



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No.: 213/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: 25th 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 22.06.2016 executed between Yarrow Infrastructure Private Limited and National Thermal Power Corporation Limited for seeking approval of Change in Law events due to enactment of the GST Laws.

AND IN THE MATTER OF:

Yarrow Infrastructure Private Limited
5th Floor, Tower-B, Worldmark 1 Aerocity,
New Delhi-I 10037

...Petitioner

VERSUS

1. NTPC Limited,
7, Institutional Area,
Core-7, Scope Complex,
Lodhi Road,
New Delhi- 110 003
2. Bangalore Electricity Supply Company Limited
KR Circle,
Bengaluru-560001
3. Hubli Electricity Supply Company Limited
PB Road, Navanagar,
Hubballi-580025
4. Mangalore Electricity Supply Company Limited
MESCOM Bhavana,
Kavoor Cross Road,
Bejai, Mangaluru-575004
5. Gulbarga Electricity Supply Company Limited
Station Road,
Kalaburagi -585101
6. Chamundershwari Electricity Supply Corporation Limited
No. 29, Kaveri Grameena Bank Road,
Hinkal, Vijayanagar, 2nd Stage,
Mysuru-570019

...Respondents

Parties Present:

Shri Vishrov Mukerjee, Advocate, YIPL
Shri Ameya Vikram Mishra, Advocate, YIPL
Shri Venkatesh, Advocate, NTPC
Shri Vikas Maini, Advocate, NTPC
Shri Suhael Buttan, Advocate, NTPC
Shri Abhishek Nangia, Advocate, NTPC
Shri Abhishek Goel, YIPL
Shri Rajeev Doharey, YIPL
Shri Damodar Prabhu, YIPL
Shri Ishpaul Uppal, NTPC

आदेश/ ORDER

The Petitioner, Yarrow Infrastructure Private Limited (YIPL) is a generating company and is engaged in the business of setting up of solar power plant and generation of electricity therefrom. YIPL has developed solar photo voltaic power project based on photo-voltaic technology of 50 MW capacity in Pavagada Solar Park, Tumkur District in the State of Karnataka.

2. The Respondent No. 1, National Thermal Power Corporation Limited (NTPC), is the Implementation Agency for setting up Grid-connected Solar PV Power Plants, with whom YIPL has executed a Power Purchase Agreement for setting up 50 MW capacity in the State of Karnataka.
3. The Respondents 2 to 6 are the distribution companies of State of Karnataka (hereinafter referred to as 'the Karnataka Discoms').
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 NTPC 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 10.03.2015, Ministry of New and Renewable Energy (MNRE) issued Guidelines for implementation of the Scheme for selection of 3000 MW Grid Connected Solar PV Power Projects under Phase-II, Batch-II, Tranche-I for “State Specific Bundling Scheme” (the Solar PV Guidelines). NTPC implemented the State Specific Bundling Scheme through its subsidiary NRVNL, which is a trading licensee for inter-State trading in electricity in India.
6. On 01.09.2015, NTPC issued Request for Selection (RfS) inviting proposals for setting up Grid connected solar-PV power projects of 500 MW capacity (50 MW X 10 Projects) in the Pavagada Solar Park at District Tumkur in the State of Karnataka. YIPL participated in the bids invited by NTPC and submitted its proposal for development of solar PV ground-mounted project of 50 MW. After following the process of reverse auction, YIPL was selected as the successful bidder.
7. On 17.05.2016, NTPC issued Letter of Intent (LoI) to the Petitioner for development of 50 MW solar power project in the Pavagada Solar Park.
8. On 22.06.2016, YIPL entered into Power Purchase Agreement (PPA) with NTPC for setting up 50 MW solar power plant at the rate of Rs. 4.78/kWh fixed tariff for 25 years. The PPA was subsequently amended vide amendment dated 04.04.2019.
9. 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 was enacted for levy and collection of tax on intra-State supply of goods or services or both. The above taxes are hereinafter referred to as ‘the GST Laws’ collectively.
10. On 14.12.2017, YIPL successfully commissioned the Project and the same was authenticated by Karnataka Solar Power Development Corporation Limited (KSPDCL) vide Commissioning Certificate dated 04.01.2018.

11. On 30.07.2018, the Ministry of Finance, Government of India, issued Notification No. 01/2018-Customs (SG) (hereinafter referred to as 'the SGD Notification') imposing Safeguard Duty on the import of solar panels/ modules for a period of two years.
12. Due to the GST Laws and the SGD Notification, the Petitioner is required to incur additional expenditure in the procurement of solar panels required for its project. Hence the Petition.

Submissions of the Petitioner

13. The Petitioner has submitted that subsequent to the execution of the PPA, the GST Laws were introduced. Due to enactment of the GST Laws, tax cost for power generators will increase as inputs are covered under GST whereas output will be outside the purview of GST.
14. The Petitioner has submitted that Article 12 of the PPA states as under:

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

15. The Petitioner has submitted that in terms of the Change in Law provision (Article 12) under the PPA, Change in Law event is any of the events enumerated therein; which have occurred after the Effective Date i.e. 21.06.2016; and which results in any additional recurring/ non-recurring expenditure or income to YIPL. Once a Change in Law event has occurred, the aggrieved party is entitled to claim relief for the same. In terms of Article 12.2 of the PPA, the aggrieved Party is required to approach the Commission for seeking approval of Change in Law.

16. The Petitioner has submitted that prior to 21.06.2016 (the effective date of the PPA) the erstwhile indirect tax regime provided for a complex tax environment comprising of multiple taxes like excise duty, VAT, Service Tax, etc. However, pursuant to introduction of the GST Laws after the Effective Date, the indirect taxation system in the country has undergone a paradigm shift in the mode and levy of indirect taxes. With introduction of GST, several indirect taxes including Excise Duty, Service Tax, VAT, Central Sales Tax etc. have been replaced by a consolidated and singular taxation scheme. In accordance to the GST Laws, with effect from 01.07.2017, CGST & SGST is to be levied by the Central and State Government respectively on supplies of goods or services at the rate prescribed from time to time.

17. The Petitioner has submitted that enactment of the GST Laws is a Change in Law event under Article 12 of the PPA since:
 - a) The enactment of the GST Laws is the enactment of a Law repealing the indirect tax regime as it existed prior to the enactment of the GST Laws.
 - b) The GST Laws have been passed by the Parliament of India and State Legislatures;
 - c) The GST Laws have been enacted subsequent to 21.06.2016; and
 - d) Implementation of the GST Laws has resulted in additional expenditure for YIPL.

18. The Petitioner has submitted that in terms 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 Ministry of Power vide letter dated 27.08.2018 under Section 107 of the Electricity Act, 2003 has directed the Commission to treat any change in taxes imposed by the Central Government or the State Government as Change in Law.

20. The Petitioner has submitted that before the Effective Date, Service Tax at the rate of 15% was being levied on Operation & Maintenance Expenses (O&M). With effect from 01.07.2017, GST at the rate of 18% (9% CGST and 9% SGST) is being levied on O&M Expenses. This will lead to an incremental impact of Rs. 19,22,79,679 (Rupees Nineteen Crores Twenty Two Lakhs Seventy Nine Thousand Six Hundred Seventy Nine) on the cost of the Project.

21. The Petitioner has submitted that impact of enactment of the GST Laws on YIPL can be divided into three parts:-
 - a) Intra-State Procurement of Goods and Services;
 - b) Inter-State Procurement of Goods and Services; and
 - c) Import of Goods

22. The Petitioner has submitted that it is entitled to carrying cost for the costs incurred due to the Change in Law events. Carrying cost is the compensation for time value of the money. Any compensation for change in law is incomplete if it does not come with carrying cost that is inherent to the very provision. The mandate of change in law provisions across all PPAs (standard documents drafted by the government) is restitution i.e. relief be granted in a manner so as to place an affected party in the same economic position as if the change in law had not occurred. Restitution is therefore inherent to compensation. The aforesaid position has been confirmed by Appellate Tribunal for Electricity (in short, 'the Tribunal') in *Sasan Power Limited vs. CERC & Ors.* judgment. The Tribunal in its Judgment dated 20.11.2018 in Appeal No. 121 of 2018 titled *Sasan Power Limited vs. CERC & Ors.* and judgment dated 12.09.2014 in Appeal No. 288 of 2013 titled *Wardha Power Company Ltd. v. Reliance Infrastructure Limited & Ors*, has held that compensation for Change in Law has to restore the affected party to the same economic position had such Change in Law event not occurred. The Petitioner has submitted that carrying costs are in the nature of compensation for money denied at the appropriate time, as held by the Tribunal in the Judgment dated 20.12.2012 in Appeal No. 150 and batch appeals titled *SLS Power Ltd v. Andhra Pradesh Electricity Regulatory Commission*. It is entitled to carrying cost being in the nature of compensation in terms of Article 12 of the PPA. Failure to do so would defeat the underlying principle of restitution and render the change in law article otiose. Further, the change in law article is restitutive in nature and thus ought to be given a wide interpretation.

Additional affidavit by petitioner

23. The Petitioner has submitted that on 30.07.2018, Safeguard Duty on import of solar cells was imposed by the Ministry of Finance, Government of India vide the SGD Notification. Safeguard Duty was imposed on solar cells when imported into India, particularly from China PR and Malaysia. The Safeguard Duty varied from 25% to 15%, being levied for a period of two years commencing from 30.07.2018 (i.e., till 29.07.2020).
24. The Petitioner has submitted that imposition of Safeguard Duty vide the SGD Notification is a Change in Law event under Article 12 of the PPA since:

- a) The imposition of Safeguard Duty is an additional duty levied on YIPL by way of the SGD Notification and has statutory force;
 - b) Safeguard Duty has been imposed subsequent to 21.06.2016; and
 - c) Imposition of Safeguard Duty has resulted in increase in recurring and non-recurring additional expenditure for YIPL.
25. The Petitioner has submitted that Commission vide Order dated 02.05.2019 in Petition No. 342/MP/2018 and Petition No. 343/MP/2018 has held that imposition of the SGD Notification qualifies as Change in Law in terms of the first, second and sixth bullet of Article 12 of the PPA therein.

Reply of the Respondent-NTPC

26. NTPC has submitted that it is an intermediary company for bulk purchase of electricity and sale to the Karnataka Discoms under a Power Sale Agreement ('PSA'). NTPC is in a position to discharge its obligations under the PPA including the payment for Change in Law implication only upon the distribution licensees remitting the amount to NTPC in terms of the PSA. The obligation of the Karnataka Discoms under the PSA is therefore on back to back basis with the obligation of NTPC to YIPL.
27. NTPC has submitted that the GST Laws have been enacted by the Parliament/ State Legislatures w.e.f. 01.07.2017. The issue of whether the GST Laws qualify as Change in Law event came up for consideration before the Commission in the matter of *Prayatana Developers Pvt. Ltd. Vs. NTPC Ltd. & Ors* and *Azure Power Venus Pvt. Ltd. Vs. SECI & Ors*, in Petition No. 50/MP/2018 and Petition No. 52/MP/2018, whereby the Commission vide its Order dated 19.09.2018 held that the enactment of the GST Laws qualifies as Change in Law event under the Article 12 of the PPA in the said case. However, the Commission in the said Order held that the relief for Change in Law on account of the GST Laws cannot be granted to projects:-
- a) where the scheduled date of commissioning is prior to 01.07.2017;
 - b) where the actual date of commissioning is prior to 01.07.2017;

- c) where the point of taxation of goods/services is before 01.07.2017 and
 - d) where there is no clear/one-to-one co-relation between the project, supply of goods or services and the invoices raised by the supplier of goods and services.
28. NTPC has submitted that the PPA provisions, specifically Article 12 pertaining to Change in law, in the present case is *pari materia* to the Change in Law provision in the aforesaid Orders. Admittedly, the Commission vide its Orders has already approved the enactment of the GST Laws as a Change in Law event subject to submission of relevant documents. Therefore, even in the present case, based on the position of law as on date, the GST Laws *prima facie* would qualify as a Change in law event under Article 12 of the PPA dated 22.06.2016 executed between YIPL and NTPC. However, the same would again be subject to YIPL demonstrating clear one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services.
29. NTPC has submitted that YIPL's claim for incremental cost arising from increase in tax on O&M services is without any merit and ought to be rejected. They state that the PPA between YIPL and the answering Respondent does not contemplate outsourcing of O&M expenses. Therefore, any increase in cost as a result of outsourcing should be solely borne by YIPL. In the instant case, YIPL has chosen to outsource O&M activities and as a result of the outsourcing, allegedly there is an increase in costs incurred by YIPL on account of GST Laws. YIPL now seeks to recover the incremental increase in cost. As per the PPA, O&M is the responsibility of YIPL. Since YIPL has chosen to employ the services of other agencies, the same cannot be passed on to NTPC. They also maintain as under:
- a) The outsourcing of O&M to a third party is neither contemplated in the PPA nor in the Request for Selection ('RfS').
 - b) The projects in question are under Section 63 of the Electricity Act, 2003 where the O&M expenses are included in the levelized tariff agreed between the parties.
 - c) Outsourcing O&M expenses is a commercial decision of YIPL for its own advantage and any increase in cost including on account of taxes is entirely to its own account.

30. NTPC has submitted that a contract must be interpreted literally and unexpressed terms should be implied only if parties intended them to be part of the contract. The Hon'ble Supreme Court has, upheld and affirmed this view in a catena of cases viz. *M/s Adani Power vs Gujarat Electricity Regulatory Commission*, Judgment dated 02.07.2019 in Civil Appeal No. 11133 of 2011 and *Gujarat Urja Vikas Nigam Limited vs. Solar Semiconductor Power Company (India) Private Limited and Ors* , 2017 16 SCC 498. Therefore, PPA should be interpreted in accordance with the terms present therein. A bare perusal of the PPA makes it evident that outsourcing of O&M expenses was not contemplated by the parties. Issue of O&M Expenses is no more res integra as the Commission, on multiple occasions, has held that any increase in taxes on O&M contracts cannot fall within the scope of Change in Law. Reference is made to Commission's Order dated 16.03.2018 in Petition No. 1/MP/2017 titled as *GMR Warora Energy Limited vs Maharashtra State Electricity Distribution and Others* and Order dated 19.09.2018 *Prayatana Developers Pvt. Ltd. Vs. NTPC Ltd. & Ors*.
31. NTPC has submitted that on a plain reading of Article 12 of the of the PPA, it is amply clear that the aggrieved party shall approach the Commission for approval of Change in Law and thereafter on acknowledgment of the Change in Law event, the Commission may 'provide relief for the same' from the date on which it will become effective. Article 12.2.2 does not contain a provision for restitution or relief to be granted in a manner so as to place an affected party in the same economic position as if no Change in Law had occurred. Therefore YIPL's claim for grant of carrying cost is not admissible.
32. NTPC has submitted that reliance placed by YIPL on the Judgment of the Hon'ble Supreme Court in *Uttar Haryana Bijli Vitran Nigam Ltd. and Anr. Vs. Adani Power Ltd. and Ors. (2019) SCC Online SC 265* upholding the Tribunal's Judgment dated 13.04.2018 in *Adani Power Ltd. vs. CERC and Ors. Appeal No. 210 of 2017*, is misplaced. Article 13.2 of the PPA in the said Judgments specifically provided for restitution, i.e. relief of restoration to the same economic position as if Change in Law had not occurred. Further, in the Tribunal's Judgment (Appeal No. 210 of 2017), it was also held that since the Gujarat Bid-01 PPA had no provision for restitution, the claim regarding carrying cost was not applicable to them. The

Hon'ble Supreme Court's Judgment ((2019) SCC Online SC 265) upheld the Judgment of the Tribunal with regard to carrying costs as the PPA itself contained an in-built principle for restitution in the form of Article 13.2 of the PPA. Therefore, YIPL's claim for grant of carrying cost is incorrect and is liable to be rejected.

33. NTPC has submitted that under the PPA, YIPL is duty bound to employ a cost-effective approach as it was under an obligation to mitigate the cost. It is stated that as a prudent utility, as envisaged under Article 4.1.1(d) of the PPA, YIPL ought to have considered reduction in impact of GST by arranging to buy the assets as a part of the solar generation system at the cost of paying GST at a lower rate instead of purchasing it individually by paying higher GST of 18%. Therefore, in view of the above, any higher cost paid, without mitigating the cost, should not be allowed to be passed on to the Respondent and thereby to the consumers at large.
34. NTPC has submitted that it is under an obligation to purchase power from YIPL and sell it to the Karnataka Discoms and is in a position to discharge its obligations under the PPA including the payment of compensation for any impact due to any change in law event. However, the same is subject to the distribution licensees remitting the amount to NTPC in terms of their respective PSAs. Therefore, any amount so paid by NTPC to YIPL shall be subject to the amounts recovered from the Karnataka Discoms. Further, the methodology that may be determined by the Commission for payment of the Change in Law implication by NTPC to YIPL, viz. onetime payment or increase in per unit tariff or in any other manner, should be directed to be implemented mutatis mutandis for payment by the Karnataka Discoms under the PSA to NTPC. In view thereof, the Commission may be pleased to consider this aspect while deciding the instant Petition.
35. NTPC has submitted that Safeguard Duty has been imposed on the import of solar cells and modules when the import is made from developed countries and certain specific developing countries, namely, China PR and Malaysia. Safeguard Duty has not been imposed on import of solar cells from other developing countries, as provided in Notification No.19/2016-

Customs (N.T) dated 05.02.2016. The SGD Notification dated 30.07.2018 imposing safeguard duty has not been given effect to any period prior to 30.07.2018 and is prospective in its operation.

36. NTPC has submitted that the issue of whether the SGD Notification qualifies as a Change in Law event came up for consideration before the Commission in in Petition No. 342/MP/2018 and Petition No. 343/MP/2018 wherein the Commission vide its Order dated 02.05.2019 observed that the SGD Notification qualifies as a Change in Law event under the Article 12 of the PPA. However, the said relief was subject to the following:
- a. The concerned Project's scheduled date of commissioning is after 30.07.2018;
 - b. Solar Power Developer (SPD) demonstrating that the SGD Notification has genuinely impacted its procurement of solar modules and that the obligation to comply with the SGD Notification is on the SPD.
 - c. Quantum of the relief claimed on account of the SGD Notification was subject to submission of relevant documentary proof to the procurers with regard to actual costs incurred and subsequent reconciliation of amounts thereof mutually between the parties.
37. NTPC has submitted that the Petitioner in the present case has also not demonstrated some key aspects which are germane while claiming relief of Change in Law for the SGD Notification. The Petitioner has not placed on record its procurement contract/ EPC Contract to demonstrate whether it is obligated under the said Agreement to discharge the obligation of the SGD Notification. The Petitioner has also not placed on record the procurement schedule in the EPC contract to ascertain whether there has been any delay in procurement causing the import of solar modules to take place beyond 30.07.2018 i.e. the date from when the SGD Notification became effective. Therefore, claim of the Petitioner for compensation on account of the SGD Notification is baseless, devoid of any merit and the same is liable to be rejected.

Rejoinder by the Petitioner

38. The Petitioner has submitted that NTPC's contention that outsourcing of O&M services has not been contemplated in the PPA and the same has been done for commercial convenience of YIPL is wrong and denied. On the contrary, the PPA specifically requires YIPL to outsource certain O&M services and mandatorily incur certain expenditure. The PPA mandates YIPL to enter into an 'Implementation Support Agreement' with the designated Solar Park Implementation Agency i.e. Karnataka Solar Power Development Corporation Limited (KSPDCL). Pursuant to the provisions of the PPA, YIPL entered into *Implementation and Support Agreement (ISA)* with KSPDCL on 15.04.2017. Article 6.2 of the ISA mandates payment of annual O&M charges which states as follows:

"6.2 Annual O&M Charges

Annual O&M charges of Rs. 13,250,000/- (Rupees One Crore Thirty Two Lakhs Fifty Thousand Only) calculated at the rate of Rs. 2.65 Lakhs (Rupees Two Lakhs Sixty Five Thousand only) per MW per annum in the first year which is escalated annually at the rate of 5% shall be payable by SPD on or before 30th April (Due Date) at the beginning of each financial year during the agreement period. First year annual O&M charges shall be payable by SPD on pro-rata basis within 30 days from the COD. Service tax and all other taxes, duties, cess and Government levies applicable on such transaction shall be reimbursed to the SPPD by the SPD within 7 days from the date of issue of bill by SPPD."

39. The Petitioner has submitted that YIPL has been paying O&M charges annually. These charges are mandatorily payable and not optional. Consequently, any financial impact on account of imposition of GST on these charges qualify as change in law and YIPL is entitled to be compensated for the same. Further, the above mentioned O&M charges have been incurred by YIPL in pursuance of performing its obligations under the PPA. Thus, compensation for costs incurred due to increase in tax on these O&M services due to promulgation of the GST Laws ought to be granted to YIPL.

40. The Petitioner has submitted that pursuant to O&M Agreement dated 24.05.2018, as well as in terms of the EPC Agreement with Tata Power Solar Systems Limited (the OEM supplier), O&M services are to be rendered by the OEM supplier during the defects liability period (DLP). This was a pre-requisite in order to procure DLP of 3 years. The invoices raised by

the OEM supplier for O&M included imposition of GST at the rate of 18%. This cost is being incurred by YIPL in terms of the O&M Agreement with Tata Power Solar Systems Limited. Therefore, YIPL is entitled to be compensated for the same. Outsourcing of O&M services has not been specifically barred under the PPA. It is a settled rule of interpretation of contracts that the words used in the contract must be given full effect to and unless something has been specifically excluded, it must be treated as permitted under the contract. The PPA does not distinguish between the expenditure incurred on account of obligations carried out by YIPL on its own and obligations which have been outsourced to third parties. Thus, NTPC cannot be permitted to create this fictional distinction contrary to the terms of the PPA.

41. The Petitioner has submitted that Carrying Cost ought to be granted in order to give full effect to the Change in Law clause in the PPA and to bring YIPL back to the same economic position. NTPC's contention denying carrying cost on the ground that there is no express provision for restitution in the PPA is wrong and denied. It is a settled position of law that carrying cost is the compensation for time value of funds deployed on account of Change in Law events. YIPL cannot be restored to the same economic position, as it was prior to the enactment of GST laws, unless carrying cost on account of time value of money is granted. They have submitted that grant of restitutive relief in the form of carrying cost is sine qua non to give effect to the true import of a Change in Law clause.
42. The Petitioner has submitted that in the instant case, the PPA does not explicitly preclude/prohibit the grant of carrying cost/interest. Instead, the phrase 'all interest' used in Article 1.2.15 of the PPA must be construed as an enabling provision for grant of carrying cost. Therefore, the ratio laid down by the Hon'ble Supreme Court in *South Eastern Coalfields vs. State of Madhya Pradesh & Ors., reported as (2003) 8 SCC 648* would squarely apply to YIPL's claim for an equitable relief of carrying cost.
43. The Petitioner has submitted that the Karnataka Discoms have unjustly benefitted in terms of time value for money resulting from the non-gratuitous acts of YIPL. Thus, in terms of Section 70 of the Indian Contract Act, 1872, restitutive relief ought to be granted to YIPL.

The Hon'ble Supreme Court in its decision in *Mulamchand v State of Madhya Pradesh*, reported as (1968) 3 SCR 214, held that the juristic basis to grant compensation not arising from an express provision in the contract is grounded on the principle of restitution. Further, the Hon'ble Supreme Court in its decision in *M/s Hansraj Gupta & Co. v Union of India*, reported as (1973) 2 SCC 637, held that compensation under Section 70 of the Indian Contract Act, 1872 can be granted in the absence of an express agreement.

44. The Petitioner has submitted that in light of the above mentioned decisions of the Hon'ble Supreme Court, the Karnataka Discoms cannot be permitted to benefit from the non-gratuitous acts of YIPL. The claim towards carrying cost is based on the principle of restitution enshrined under Section 70 of the Indian Contract Act, 1872 for which YIPL ought to be compensated.
45. The Petitioner has submitted that it has submitted all requisite documents/ information in support of its claim towards compensation for imposition of Safeguard Duty vide SGD Notification dated 30.07.2018. Further, YIPL undertakes to file/ place on record any other relevant information/ documents in this regard, if required.

Written submissions by the Petitioner

46. The Petitioner has reiterated its submissions which have been tendered in plaint, affidavit and rejoinder and as such, the same have not been reproduced for the sake of brevity. Additionally, the Petitioner has submitted as under:
47. The Petitioner has submitted that in terms of Article 12, YIPL is entitled to be compensated for any Change in Law occurring after the Effective Date i.e. 21.06.2016 which results in recurring/ non-recurring expenditure. Moreover, Ministry of Power, Government of India has, vide Notification dated 27.08.2018 issued a direction to the Commission under Section 107 of the Electricity Act, 2003 in terms of which any change in taxes imposed by the Central Government or the State Government is to be treated as Change in Law. The total impact of enactment of the GST Laws on YIPL (excluding carrying cost) is Rs. 16,56,87,239/-. The

carrying cost entailed by YIPL on account of introduction of the GST Laws is Rs. 2,65,92,440/-.

48. The Petitioner has submitted that in terms of Clause 3.6 of the RFS, the projects selected by NTPC were to be set up in the Solar Park. Further, in terms of Clause 3.4 of the MNRE Guidelines read with Clause 3.6.3 of the RFS, all costs in relation to the Solar Park have to be borne by YIPL. In terms of Article 3.1(c) read with Article 4.1.1(b) of the PPA, YIPL was required to enter into an Implementation and Support Agreement with Solar Park Implementation Agency (SPIA). Accordingly, on 15.04.2017, YIPL entered into ISA with the Solar Power Park Developer - Karnataka Solar Power Development Corporation Limited (KSPDCL). As per Clause 6.2 of the ISA, YIPL has to pay Annual Charges to SPIA amounting to Rs. 1,32,50,000/- (calculated at the rate of Rs. 2.65 lakhs per MW per annum) in the first year and escalated at a rate of 5% annually and payable throughout the duration of the ISA i.e. until December 2042 (25 years from COD which was in December 2017). As such, an aggregate sum of Rs. 20,08,80,000/- has to be contractually paid by YIPL to SPIA as per provisions of the ISA (as mandated by the PPA).
49. The Petitioner has submitted that the entire selection and bid process was premised on a mandatory condition that the successful bidders had to set up the project in the Solar Park. The RfS and PPA made it mandatory on YIPL to enter into the ISA and bear all costs imposed by the SPIA. These charges are mandatory and in pursuance of fulfilment of contractual obligations under the PPA and ISA. The amounts paid to the SPIA are not for commercial convenience and cannot be avoided by YIPL undertaking these activities since the activities for which the SPIA is being paid are for the Solar Park as a whole. Further, this is evident from Clause 5.3(vii) of the RfS as well in terms of which the SPIA is required to develop the land and associated infrastructure of the Solar Park. Consequently, any financial impact on account of imposition of GST on those charges qualify as Change in Law. The abovementioned charges have been incurred by YIPL in pursuance of performing its obligations under the PPA. Thus, compensation for costs incurred due to increase in tax on these charges due to promulgation of the GST Laws ought to be granted to YIPL.

50. The Petitioner has submitted that NTPC has contended that entitlement to compensation for safeguard duty will apply only for projects whose SCoD is after 30.07.2018. The contention is erroneous for the reasons that there may be a situation where projects commissioned prior to 30.07.2018 were required to import equipment/ spares after 30.07.2018. Neither the Change in Law provisions under the PPA nor the SGD Notification limits or restricts the entitlement of compensation to projects whose SCoD is after 30.07.2018. In the present case, the SCoD was 20.07.2017 and the project was commissioned on 14.12.2017. However, certain spares and replacement panels were delivered after 30.07.2018. Therefore, safeguard duty was imposed on these spares and panels. The Commission has already held safeguard duty to be a Change in Law. Therefore, YIPL ought to be compensated for the same.
51. As regards carrying cost, the Petitioner has submitted that compensation is a comprehensive term and is aimed at restoring a party to the same position as if no injury was caused to him, as held by the Hon'ble Supreme Court in the case of *Yadava Kumar v. The Divisional Manager, National Insurance Co. Ltd. and Anr.*, reported as (2010) 10 SCC 341. The Petitioner has submitted that "economic position" does not limit itself to a simple co-relation of increased expenditure and a corresponding compensation amount. Relief under the Change in Law articles has to take into consideration the actual economic impact of such Change in Law event. Restitution is a principle of equity which ought to be invoked in order to do substantive justice. It is a pre-existing rule of justice, equity and fair play which has also been statutorily recognized in Section 144 of Code of Civil Procedure, 1908.

Written Submissions by NTPC

52. NTPC vide written submission has reiterated its submissions which have been tendered in reply and as such the same have not been reproduced for the sake of brevity. Additionally, NTPC has submitted as under:
53. NTPC has submitted that YIPL in the instant case has claimed for incremental cost arising from increase in tax on charges payable to Solar Park Implementation Agency (SPIA) as in

terms of the MNRE Guidelines and Clause 3.6.3 of the RfS, all costs in relation to the solar park have to be borne by the Petitioner. However, it is pertinent to mention herein that this Commission itself in a similar case where the project had to be set up in a Solar power park and there was a requirement to enter into a contract as per the MNRE Guidelines, has categorically held that claim of O&M services on account of additional tax burden is not maintainable as the same is not the requirement of the PPA/ bidding documents and is not expressly included under Article 12 of the PPA.

54. NTPC has submitted that in so far as the issue of whether the SGD Notification qualifies as a Change in Law event or not, YIPL's claim in the instant Petition is wholly contrary to the Order of this Commission in the Petition No. 342/MP/2018 and Petition No. 343/MP/2018 as admittedly the Petitioner's project commissioned on 04.01.2018 which is much prior to the cut-off date for the SGD Notification to be applicable, i.e. 30.07.2018. Therefore, the test laid down by this Commission has not been met by the Petitioner. YIPL has also not demonstrated some key aspects which are germane while claiming relief of Change in Law for the SGD Notification viz. YIPL has not placed on record its procurement contract/ EPC Contract to demonstrate whether it is obligated under the said Agreement to discharge the obligation of the SGD Notification. YIPL has also not placed on record the procurement schedule in the EPC contract to ascertain whether there has been any delay in procurement causing the import of Solar Modules to take place beyond 30.07.2018 i.e. the date upon which the SGD Notification became effective.
55. NTPC has submitted that on a plain reading of Article 12 of the PPA, it is amply clear that the aggrieved party shall approach this Commission for approval of Change in Law and thereafter on acknowledgment of the Change in Law event, this Commission may 'provide relief for the same' from the date on which it will become effective. Furthermore, from a bare perusal of Article 12.2.2 it is clear that the same does not contain a provision for restitution or relief to be granted in a manner so as to place an affected party in the same economic position as if no Change in Law had occurred. Therefore, YIPL's claim for grant of carrying cost is not admissible. YIPL has wrongly placed its reliance on the Judgment of the Hon'ble

Supreme Court in *Uttar Haryana Bijli Vitran Nigam Ltd. and Anr. Vs. Adani Power Ltd. and Ors. (2019) SCC Online SC 265* upholding the Tribunal's Judgment dated 13.04.2018 in *Adani Power Ltd. vs. CERC and Ors. Appeal No. 210 of 2017*, is misplaced. The Article 13.2 of the PPA in the said Judgments specifically provided for restitution, i.e. relief of restoration to the same economic position as if Change in Law had not occurred. The issue pertaining to the entitlement of carrying cost on GST for similar PPAs is no more *res integra*, as this Commission has time and again rejected the said claim of the Solar Power Developers (SPDs) in catena of its Orders. Therefore, YIPL's claim for grant of carrying cost is incorrect and is liable to be rejected.

Analysis & Decision

56. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records.
57. The brief facts of the petition are that M/s Yarrow Infrastructure Private Limited (YIPL) has developed solar power project of 50 MW capacity based on solar photo-voltaic technology in Pavagada Solar Park, Tumkur District in the State of Karnataka. The Petitioner has submitted that imposition of the GST Laws is a Change in Law event under Article 12 of the PPA and it should be restored to the same economic condition prior to occurrence of the Change in Law by directing NTPC to pay the amount claimed in terms of Article 12 of the PPA along with carrying cost. Subsequently, the Petitioner also filed an affidavit on 14.09.2019 vide which it has submitted that imposition of Safeguard Duty on 30.07.2018 is also Change in Law event under Article 12 of the PPA and it ought to be compensated for the same.
58. Accordingly, the following issues arise before us for adjudication:

Issue No. 1: *Whether the enactment of the GST Laws and imposition of Safeguard Duty are Change in Law events under Article 12 of the PPA?*

Issue No. 2: *Whether the claim of GST on operation and maintenance expenses as prayed by the Petitioner is sustainable?*

Issue No. 3: Whether the claim of Carrying Cost as prayed by the Petitioner is sustainable?

59. No other issue was pressed or claimed.

Issue No. 1: Whether the enactment of the GST Laws and imposition of Safeguard Duty are Change in Law event under Article 12 of the PPA?

60. The Petitioner has submitted that the enactment of the GST Laws and imposition of Safeguard Duty constitute Change in law in terms of Article 12 of the PPA. Respondent NTPC 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 GST petitions decided by the Commission and 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. NTPC has submitted that based on the position of law as on date, the GST Laws prima facie would qualify as a Change in law event under Article 12 of the PPA dated 22.06.2016 executed between YIPL and NTPC. However, the same would again be subject to YIPL demonstrating 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. In so far as the issue of whether the SGD Notification qualifies as a Change in Law Event, NTPC has submitted that the Petitioner's project was commissioned on 14.12.2017 which is much prior to the cut-off date for the SGD Notification to be applicable, i.e. 30.07.2018, therefore, the test laid down by this Commission has not been met by the Petitioner and hence the claim cannot be allowed on this aspect.

61. We observe that the Commission vide its combined Order dated 27.03.2020 in Petition No. 388/MP/2018 & 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."

62. In the instant case, we observe that the Petitioner submitted its bid on 23.02.2016 and was declared successful bidder on 12.04.2016. NTPC issued the Letter of Award on 17.05.2016. The contracting parties executed the PPA on 22.06.2016 (effective date being 21.06.2016). Subsequently, the GST Laws became effective from 01.07.2017. Further, SCoD of the Petitioner's project was on 20.07.2017 i.e. after 01.07.2017. The Petitioner successfully commissioned the project on 14.12.2017. Since the PPAs in Petition No. 388/MP/2018 and Petition No. 395/MP/2018 are pari-materia with the PPA in the instant case, the above decision is also applicable in the instant petition 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.
63. Therefore, the Petitioner is entitled for relief under Article 12 of the PPA on account of cost incurred due to the GST Laws and is directed 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 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 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 PPAs. 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 PPAs as a percentage of the tariff agreed in the PPAs.

64. The billing and payment between Petitioner and NTPC are not conditional upon billing and payment between NTPC and the Karnataka Discoms. The Power Purchase Agreement (between the Petitioner and NTPC) and Power Sale Agreement (between NTPC and the Karnataka Discoms) being back-to-back in nature are interconnected implying thereby that the Karnataka Discoms are liable to pay NTPC all that NTPC has to pay to the Petitioner.
65. The Petitioner has also submitted that imposition of Safeguard Duty on 30.07.2018 is Change in Law event under Article 12 of the PPA since Safeguard duty has been imposed after 21.06.2016 i.e. execution of PPA by the contracting parties and further it ought to be compensated for the same by the Respondents.
66. We observe that similar issue has been considered and decided by the Commission in Petition No. 342/MP/2018 and Petition No. 343/MP/2018 vide Order dated 02.05.2019 wherein it was held that imposition of Safeguard Duty in terms of the SGD Notification dated 30.07.2018 qualifies as Change in Law in terms of Article 12 of the PPA therein. The relevant extract from the Order is as under:

“132. The Commission observes that the Appellate Tribunal for Electricity by the Judgment dated 14.08.2018 in Appeal No. 111 of 2017 in M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors. has decided on interpretation of “Change in Law” provision similar to the present PPAs. It was held as under: —This Tribunal has decided that any tax or application of new tax on supply of power also covers the taxes on inputs required for such generation and

supply of power to the Distribution Licensees.

133. From the above, it is apparent that any tax or application of new tax on “supply of power” covers the taxes on inputs required for such generation and supply of power to the Distribution Licensees. In the instant case, “Safeguard Duty” has been levied on import of “Solar Cells whether or not assembled in modules or panels”. The change in duties/ tax imposed by the Central Government has resulted in the change in cost of the inputs required for generation.

134. Accordingly, the Commission of the view that as per the Government of India Notification No. 01/2018-Customs (SG) dated 30.07.2018 and provision of PPAs related to “change in law” the imposition of the “Safeguard Duty” is covered under “Change in Law” under first, second and sixth bullet of Article 12 of the PPAs.

135. The Commission observes that the Notification No. 01/2018-Customs (SG) New Delhi dated 30.07.2018 stipulates that “a safeguard duty at twenty five per cent to fifteen per cent ad valorem minus anti-dumping duty payable has been levied on Solar Cells whether or not assembled in modules or panels” when imported into India “during the period from 30th July, 2018 to 29th July, 2020 (both days inclusive)”. The Commission observes that since the duration of the safeguard duty levied is two years, hence as per requirement of the Customs Tariff Act, 1975 the duty is progressively liberalized at regular intervals during the period of its imposition. The notification provides for a diminishing “Safeguard Duty” slab in the range of 25% to 15% applicable ad valorem on the imports from 30.07.2018 till 29.07.2020. The impact of “Safeguard Duty” notification is on/any portion of import whose point of taxation is on or after implementation of the Notification dated 30.07.2018 the same will be subjected to purview of “Safeguard Duty”.

136. The Commission is of the view that “Safeguard Duty” became effective from 30.07.2018 and hence the date of notification becomes the “cut-off date” for imposing the same. Meaning thereby, the notification/imposition of “Safeguard Duty” will directly affect the projects where “Solar Cells whether or not assembled in modules or panels” were imported on or after 30.07.2018 where:-

a) the bids have been accepted and crystalized before 30.07.2018 or the Power Purchase Agreements have been executed before 30.07.2018 and the Scheduled Date of Commissioning of the project is after 30.07.2018; OR

b) the bids have been accepted and crystalized before 30.07.2018 or the Power Purchase Agreements have been executed before 30.07.2018 and the Scheduled Date of Commissioning of the project is before 30.07.2018 but the same stands extended after the cut-off date i.e. 30.07.2018 due to the circumstances permitted under provisions of the executed PPAs;”

67. We observe that the contracting parties executed the PPA on 22.06.2016 (effective date being 21.06.2017). The SCoD of the project as per PPA was on 20.07.2017. The project was successfully commissioned on 14.12.2017. The Petitioner is claiming compensation on certain spares and replacement panels which were delivered after 30.07.2018, on which safeguard duty was imposed. We observe that as per the ratio and decisions held by the Commission in Petition No. 342/MP/2018 and Petition No. 343/MP/2018 vide its Order dated 02.05.2019, the notification/ imposition of Safeguard Duty will directly affect the projects where the scheduled date of commissioning of the project is after 30.07.2018. Since the project has been successfully commissioned on 14.12.2017 i.e. before 30.07.2018, we hold that the Petitioner is not eligible for any compensation qua imposition of Safeguard duty. The issue is decided accordingly.

Issue No. 2: Whether the claim of “operation and maintenance” expenses as prayed by the Petitioner is sustainable?

68. The Petitioner has submitted that its project 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. The Petitioner has submitted the following claims:
- (a) Claim payable to OEM during the Defects Liability Period
 - (b) Claim on charges payable to Solar Park Implementation Agency
69. The Petitioner has submitted that pursuant to the terms of the EPC Agreement with Tata Power Solar Systems Limited (the OEM supplier), O&M services are to be rendered by Tata Power Solar Systems Limited during the defects liability period (DLP). This was a pre-requisite in order to procure DLP of 3 years. The invoices raised by Tata Power Solar Systems Limited for O&M included imposition of GST at the rate of 18% and is being incurred in terms of the O&M Agreement with Tata Power Solar Systems Limited. Therefore, the Petitioner has claimed that it is entitled to be compensated for the same since outsourcing of O&M services has not been specifically barred under the PPA. *Per Contra*, NTPC 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.

70. A similar issue has been considered and decided by the Commission in Petition No. 388/MP/2018 and Petition No. 395/MP/2018 in Order dated 27.03.2020. The relevant extract from the 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 levelled 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.”

71. The above decision is squarely applicable in the instant case of the Petitioner qua claim payable to OEM during the Defects Liability Period. Therefore, the prayer of Petitioner to grant GST on the O&M expenses to this extent is not allowed.
72. The next issue raised by the Petitioner is that entire selection and bid process was based on the premise that the successful bidder had to set up the project in the Solar Park. The RfS and PPA made it mandatory on the Petitioner to enter into the Implementation and Support Agreement (ISA) and also to bear all costs imposed by the SPIA. The Petitioner has submitted that these charges are mandatory and in pursuance of fulfilment of contractual obligations under the PPA and ISA and are not for commercial convenience and cannot be avoided by YIPL since the activities for which the SPIA is being paid are for the Solar Park as a whole. *Per Contra*, NTPC has submitted that this Commission itself in a similar case

where the project had to be set up in a Solar power park and there was a requirement to enter into a contract as per the MNRE Guidelines, has categorically held that claim of O&M services on account of additional tax burden is not maintainable as the same is not the requirement of the PPA/bidding documents and is not expressly included under Article 12 of the PPA.

73. The relevant provisions of RfS dated 01.09.2015 is as under:

3.6 SPIA and location of solar Park.

3.6.1 The Solar PV projects to be selected by NTPC under the scheme are to be developed inside solar Park which is developed by solar Park implementing agency (SPIA).

3.6.2 Karnataka solar powered by payment Corporation Private Limited (KSPDCPL) is SPIA for this solar Park which is a joint venture company of Karnataka Renewable Energy Development Limited (KERDL) and Solar Energy Corporation of India Limited (SECI). The bidder will have to approach the SPIA for allotment of land timelines for availability position and connectivity for the projects....

3.6.3 Location of solar Park

*....
The information related to solar Park may be obtained from SPIA.*

As per MNRE guidelines bidders are advised to approach SPIA directly for all the cost to be paid to SPIA by SPDs and other details and information since developer will have to take all these into consideration in their respective bid to NTPC.

.....

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) Develop, plan, execute, implement, finance, operate and maintain the Solar Park;*
- (ii) Identify potential site and to acquire/possess land for Solar Park;*
- (iii) Carry out site related studies / investigations;*
- (iv) Obtain statutory & non statutory clearances and to make area development plan within Solar Power Park;*
- (v) Frame out transparent plot allotment policy and specify procedures*

- pursuant to the relevant State policies and their amendments thereof;*
- (vi) *Enter into Lease agreement and give possession before Financial Closure to SPD for the entire period of the Project;*
 - (vii) *Enter into an Implementation Support Agreement with SPDs for Land & associated infrastructure for development of the Project inside the Solar Park, Connectivity with the STU/ CTU System, and*
 - (viii) *Handover land to developer within 3 months of signing of PPA.*
- ...

74. The relevant provisions of PPA dated 22.06.2016 is 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 including Financial Closure at the SPD’s own cost and risk within 210 days 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 NTPC:

....

(c) *The SPD shall enter into an Implementation Support Agreement with Solar Park Implementation Agency (SPIA) for Land & associated infrastructure for development of the Project inside the Solar Park and for Connectivity with the STU/CTU System for confirming the evacuation of power by the Scheduled Commissioning date;*

...

4.1.1 *The SPD undertakes to be responsible, at SPD’s own cost and risk, for:*

...

(b) *Entering 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;”*

75. The relevant provisions of *Implementation and Support Agreement* executed with KSPDCL on 15.04.2017 is as under:

“6.2 Annual O&M Charges

Annual O&M charges of Rs. 13,250,000/- (Rupees One Crore Thirty Two Lakhs Fifty Thousand Only) calculated at the rate of Rs. 2.65 Lakhs (Rupees Two Lakhs Sixty Five Thousand only) per MW per annum in the first year which is escalated annually at the rate of 5% shall be payable by SPD on or before 30th April (Due Date) at the beginning of each financial year during the agreement period. First year annual

O&M charges shall be payable by SPD on pro-rata basis within 30 days from the COD. Service tax and all other taxes, duties, cess and Government levies applicable on such transaction shall be reimbursed to the SPPD by the SPD within 7 days from the date of issue of bill by SPPD.”

76. From the above, we observe that SPDs to be selected by NTPC under the scheme were to be developed inside the solar park (developed by SPIA). As per the scheme, SPIA was to enter into an 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, As per the PPA the responsibility for entering into an ISA with SPIA for land & associated infrastructure for development of the project inside the Solar Park and for connectivity with the STU/CTU System for confirming the evacuation of power by the SCoD was at SPD's own cost and risk. It is also observed that the Petitioner had to pay annual O&M charges which as per ISA were calculated at the rate of Rs. 2.65 lakhs per MW per annum escalated annually at the rate of 5% thereafter. We are of the view that the increase in O&M expenses due to GST Laws being levied on the Petitioner is levied due to its location in the Solar Park and is of mandatory nature, as per the *Implementation and Support Agreement*. These O&M charges are related to land & associated infrastructure for development of the project inside the Solar Park and for connectivity with the STU/CTU System and are not due to any outsourcing/ commercial decision of the Petitioner. Therefore, we hold that the prayer of Petitioner for increased charges on account of GST payable to SPIA is allowed.

Issue No. 3: Whether the claim of “Carrying Cost” as prayed by the Petitioner is sustainable?

77. The Petitioner has 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. For the Petitioner to effectively perform its obligations under the PPA, it is imperative that tariff be suitably revised so as to bring the Petitioner to a position as if the introduction of the GST Laws never occurred. 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 Change in Law by receiving carrying cost.

78. On the other hand, the Respondents have submitted that there is no provision in the PPA regarding carrying cost or interest for the period till the decision of the Commission acknowledging 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 the amount is determined by the Commission, the Petitioner can raise a supplementary invoice for the amount so computed. 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. In the present case, the payment is due only after issuance of supplementary invoice after the decision of the Commission. NTPC has submitted that the PPA does not have a provision dealing with restitution principles of restoration of the Petitioner to same economic position.
79. We have considered the submissions of the Petitioner and the Respondents. The issue of carrying cost has been dealt 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, wherein 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.”

80. 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.”

81. We note that the PPA in the instant matter does 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.

82. 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 respective 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 further 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 NTPC are not conditional on billing and payment between NTPC and the Karnataka Discoms. The PPA (between the Petitioner and NTPC) and PSA (between NTPC and the Karnataka Discoms) being back to back in nature are interconnected implying thereby that the Karnataka Discoms are liable to pay to NTPC all that NTPC has to pay to the Petitioner.
 - c. The Petitioner is not eligible for compensation qua imposition of Safeguard duty.
 - d. The prayer of Petitioner to compensate on account of GST on the O&M qua claim payable to OEM during the Defects Liability Period is not allowed.
 - e. The prayer of Petitioner to compensate on account of GST on O&M qua charges payable to SPIA is allowed.

f. The claim regarding 'carrying cost' is not admissible.

83. Accordingly, the Petition No. 213/MP/2019 is disposed of.

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