



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 308/MP/2022

कोरम/ Coram:

श्री जिष्णु बरुआ, अध्यक्ष/Shri Jishnu Barua, Chairperson
श्री आई. एस. झा, सदस्य/ Shri I. S. Jha, Member
श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member
श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 16th of January, 2024

IN THE MATTER OF:

A Petition under Section 79 of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement dated 08.06.2020, filed on behalf of Avaada Sustainable RJProject Private Limited and Solar Energy Corporation of India Limited seeking a declaration that change in Goods and Services Tax from 5% to 12% w.e.f. 01.10.2021 on account of amendment to Notification Nos. 1/2017- Central Tax (Rate), 01/2017- Integrated Tax (Rate) dated 28.06.2017 and Finance Department (Govt. of Rajasthan) Notification No. F.12(56)FD/Tax/2017-Pt- I-40 dated 29.06.2017 by way of Notification No. 8/2021- Central Tax (Rate), Notification No. 8/2021- Integrated Tax (Rate) dated 30.09.2021 and Finance Department (Govt. of Rajasthan) Notification No. F.12(1)FD/Tax/2021-60 dated 30.09.2021 as a Change in Law event under Article 12 of the PPA and to direct Solar Energy Corporation of India Limited to compensate along with applicable carrying cost towards additional expenditure incurred on account of increase in rate of Goods and Services tax, paid by the Petitioner and to restitute Avaada Sustainable RJProject Private Limited to the same economic position as it would have been prior to the Notifications dated 30.09.2021

AND IN THE MATTER OF:

Avaada Sustainable RJProject Private Limited

138, Ansal Chambers II,
Bhikaji Cama Place, Delhi – 110066

...Petitioner

Versus

1. **M/s Solar Energy Corporation of India Limited,**
6th Floor, Plate-B, NBCC Office Block,
Tower-2, East Kidwai Nagar,
New Delhi-110 023
2. **Tamil Nadu Generation and Distribution Corporation Limited,**
NPKRR Maligai, 6th Floor,
Eastern Wing, 144, Anna Salai,
Chennai- 600002
3. **Southern Power Distribution Company of Telengana Limited,**
Corporate Office- #6-1-50, Mint Compound,
Hyderabad- 500063
4. **Northern Power Distribution Company of Telengana Limited,**
House No. 2-5-31/2, Corporate Office,
Vidyut Bhawan,
Nakkallgutta, Hanamkonda
Warangal-506001

...Respondents

Parties Present:

Shri Abhishek Kumar, Advocate, ASRJPPPL
Shri Shubham Mudgil, Advocate, ASRJPPPL
Ms. Elwin Ruth, Advocate, ASRJPPPL
Shri Amit Ojha, ASRJPPPL
Ms. Srishti Khindaria, Advocate, SECI
Shri Aneesh Bajaj, Advocate, SECI

आदेश/ ORDER

The Petitioner, M/s Avaada Sustainable RJProject Private Limited (ASRPL), is a generating company and has set up a 300MW solar power project in the State of Rajasthan. Avaada

Energy Private Limited (parent company of the Petitioner) participated in the bidding process and submitted its bid on 18.10.2019. As part of the bidding process, the e-reverse auction was conducted on 31.10.2019, and Avaada Energy Private Limited was declared as the successful bidder with a levelized tariff of Rs. 2.71/ kWh with an allocated capacity of 300 MW. Accordingly, a Letter of Award dated 25.11.2019 was issued by the Solar Energy Corporation of India Limited. The Petitioner and Solar Energy Corporation of India (SECI) executed the Power Purchase Agreement (PPA) on 08.06.2020 for the supply of 300 MW of solar power from the project for onward sale to TANGEDCO and/or TDISCOMs. The Petitioner has filed the present petition seeking a declaration that the change/increase in the rate of Goods and Services Tax (GST) from 5% to 12% with effect from 01.10.2021 on account of amendment to Notification Nos. 1/2017- Central Tax (Rate), 01/2017- Integrated Tax (Rate) dated 28.06.2017 and Finance Department (Govt. of Rajasthan) Notification No. F.12(56)FD/Tax/2017-Pt- I-40 dated 29.06.2017 by way of Notification No. 8/2021- Central Tax (Rate), Notification No. 8/2021- Integrated Tax (Rate) dated 30.09.2021 and Finance Department (Govt. of Rajasthan) Notification No. F.12(1)FD/Tax/2021-60 dated 30.09.2021 as a 'Change in Law' event under Article 12 of the PPA dated 08.06.2020 and compensation thereof. The Petitioner has executed two agreements i.e. agreement for Supply dated 10.08.2020 with its parent company-Avaada Energy Private Limited (AEPL) and agreement dated 10.08.2020 with affiliate-Avaada Clean Project Private Limited (ACPPL) for supply of goods (solar PV modules, balance plant equipment) and services (like erection, installation, commissioning and testing of solar power generating system) for development of Solar Power Generating System (EPC Contract)

2. Respondent No. 1, Solar Energy Corporation of India Limited (SECI), has been set up under the administrative control of the Ministry of New and Renewable Energy (MNRE). SECI is an inter-state trading licensee that has been designated as a nodal agency by the Government of India for developing and facilitating the establishment of grid-connected solar power capacity in India in terms of the Government of India's policy for the promotion of solar power in the country.
3. Respondent No. 2, Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO), is a power generation and distribution company owned by the Government of Tamil Nadu and is engaged in the activities of promoting the coordinated development of

Generation and Distribution of electricity within the state in a most efficient and economical manner.

4. Respondent No.'s 3 & 4 are the distribution companies (DISCOMs) engaged in power distribution activities in the state of Telangana.
5. The Petitioner has made the following prayers:
 - a) *Admit the instant Petition and list the same for urgent hearing;*
 - b) *Acknowledge, approve and declare the issuance of **GST Amendment Notifications**, as a 'change in law' event under Article 12 of the PPA;*
 - c) *Hold and declare that the Petitioner is entitled to claim relief under Article 12 of the PPA for the additional expenditure incurred on account of the occurrence of the 'change in law' event, i.e., issuance of the GST Amendment Notifications;*
 - d) *Direct the Respondent No.1/SECI to pay a one time compensation of Rs. 63,61,99,494/- (Rupees Sixty Three Crores Sixty One Lakhs Ninety Nine Thousand Four Hundred Ninety Four Only), with applicable interest, to the Petitioner in lieu of the additional expenditure incurred on account of the aforesaid change in law event;*
 - e) *Direct the Respondent No.1/SECI to pay the carrying cost to the Petitioner from the period of payment of additional expenditure on account of the aforesaid 'change in law' event, upto the date of reimbursement by the Respondent No.1/SECI;*
 - f) *In the alternative to prayer (d) above, direct the Respondent No.1/SECI to make payment of Rs. 63,61,99,494/- (Rupees Sixty Three Crores Sixty One Lakhs Ninety Nine Thousand Four Hundred Ninety Four Only), towards 'change in law' compensation by way of annuity method by considering discounting factor at a rate which may be considered appropriate by this Hon'ble Commission;*
 - g) *Direct the Respondent No.1/SECI to reimburse the legal and administrative costs incurred by the Petitioner in pursuing the instant Petition;*
 - h) *Any errors/ omissions may kindly be condoned, and opportunity be kindly given to rectify the same and also submit additional pleadings at a suitable later date, if required; and*
 - i) *Grant such order, further relief(s) in facts and circumstances of the case as this Hon'ble Commission may deem just and equitable in favour of the Petitioner.*

Factual Matrix

6. The brief facts of the case are as under:

Location	Village Noorsar, Bikaner, Rajasthan
Nodal agency	SECI
Tariff	<i>Rs.2.71/kWh</i>
Date of Notification No.1/2017-Central Tax (Rate)	28.06.2017
Date of Notification No.1/2017-Integrated Tax (Rate)	28.06.2017
Date of Notification No. F.12(56) FD/Tax/2017-Pt-I-40 issued by Finance department (Government of Rajasthan)	29.06.2017
RfS issued on	28.06.2019
Bid submitted by AEPL on	18.10.2019
E-Reverse auction held on	31.10.2019
LOA issued on	25.11.2019
Capacity (MW)	300 MW
Power	Solar
Power Sale Agreement (PSA) executed on	<u>with TANGEDCO- 05.05.2020;</u> <u>with Telangana Discoms-</u> 21.01.2020
Effective date of the PPA	11.05.2020
PPA executed on	08.06.2020
Agreements for supply and services were executed between ASRPL with Avaada Energy Private Limited and other with Avaada Clean Project Private Limited, for supply of solar PV modules, balance plant equipment and associated services like erection, installation, commissioning and testing of solar power generating system.	10.08.2020
Tariff was adopted in Petition No. 552/AT/2020 on	19.03.2021
SCOD of the project	11.11.2021
Date of Notification of 8/2021- Central Tax (Rate) and Notification No. 8/2021- Integrated Tax (Rate)	30.09.2021
Date of Notification No. F.12 (56) FD/Tax/2017-Pt-I-49	30.09.2021
Extended SCOD by SECI	23.08.2021 12.05.2022
COD of the project	<i>100 MW- 14.01.2022</i> <i>50 MW- 07.02.2022</i> <i>50 MW- 12.04.2022</i> <i>100 MW- 11.05.2022</i>

7. The present petition was filed on 01.10.2022. The petition was listed for hearing on 11.04.2022, wherein the Commission, after hearing the submission of the parties, admitted the Petition. The hearing was also conducted on 12.07.2023, where the Commission directed the parties to file their respective submissions. Further hearing was conducted on 22.09.2023 wherein the Commission, after hearing the submissions of the parties, reserved the matter for orders and directed the parties to file their written submissions. Pursuant to the directions of the Commission, the parties filed their respective submissions.

Submissions of the Petitioner

8. Briefly, the Petitioner has submitted as under:
- a) The imposition of Notification No. 8/2021- Central Tax (Rate), Notification No. 8/2021- Integrated Tax (Rate) dated 30.09.2021 and Finance Department (Govt. of Rajasthan) Notification No. F.12(1)FD/Tax/2021-60 dated 30.09.2021 (“2021 GST Notifications”) have changed the rate of tax for setting up the project due to which Petitioner had to incur additional expenditure and therefore amounts to change in law event. Further, the additional amount incurred by ASRPL in developing the project on account of the issuance of the GST Amendment Notifications is approximately Rs. 56,41,91,774 under the Module Supply Agreement (Supply Contract) and Rs. 7,20,07,720 under the EPC Contract (Works Contract), cumulatively amounting to Rs. 63,61,99,494.
 - b) The issuance of the 2021 GST Notifications occurred after the last date of bid submission, i.e., 18.10.2019, and ASRPL could not have foreseen such an event. Therefore, it squarely attracts Article 12 of the PPA, thereby entitling ASRPL to Change in Law relief stipulated under Article 12 of the PPA. Even MNRE, on 27.09.2022, requested the RE implementing agencies, including SECI to consider the increase in GST rates as a change in law event. So, the Petitioner is entitled to additional expenditure due to the said event.
 - c) SECI is liable to reimburse the additional expenditure amounting to Rs. 63,61,99,494 either by way of lump sum one-time compensation along with applicable carrying cost; or by following annuity method considering discounting factor of 10.41% as granted by this Commission vide its order dated 20.08.2021 in Petition No. 536/MP/2020 for complete restitution of the Petitioner as per the terms of the PPA. In response to the reliance placed by SECI on *CERC (Terms and Conditions of Tariff*

determination from Renewable Energy Sources) Regulations, 2020 and RE Tariff Order dated 31.03.2021, the same are not applicable as the Petitioner's Project has been constructed and implemented pursuant to a competitive bidding process under Section 63 of the Act. Assuming without conceding that the tariff regulations and tariff orders issued by this Commission are applicable, it is submitted that the Project achieved commissioning on 11.05.2022 while the tariff order dated 07.11.2022 was in operation. In the said tariff order dated 07.11.2022, the interest rate was determined as 9.12% and the term of the loan repayment as 15 years. Therefore, even applying the rate of interest specified by this Commission for the purposes of compensation for Change in Law, discount rate of 9.12% and annuity period of 15 years shall be declared to be the appropriate methodology.

Submissions of SECI

9. Briefly, SECI has submitted that in order to qualify for any relief under Article 12 of the PPA, the claims raised by the Petitioner should fall within the scope and ambit of the said provision. If there are two separate contracts, one for the supply of goods and one for the erection of services, etc., the supply of goods will attract a GST of 12%, and the supply of services will attract a GST of 18%. The extent of relief is admissible to the Petitioner on account of the Notification dated 30.09.2021 and is subject to examination and verification of documents by SECI/TANGEDCO/Telangana Discoms. SECI has also submitted that this Commission may clarify the cut-off date for considering the change in law impact as the actual commercial operation date of the project. After CERC's order dated 20.08.2021 in Petition No. 536/MP/2020, there has been a fall in the interest rate of loan, and the Commission has notified the *Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020 and RE Tariff Order dated 31.03.2021*. In the said regulations read with RE tariff Order, the Commission has considered the interest rate of 9% and the term of the Loan repayment as 15 years instead of 13 years earlier considered. The same parameters for making payment on an annuity basis may be considered by the Commission in case compensation is allowed. Telangana Discoms may be directed to make payment towards the evaluated claims of the Customs Duty and GST payable by SECI to the Petitioner on a back-to-back basis under the PSA in a time-bound manner.

Analysis and Decision

10. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records and considered the submissions of the parties.

11. On the basis of the submissions of the contracting parties, the following issues arise for adjudication:

Issue No. I: *Whether Notification No. 8/2021- Central Tax (Rate), Notification No. 8/2021- Integrated Tax (Rate) dated 30.09.2021 and Finance Department (Govt. of Rajasthan) Notification No. F.12(1)FD/Tax/2021-60 dated 30.09.2021 (“2021 GST Notifications”) amount to Change in Law events under Article 12 of the Power Purchase Agreement dated 18.01.2019? AND Whether the Petitioner is entitled to compensation towards additional expenditure on account of the Change in Law event in terms of Article 12.2 of the PPA?*

Issue No. II: *What should be the discount rate for the calculation of Annuity for payment of compensation (if any) on account of Change in Law?*

Issue No. III: *Is the Petitioner entitled to carrying cost towards compensation for Change in Law?*

12. Now, we proceed to discuss the above issues.

Re: Issue No. I

13. The Petitioner has submitted that the following notifications amount to change in law events under Article 12 of PPA dated 08.06.2020:

- a) *introduction of Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021, both issued by Ministry of Finance, Government of India;*
- b) *introduction of Notification No. 8/2021- Integrated Tax (Rate) dated 30.09.2021, both issued by Ministry of Finance, Government of India; and*
- c) *introduction of Finance Department (Government of Rajasthan) Notification No. F.12(1)FD/Tax/2021-60 dated 30.09.2021).*

(Collectively referred hereinafter as ‘2021 GST Notifications’)

14. We observe that Article 12 of the PPA dated 08.06.2020 stipulates as under:

ARTICLE 12: CHANGE IN LAW

12.1 Definitions

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

*In this Article 12, the term **Change in Law shall refer to the occurrence of any of the following events pertaining to this project only after the last date of the bid submission, including (i) the enactment of any new law; or (ii) an amendment, modification or repeal of an existing law; or (iii) the requirement to obtain a new consent, permit or license; or (iv) any modification to the prevailing conditions prescribed for obtaining an consent, permit or license, not owing to any default of the Solar Power Generator; or (v) any change in the rates of any Taxes including any duties and cess or introduction of any new tax made applicable for setting up the solar power project and supply of power from the Solar Power project by the SPD which have a direct effect on the Project.***

However, Change in Law shall not include (i) any change in taxes on corporate income or (ii) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD, or (iii) any change on account of regulatory measures by the Appropriate Commission.”

In the event a Change in Law results in any adverse financial loss/ gain to the Solar Power Generator then, in order to ensure that the Solar Power Generator is placed in the same financial position as it would have been had it not been for the occurrence of the Change in Law, the Solar Power Generator/ Procurer shall be entitled to compensation by the other party, as the case may be, subject to the condition that the quantum and mechanism of compensation payment shall be determined and shall be effective from such date as may be decided by the Appropriate Commission.

It the event of any decrease in the recurring/ nonrecurring expenditure by the SPD or any income to the SPD on account of any of the events as indicated above, SPD shall file an application to the appropriate commission no later than sixty (60) days from the occurrence of such event, for seeking approval of Change in Law. In the event of the SPD failing to comply with the above requirement, in case of any gain to the SPD, SECI shall withhold the monthly tariff payments on immediate basis, until compliance of the above requirement by the SPD.

12.2 Relief for Change in Law

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

12.2.2 The decision of the Appropriate 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. We observe that the Notification No. 1/2017- Central Tax (Rate), Notification No. 1/2017- Integrated Tax (Rate) both dated 28.06.2017 and Notification No. F.12 (56) FD/Tax/2017-Pt-I-140, dated 29.06.2018, stipulate as under:

Schedule I- 2.5%

Sr.	Chapter/	Description of Goods
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No.	Heading/ /Sub-heading/ Tariff-item	
234	84, 85 or 94	<p><u>Following renewable energy devices & parts for their manufacture:</u></p> <p>(a) Bio-gas plant;</p> <p>(b) Solar power based devices;</p> <p>(c) <u>Solar power generating system;</u></p> <p>(d) Wind mills, Wind Operated Electricity Generator (WOEG);</p> <p>(e) Waste to energy plants / devices;</p> <p>(f) Solar lantern / solar lamp;</p> <p>(g) Ocean waves/tidal waves energy devices/plants;</p> <p>(h) Photo voltaic cells, whether or not assembled in modules or made up into panels;</p>

16. We observe that the 2021 GST Notifications stipulate as under:

(b) in Schedule II – 6%, -

...

(iv) after S. No. 201 and the entries relating thereto, the following S. No. and entries shall be inserted, namely: -

201 A	84, 85 or 94	<p>Following renewable energy devices & parts for their manufacture: -</p> <p>(a) Bio-gas plant</p> <p>(b) Solar power-based devices</p> <p>(c) Solar power generating system</p> <p>(d) Wind mills, Wind Operated Electricity Generator (WOEG)</p> <p>(e) Waste to energy plants / devices</p> <p>(f) Solar lantern / solar lamp</p> <p>(g) Ocean waves/tidal waves energy devices/plants</p> <p>(h) Photo voltaic cells, whether or not assembled in modules or made up into panels.</p> <p><i>[Explanation: If the goods specified in this entry are supplied, by a supplier, along with supplies of other goods and services, one of which being a taxable service specified in the entry at S. No. 38 of the Table mentioned in the notification No. 11/2017-Central Tax (Rate), dated 28th June, 2017 [G.S.R. 690(E)], the value of supply of goods for the purposes of this entry shall be deemed as seventy per cent. of the gross consideration charged for all such supplies, and the remaining thirty per cent. of the gross consideration charged shall be deemed as value of the said taxable service.</i></p>
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17. From the above, we observe that Clause (v) of Article 12 of the PPA, in seriatim, specifically stipulates that *any change in rates of taxes, duties and cess, or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power from the Solar*

Power Project by the SPD which have a direct effect on the Project, is a Change in Law event. The Notification No. 8/2021- Central Tax (Rate) and Notification No. 8/2021- Integrated Tax (Rate) dated 30.09.2021 have been issued by the Ministry of Finance, Government of India and Notification No. F.12 (1) FD/Tax/2021-60 dated 30.09.2021 has been issued by the Finance Department (Government of Rajasthan). The change in rate of Goods and Services Tax from 5% to 12% w.e.f. 01.10.2021 has resulted in the change in the cost of the inputs required for generation, and the same is considered as 'Change in Law'. Hence, we hold that the impugned notifications viz the 2021 GST Notifications are Change in Law events as per Article 12 of the PPA dated 08.06.2020. It is pertinent to mention here that the view taken is consistent with similar orders issued by the Commission, viz. order dated 05.04.2023 in Petition No. 268/MP/2021; order dated 05.04.2023 in Petition No.216/MP/2022 and order dated 21.04.2023 in Petition No. 219/MP/2022; order dated 17.05.2023 in Petition No. 174/MP/2022; order dated 20.07.2023 in Petition No. 273/MP/2021.

18. In the instant petition, the bid was submitted by the Petitioner on 18.10.2019. The e-Reverse auction was conducted on 31.10.2019. PPA was executed between the Petitioner and SECI on 08.06.2020, and the SCoD of the project was 11.11.2021. In terms of the extended SCoD, the Project was required to be commissioned on or before 12.05.2022. The Petitioner commissioned the full capacity of its project on 11.05.2022, whereas the 2021 GST Notifications were notified on 30.09.2021. As such, the Petitioner's project was affected by the impugned Notifications and is entitled to relief under the GST Laws as per the terms of Article 12 of the PPA.
19. Accordingly, the Commission hereby directs the contracting parties to carry out the reconciliation of additional expenditure along with carrying cost by exhibiting clear and one-to-one correlation with the projects and the invoices raised supported with an auditor certificate. The Commission further directs that the responding Discoms are liable to pay SECI all the above-reconciled claims that SECI has to pay to ASRPL. However, payment to ASRPL by SECI is not conditional upon the payment to be made by the responding Discoms to SECI.
20. The issue is answered accordingly.

Re: Issue No. II

What should be the discount rate for the calculation of Annuity for payment of compensation (if any) on account of Change in Law?

21. ASRPL has submitted that SECI is liable to reimburse the additional expenditure either by way of lump sum one time compensation along with applicable carrying cost or by following the annuity method considering discounting factor of 10.41% as granted by this Commission vide its order dated 20.08.2021 in Petition No. 536/MP/2020. *Per contra*, SECI has submitted that there has been a fall in the interest rate of the loan, and the Commission has notified the *Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020* and *RE Tariff Order* dated 31.03.2021. In the said regulations read with RE tariff Order, the Commission has considered the interest rate of 9% and the term of the Loan repayment as 15 years instead of 13 years earlier considered. The same parameters for making payment on an annuity basis may be considered by the Commission in case compensation is allowed. Telangana Discoms may be directed to make a payment towards the evaluated claims of the Customs Duty and GST payable by SECI to the Petitioner on a back-to-back basis under the PSA in a time-bound manner.
22. We observe that this Commission, in its earlier order dated 20.08.2021 in the Petition No. 536/MP/2020, has already decided on the methodology of compensation due to Change in Law events as under:
65. *We find that in Petition No. 536/MP/2020, SECI and the Respondents (SPDs as well as the Discoms) are on the same page in so far as the rate of interest on loan is considered. This is evident from the computation of the weighted average cost of capital advanced by the contending parties. Majority of the parties have used 10.41% (as mentioned in the CERC RE Tariff Order dated 19.03.2019) as the reference rate of interest for building their arguments for the rate of annuity payment. In other words, the parties have accepted this rate as the appropriate normative rate of interest for any debt that they might have taken. Given the fact that it is not possible in case of competitive bidding projects to ascertain either the capital structuring (extent of debt and equity) of the projects, or the actual rate of interest of the debt component or the expected rate of return on equity, we consider it appropriate to use the normative rate of 10.41% as reference for the purpose of annuity payment. As the actual deployment of capital by way of debt or equity and their cost in terms of rate of interest or return, respectively, is unknown, the rate 10.41% can be taken as the uniform rate of compensation for the entire expenditure incurred on account of GST Laws or Safeguard Duty. The Commission is of the view that the compensation for change in law cannot be a source for earning profit, and therefore, there cannot be any higher rate of return than the prevailing normative cost of debt. Accordingly, we hold that 10.41% shall be the discount rate of annuity payments towards the expenditure*

incurred on GST or Safeguard Duty (as the case may be) by the Respondent SPDs on account of 'Change in Law'.

Commencement of 'Monthly Annuity Payments' and "Late Payment Surcharge"

66. *Further, SPDs have submitted that the 'Monthly Annuity Payment' of GST claims ought to start from COD taking into consideration the provisions of applicable 'Late Payment Surcharge' in the PPAs in case of delayed payments*
67. *We observe that in the Petitions filed by the SPDs where claims under Change in Law were adjudicated, the Commission has directed SPDs to make available to SECI/ Discoms all relevant documents exhibiting clear and one to one correlation between the projects and the supply of goods or services, duly supported by the relevant invoices and Auditor's Certificate. SECI/ Discoms were further directed to reconcile the claims for Change in Law on receipt of the relevant documents and pay the amount so claimed to SPDs. It was also held that SECI is liable to pay to SPDs which is not conditional upon the payment to be made by the Discoms to SECI. However, SECI is eligible to claim the same from the Discoms on 'back to back' basis. The claim was directed to be paid within sixty days of the date of respective orders or from the date of submission of claims by SPDs whichever was later failing which it will attract late payment surcharge as provided under PPAs/PSAs. Alternatively, SPDs and the SECI/ Discoms may mutually agree to a 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.*
68. *In view of the above, the liability of SECI/ Discoms for 'Monthly Annuity Payment' starts from 60th (sixtieth) day from the date of orders in respective petitions or from the date of submission of claims by the Respondent (SPDs), whichever is later. In case of delay in the Monthly Annuity Payment beyond the 60th (sixtieth) day from the date of orders in respective petitions or from the date of submission of claims by the Respondent (SPDs), whichever is later, late payment surcharge shall be payable for the delayed period corresponding to each such delayed Monthly Annuity Payment(s), as per respective PPAs/PSAs.*

Tenure of 'Annuity Period'

69. *SPDs have submitted that the annuity period should be 13 years. It is observed that SECI has revised the proposal of annuity payments by considering the annuity period of 13 years instead of 25 years as proposed earlier. Further, SECI has stated that the payment shall be provisional and subject to final decision of this Commission in respective petitions. The period of 13 years is consistent with Regulation 14 of the RE Tariff Regulations, 2017 which stipulates as under:*

"14. Loan and Finance Charges

Loan Tenure

For the purpose of determination of tariff, loan tenure of 13 years shall be considered."

70. *We observe that as there seems to a general acceptance amongst SECI and the Respondent SPDs that the Annuity Period could be of 13 years, as such the same is approved by the Commission.*

23. We note that the issue of the determination of the appropriate methodology for payment of compensation on account of the Change in Law event has already been decided by us in earlier orders. We have taken the view that in the case of competitive bidding projects, it is not possible to ascertain either the capital structuring (extent of debt and equity) of the projects, the actual rate of interest of the debt component or the expected rate of return on equity. As the actual deployment of capital by way of debt or equity and their cost in terms of rate of interest or return, respectively, is unknown, the normative rate of interest as determined by CERC in its RE Tariff Regulations/Orders can be taken as the uniform rate of compensation for the entire expenditure incurred on account of Change in Law. *The compensation for change in law cannot be a source for earning profit, and therefore, there cannot be any higher rate of return than the prevailing normative cost of debt.*
24. We note that the Petitioner's project achieved actual commercial operation on 11.05.2022, which is during FY 2022-23. The Commission notified the RE Tariff Order dated 07.11.2022 for FY-2022-2023, in pursuance of the CERC (*Terms and Conditions for Tariff determination from Renewable Energy Sources*) Regulations, 2020, wherein the Commission considered the interest rate of 9.12% and the term of the loan repayment as 15 years. Therefore, applying the principle decided by this Commission in the Order dated 20.08.2021 in Petition No. 536/MP/2020, that the ***compensation for change in law cannot be a source for earning profit, and therefore, there cannot be any higher rate of return than the prevailing normative cost of debt***, we hold that the *discount rate of 9.12% and annuity period of 15 years* shall be the appropriate methodology towards change in law compensation.
25. Further, the Commission holds that the liability of SECI/ Discoms for '*Monthly Annuity Payment*' shall start from the 60th (sixtieth) day from the date of this order or from the date of submission of claims by the Respondent, whichever is later. In case of delay in the Monthly Annuity Payment beyond the 60th (sixtieth) day from the date of this order or from the date of submission of claims by the Petitioner, whichever is later, a late payment surcharge shall be payable for the delayed period corresponding to each such delayed Monthly Annuity Payment(s), as per respective PPAs/PSAs.
26. The issue is answered accordingly.

Re: Issue No. III

Is the Petitioner entitled to carrying cost towards compensation for Change in Law?

27. The Petitioner has submitted that as a relief for the occurrence of the ‘Change in Law’ event, the Petitioner is entitled to claim carrying cost, specifically in view of the principle of complete restitution in terms of Article 12 of the PPA, and the general law applicable to grant of carrying cost/interest. Further, if the Petitioner’s claim for interest/carrying cost is denied, then mere compensation after the lapse of time will have diminished value and severely affect the economic position of the Petitioner. In order to restore the affected party to the same economic position as if a change in law event has not occurred, the carrying cost has to be allowed at actuals. Reliance is placed on APTEL judgement dated 16.11.2021 in A.No. 163 of 2020 and in A.No. 171 of 2020 in the matter of *Nisagra Renewable Energy Private Limited v. Maharashtra State Electricity Distribution Co. Ltd. & Anr* and *Juniper Green Energy Private Limited v. Maharashtra State Electricity Distribution Co. Ltd. & Anr.* (Nisagra judgement).
28. *Per-contra*, SECI has submitted that the carrying cost is to be restricted to the cost of financing of a prudent and efficient utility i.e. the interest rate at which such utility can borrow money from the lenders and financial institutions after due and sincere efforts to minimize the interest cost. The Commission may consider the decision of the Hon’ble Supreme Court (dated 12.12.2022 in Civil Appeal No. 8880 of 2022 and Civil Appeal bearing Diary No. 135 of 2023 dated 23.01.2023) to maintain parity between the cases pending before the Commission. The Commission may direct that enforcement of any order of the Commission passed on the aspects covered in the APTEL’s judgment dated 15.09.2022 in A.No. 256 of 2019 & Batch titled as *Parampujya Solar Energy Private Limited & Ors. vs. CERC & Ors.* (Parampujya case) will take place after the decision of the Hon’ble Supreme Court to maintain such parity.
29. We observe that Article 12 of the PPAs deals with Change in Law, inter-alia, as under:

ARTICLE 12: CHANGE IN LAW

12.1 Definitions

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

*In this Article 12, the term **Change in Law shall refer to the occurrence of any of the following events pertaining to this project only after the last date of the bid submission, including (i) the enactment of any new law; or (ii) an amendment, modification or repeal of an existing law; or (iii) the requirement to obtain a new consent, permit or license; or (iv) any modification to the prevailing conditions prescribed for obtaining an consent, permit or license, not owing to any default of the Solar Power Generator; or (v)***

any change in the rates of any Taxes including any duties and cess or introduction of any new tax made applicable for setting up the solar power project and supply of power from the Solar Power project by the SPD which have a direct effect on the Project.

However, Change in Law shall not include (i) any change in taxes on corporate income or (ii) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD, or (iii) any change on account of regulatory measures by the Appropriate Commission.”

In the event a Change in Law results in any adverse financial loss/ gain to the Solar Power Generator then, in order to ensure that the Solar Power Generator is placed in the same financial position as it would have been had it not been for the occurrence of the Change in Law, the Solar Power Generator/ Procurer shall be entitled to compensation by the other party, as the case may be, subject to the condition that the quantum and mechanism of compensation payment shall be determined and shall be effective from such date as may be decided by the Appropriate Commission.

It the event of any decrease in the recurring/ nonrecurring expenditure by the SPD or any income to the SPD on account of any of the events as indicated above, SPD shall file an application to the appropriate commission no later than sixty (60) days from the occurrence of such event, for seeking approval of Change in Law. In the event of the SPD failing to comply with the above requirement, in case of any gain to the SPD, SECI shall withhold the monthly tariff payments on immediate basis, until compliance of the above requirement by the SPD.

12.2 Relief for Change in Law

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

12.2.2 The decision of the Appropriate 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.”

30. We observe that the Hon’ble Supreme Court vide judgement dated 25.02.2019 in the matter of *Uttar Haryana Bijili Vitran Nigam Ltd. & Anr. v. Adani power Ltd. & Ors.* (Uttar Haryana judgement) has held as under:

Article 13.2 is an in-built restitutionary principle which compensates the party affected by such change in law and which must restore, through monthly tariff payments, the affected party to the same economic position as if such change in law has not occurred. This would mean that by this clause a fiction is created, and the party has to be put in the same economic position is if such change in law has not occurred, i.e., the party must be given the benefit of restitution as understood in civil law...

...

13. 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.***

31. From the above, we observe that Article 12.1 of the PPA dated 08.06.2020 specifically stipulates that in the event a Change in Law results in any adverse financial loss/ gain to the solar power generator, in order to ensure that the solar power generator is placed in the same financial position as it would have been had it not been for the occurrence of the Change in Law. We further observe that the Hon'ble Supreme Court vide *Uttar Haryana judgement* dated 25.02.2019 has held that in case there is an in-built restitutionary principle in the PPA, the affected party has to be put in the same economic position as if such change in law has not occurred, i.e., the party must be given the benefit of restitution as understood in civil law.
32. ASRPL, in the instant petitions, shall be eligible for carrying cost starting from the date when the actual payments were made to the Authorities till the date of issuance of this Order at the actual rate of interest paid by ASRPL for arranging funds (supported by Auditor's Certificate) or the rate of interest on working capital as per applicable RE Tariff Regulations prevailing at that time or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by ASRPL in terms of this order, the provision of a Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within the due date.
33. Accordingly, the Commission hereby directs the contracting parties to carry out the reconciliation of additional expenditure along with carrying cost by exhibiting clear and one-to-one correlation with the projects and the invoices raised supported with an auditor certificate. The Commission further directs that the responding Discoms are liable to pay SECI

all the above-reconciled claims that SECI has to pay to ASRPL. However, payment to ASRPL by SECI is not conditional upon the payment to be made by the responding Discoms to SECI.

34. Further, APTEL, vide judgment dated 15.09.2022 in A.No. 256 of 2019 & Batch titled as *Parampujya Solar Energy Private Limited &Ors. vs. CERC &Ors.* held as under:

...
*109. The other captioned appeals – Appeal no. 256 of 2019 (Parampujya Solar Energy Pvt. Ltd &Anr. v. CERC &Ors.), Appeal no. 299 of 2019 (Parampujya Solar Energy Pvt. Ltd. v. CERC &Ors.), Appeal no. 427 of 2019 (Mahoba Solar (UP) Private Limited v. CERC &Ors.), Appeal no. 23 of 2022 (Prayatna Developers Pvt. Ltd. v. CERC &Ors.) Appeal no. 131 of 2022 (Wardha Solar (Maharashtra) Private Ltd. &Anr. v. CERC &Ors.) and Appeal no. 275 of 2022 (Parampujya Solar Energy Pvt. Ltd. &Anr. v. CERC &Ors.) - deserve to be allowed. **We order accordingly directing the Central Electricity Regulatory Commission to take up the claim cases of the Solar Power Project Developers herein for further proceedings and for passing necessary orders consequent to the findings recorded by us in the preceding parts of this judgment, allowing Change in Law (CIL) compensation (on account of GST laws and Safeguard Duty on Imports, as the case may be) from the date(s) of enforcement of the new taxes for the entire period of its impact, including the period post Commercial Operation Date of the projects in question, as indeed towards Operation & Maintenance (O&M) expenses, along with carrying cost subject, however, to necessary prudence check.**”*

35. The Hon’ble Supreme Court in its Order dated 12.12.2022, in Civil Appeal no. 8880/2022 in the case of “*Telangana Northern Power Distribution Co. Limited & Anr. Vs. Parampujya Solar Energy Pvt. Limited & Ors.*” (and in similar Orders dated 03.01.2023 and 23.01.2023) has held as under:

“Pending further orders, the Central Electricity Regulatory Commission (CERC) shall comply with the directions issued in paragraph 109 of the impugned order dated 15 September 2022 of the Appellate Tribunal for Electricity. However, the final order of the CERC shall not be enforced pending further orders.”

36. Therefore, the directions issued in this Order so far as they relate to additional compensation for the period pre-COD claims only shall be enforced, and the directions issued in this Order so far as they relate to additional compensation for the period post-COD of the project in question as also towards the carrying cost (post-COD) shall not be enforced and shall be subject to further orders of the Hon’ble Supreme Court in Civil Appeal No. 8880/2022 in *Telangana Northern Power Distribution Company Limited & Anr. v. Parampujya Solar Energy Pvt. Limited & Ors.*, and connected matters.

37. The issue is answered accordingly.

38. The summary of our findings is as follows:

- (a) The *2021 GST Notifications* are Change in Law events in terms of Article 12 of the PPA dated 03.05.2019.
- (b) The Petitioner is entitled to compensation on account of Change in Law as per the terms of Article 12 of the PPA due to the impugned notification viz. *2021 GST Notifications*.
- (c) Compensation is to be paid at the discount rate of 9.12% and an annuity period of 15 years. The liability of SECI/ Discoms for '*Monthly Annuity Payment*' shall start from the 60th (sixtieth) day from the date of this order or from the date of submission of claims by the Petitioner, whichever is later. Late payment surcharge shall be payable for the delayed period corresponding to each such delayed Monthly Annuity Payment(s), as per respective PPAs/PSAs.
- (d) The Petitioner shall also be eligible for carrying cost starting from the date when the actual payments were made to the Authorities till the date of issuance of this Order, at the actual rate of interest paid by the Petitioner for arranging funds (supported by Auditor's Certificate) or the rate of interest on working capital as per applicable RE Tariff Regulations prevailing at that time or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by the Petitioner in terms of this order, the provision of a Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within the due date.
- (e) The directions issued in this Order so far as they relate to compensation for the period post-COD of the projects in question as also towards carrying cost (post-COD) shall not be enforced and shall be subject to further orders of the Hon'ble Supreme Court in Civil Appeal No. 8880/2022 in *Telangana Northern Power Distribution Company Ltd. & Anr. V. Parampujya Solar Energy Pvt. Ltd. & Ors*, and connected matters.

39. Petition No. 308/MP/2022 is disposed of in terms of the above.

Sd/-
पी. के. सिंह
सदस्य

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अरुण गोयल
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आई. एस. झा
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