&M expenses and, therefore, any increase in cost as a result of outsourcing should be solely borne by the Petitioner.
49. We observe that similar issues have been considered and decided by the Commission in Petition No. 388/MP/2018 and Petition No. 395/MP/2018 vide its Order dated 27.03.2020. The relevant extract from the said Order is as under:

*“116. 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 for a solar plant: Site Security; Consumables and breakdown spares; Annual Maintenance Contract; and Module cleaning -labour and water supply. The Commission observes that as per the GST Act, 2017, the supply of services includes:*

*“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.”

117. 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. The Commission notes, based on the records submitted in the context of the petitions, that outsourcing of ‘Operation and Maintenance’ services is not the requirement of the PPAs/ bidding documents. The concept of outsourcing is neither included expressly in the PPAs nor is it included implicitly in Article 12 of the PPAs. 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 its earlier Orders that it is a pure commercial decision of the Petitioners taken for its own advantage. In the event the Petitioners choose to employ the services of other agencies, it 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 in Order dated 09.10.2018 in Petition No. 188/MP/2017 &Ors. case titled Acme Bhiwadi Solar Power Private Limited –v-Solar Energy Corporation of India and Ors. The Commission does not find merit in the argument of the Petitioners that compensation on O&M expenses should be allowed on lines of the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012. The present Petition relates to section 63 of

*the Electricity Act, 2003 and as such drawing reference to cost plus tariff fixation principles, is misplaced.”*

50. The above decision is squarely applicable in the instant case of the Petitioner.
51. As regards claim of GST on O&M Expenses, we also note that the RfS document and PPA made it mandatory on the Petitioner to enter into the ‘Land Use cum Implementation and Support Agreement’ and also to bear all costs imposed by the SPIA. The relevant provisions of RfS dated 24.09.2015 are as under:

*3.2. Total Capacity Offered, Project Scope and Technology selection*

*Selection of Grid-connected Solar PV Power Projects for total capacity of 440 MW (390 MW under Part-B (Open) and 50 MW under Part-A (DCR)) will be carried out through e-bidding followed by e-Reverse Auction process. The projects will be setup in the districts of Jalaun (265MW), Allahabad (50MW), Kanpur (50 MW) and Mirzapur (75 MW) in UP Solar Park [being developed by Solar Park Implementation Agency (SPIA)].*

*5.3. Role of Solar Park Implementation Agency (SPIA)*

*The SPIA shall undertake the following activities to achieve the objectives of speedy establishment and implementation of Solar Park in the Host State.*

- i) Frame out transparent project land allotment policy and specify procedures pursuant to the relevant State policies and their amendments thereof.*
- ii) Enter into Lease agreement and give possession before Financial Closure to SPD for the entire period of the Project.*
- iii) Work out charges to be paid by the developers for land, connectivity and use of various facilities in the Solar Park.*
- iv) Enter into an Implementation Support Agreement with SPDs for Land, connectivity with the STU / CTU System.*

*While it will be the endeavor of the State Agencies /Central Agencies as described above to facilitate support in their respective area of working but nevertheless, SPD shall be overall responsible to complete all the activities related to Project Development at its own risk and cost.*

*7.1. Solar Park Scheme*

*The provisions of Solar Park Scheme notified by the Ministry of New & Renewable Energy vide No.30/26/2014-15/NSM dated 12th December, 2014 would be applicable for the solar projects to be set up in the Solar Park.*

*7.2. Solar Park Implementing Agency (SPIA)*

*The Solar PV Projects to be selected by SECI under this scheme are to be developed inside Solar Park which is developed by Solar Park Implementing Agency (SPIA).*

*7.2.1. Lucknow Solar Power Development Corporation Limited (LSPDCL) is SPIA for this Solar Park. The SPD after issuance of LOI, will have to approach the SPIA to carry out the SPIA agreement, allotment of land, timelines for availability, possession and connectivity for the projects/plots.*

*7.9. Additional Requirement for solar park:*

*7.9.4. SPDs shall enter into an Implementation Support Agreement with SPIA / State Agency for Land & associated infrastructure for development of the Project inside the Solar Park, Connectivity with the STU / CTU System and all clearances related thereto shall be the responsibility of the SPIA/State Agency / SPD.*

52. The relevant provisions of PPA dated 27.06.2016 are as under:

*“3.1 Satisfaction of conditions subsequent by the SPD*

*The SPD agrees and undertakes to duly perform and complete all of the following activities at the SPD’s own risk and cost within seven (7) months from the Effective Date, unless such completion is affected by any Force Majeure event, or if any of the activities is specifically waived in writing by SECI:*

- a) The SPD execute Land Use cum Implementation and Support Agreement with the SPPD. The SPD shall also execute Land lease/Right to use Agreement (as applicable) with the SPPD;*
- b) The SPD shall obtain a Certificate of Compliance from SPIA for the Conditions given in the Land Use cum Implementation and Support Agreement executed between SPIA and the SPD from the SPIA:*

53. From the above, we observe that SPDs (such as the Petitioner) to be selected by SECI under the MNRE scheme were to be develop power projects inside the solar park (developed by SPIA). As per the MNRE Scheme, SPIA was to enter into ‘Land Use cum Implementation Support Agreement’ with the SPDs for Land & associated infrastructure for development of the Project inside the Solar Park, Connectivity with the STU/ CTU System. We observe that the Petitioner has not filed ‘Land Use cum Implementation Support Agreement’, nor has it placed on record any other document which has specific provision fastening liability on the Petitioner to pay O&M Charges to SPIA. Therefore, compensation on account of GST on O&M expenses cannot be allowed to the Petitioner in absence of any specific provision of PPA or any other documents like ‘Land Use cum Implementation Support Agreement’.

54. The Petitioner has claimed carrying cost and submitted that the underlying purpose of Article 12 of the PPA is to provide compensation and to restore a party affected by Change in Law events to a position as if such Change in Law had not taken place. The Petitioner has submitted that it can be brought to the position existing prior to occurrence of the Change in Law event i.e. introduction of the GST Laws only if the Petitioner is also compensated for the

additional expenditure incurred as a result of the Change in Law by paying it carrying cost. The Petitioner could not have raised supplementary invoices claiming the additional recurring expenditure incurred by the Petitioner due to introduction of GST Laws under Article 10.3.3 of the PPA, as Article 12.2 of the PPA makes it obligatory upon them to approach this Commission to seek relief for a Change in Law event before raising any supplementary invoices.

55. On the other hand, the Respondent SECI has submitted that there is no provision in the PPA regarding carrying cost or interest for the period till the decision of the Commission acknowledging Change in Law and deciding on the amount to be paid for such Change in Law as specified in Article 12.2.2 of the PPA. The Change in Law claim of the Petitioner is yet to be adjudicated and the amount, if any, due to the Petitioner has to be determined/computed first. Only when there is 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. 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. The Respondent has submitted that the PPA does not have a provision dealing with restitution principles of restoration of the Petitioner to same economic position. The Petitioner is not entitled to claim relief which is not provided for in the PPA.

56. We have considered the submissions of the Petitioner and the Respondent SECI. The issue of carrying cost has been dealt with by APTEL. Vide judgement 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 had 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.”*

57. The judgment of the Tribunal dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited v. Central Electricity Regulatory Commission and Ors.*, 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. Vs. Adani Power Ltd. & Ors.) 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.”*

58. We note that the PPAs in the instant matter do not have restitution provisions. Therefore, in view of above judgements of APTEL and Hon’ble Supreme Court, the claim regarding ‘carrying cost’ is not admissible.
59. Our decisions in this Order are summed up as under:
- a. The introduction of the GST Laws w.e.f. 01.07.2017 is covered under Change in Law

in terms of Article 12 of the PPA. The Commission directs the Petitioner to make available to the Respondents all relevant documents exhibiting clear and one to one correlation between the project and the supply of imported goods till the COD as per PPA or till the COD upon extension of SCOD in terms of PPA, duly supported by relevant invoices and Auditor's Certificate. The Respondents are directed to reconcile the claims for Change in Law on receipt of the relevant documents and pay the amount so claimed to the Petitioner. The quantum of compensation on account of introduction of GST w.e.f. 01.07.2017 should be discharged by the Respondents within 60 days from the date of issue of this Order or from the date of submission of claims by the Petitioner, whichever is later, failing which it shall attract late payment surcharge at the rates provided for in the PPA. Alternatively, the Petitioner and the Respondents may mutually agree to a mechanism for the payment of such compensation on annuity basis spread over a period not exceeding the duration of the PPA as a percentage of the tariff agreed in the PPA.

- b. The billing and payment between the Petitioner and SECI are not conditional upon billing and payment between SECI and UPPCL. The PPA (between the Petitioner and SECI) and PSA (between SECI and UPPCL) being back to back in nature are interconnected implying thereby that UPPCL is liable to pay to SECI all that SECI has to pay to the Petitioner.
- c. The prayer of Petitioner to compensate for adverse impact of GST on O&M expenses is not allowed.
- d. The claim regarding 'carrying cost' is not admissible.

60. Accordingly, the Petition No. 211/MP/2019 is disposed of.

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