



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 65/MP/2023

कोरम/ Coram:

श्री जिष्णु बरुआ, अध्यक्ष/Shri Jishnu Barua, Chairperson
श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member
श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 14th of March, 2024

IN THE MATTER OF:

A petition under Section 79 of the Electricity Act 2003 read with Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 before the Central Electricity Regulatory Commission for seeking an appropriate adjustment/ compensation to offset financial/commercial impact of change in law events on account of increase in the rate of goods and services tax from 5% to 12 % by way of Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 and on account of increase in the rate of goods and services tax paid (impact) at the rate of 4.9% (70% of 7% GST increase) as per the Notification No.24/2018 – Central Tax (Rate) dated 31.12.2018, in terms of Article 12 of the Power Purchase Agreement dated 11.02.2020 between GRT Jewellers (India) Private Limited and Solar Energy Corporation of India Limited.

AND IN THE MATTER OF:

GRT Jewellers (India) Private Limited,
21, Coats Road, (North Usman Road),
T. Nagar, Chennai – 600 017.

...Petitioner

Versus

- 1. M/s Solar Energy Corporation of India Limited,**
6th Floor, Plate – B NBCC Office Block Tower-2,
East Kidwai, New Delhi – 110 023.
- 2. North Bihar Power Distribution Company Limited,**
Third Floor, Vidyut Bhawan,
Bailey Road, Patna - 800 001.
- 3. South Bihar Power Distribution Company Limited,**
Second Floor, Vidyut Bhawan,
Bailey Road, Patna - 800 001.

...Respondents

Parties Present: Shri Anand Ganesan, Advocate, GRTJIPL
Ms. Swapna Seshadri, Advocate, GRTJIPL
Ms. Aishwarya Subramani, Advocate, GRTJIPL
Ms. Anushree Bardhan, Advocate, SECI
Ms. Surbhi Kapoor, Advocate, SECI
Ms. Srishti Khindaria, Advocate, SECI
Shri Aneesh Bajaj, Advocate, SECI

आदेश/ ORDER

The Petitioner, GRT Jewellers (India) Private Limited (GJIPL) is engaged in the business to generate, accumulate, transit, distribute, purchase, sell and supply electric power or other energy from conventional/non-conventional energy sources. GJIPL was selected through the competitive bidding process for generation and supply of electricity from the 150 MW Solar Power Project from its project situated at Taluka Ettayapuram, Kayathar, District: Thoothukkudi, in the State of Tamil Nadu. The Letter of Award dated 28.09.2019 was issued by SECI in favour of GJIPL. SECI executed the Power Sale Agreement (PSA) with North Bihar Power Distribution Company Limited and South Bihar Power Distribution Company Limited on 05.02.2020. SECI also executed the Power Purchase Agreement with GJIPL on 11.02.2020. GJIPL has filed the present Petition seeking declaration of change in rate of Central Goods and Service Tax (GST) on renewable energy devices and parts as per Ministry of Finance Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 as Change in Law

event and seeking appropriate adjustment towards increase in GST from 5% to 12% and increase in rate of GST paid @ 4.9% as per Notification No. 24/2018- Central Tax (Rate) dated 31.12.2018 along with carrying cost.

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 has been designated as the nodal agency for implementation of MNRE schemes for developing grid connected solar power capacity in India.
3. Respondent No. 2 and Respondent No.3, North Bihar Power Distribution Company Limited and South Bihar Power Distribution Company Limited (Bihar Discoms) are the distribution companies of the State of Bihar.
4. The Petitioner has made the following prayers:
 - a) *Declare increase in rate of goods and services tax from 5% to 12% on renewable energy parts, which has been made effective by way of introduction of Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 as change in law in terms of the PPA read with Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021;*
 - b) *Direct Respondent to compensate the Petitioner, as one-time lump sum payment or by way of tariff increment, towards increase in rate of goods and services tax from 5% to 12%, which has been made effective by way of Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021;*
 - c) *Direct the Respondent to compensate the Petitioner, as one-time lump sum payment or by way of tariff increment, towards increase in the rate of goods and services tax paid (impact) at the rate of 4.9% being 70% of 7% GST increase due to the Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 on the GST payable as per the Notification No.24/2018 – Central Tax (Rate) dated 31.12.2018;*
 - d) *Grant interest/carrying cost at as mentioned in para 36 from the date of incurring of the cost by the Petitioner till the date of order by this Commission;*
 - e) *If the event this Hon'ble Commission is not inclined to grant the relief prayed at (c) then in the alternate it is prayed, that this Hon'ble Commission grants interest/ carrying cost from the date of the cost by the Petitioner till the date of order by this Commission restoring the Petitioner to the same economic position as before the occurrence of the Change in Law events;*
 - f) *Allow legal and administrative costs incurred by the Petitioner in pursuing the instant petition; and*
 - g) *Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case.*

Factual Matrix:

5. The brief facts of the case is as under:

| | |
|--|--|
| Location | Ettayapuram, Kayathar, District: Thoothukkudi, Tamil Nadu |
| Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects | 03.08.2017 |
| Nodal agency | SECI |
| Tariff | Rs.2.53/kWh |
| Capacity (MW) | 150 MW |
| Power | Solar |
| Date of Notification No.1/2017-Central Tax (Rate) (2017 GST Notification) | 28.06.2017 |
| Date of Notification No. 24/2018- Central Tax (Rate) (2018 GST Notifications) | 31.12.2018 |
| RfS issued on | 28.06.2019 |
| Bid submitted on | 09.08.2019 |
| E-Reverse auction held on | 28.08.2019 |
| LOA issued on | 28.09.2019 |
| Power Sale Agreement (PSA) executed on | 05.02.2020 |
| Power Purchase Agreement (PPA) executed on | 11.02.2020 |
| Scheduled Commissioning Date (SCOD) of the project | 11.08.2021 |
| Date of Notification of 8/2021- Central Tax (Rate) (2021 GST Notification) | 30.09.2021 |
| Extended SCOD | 11.01.2022; 28.03.2022; 14.04.2022; 17.06.2022 |
| Commissioning of the project | 50 MW- 30.03.2022; 50 MW- 13.04.2022; 50 MW- <u>17.06.2022</u> (CoD was declared on 17.06.2022) |

6. The instant petition was filed on 10.02.2023. Hearing was conducted on 10.05.2023, wherein the Commission, after hearing the Petitioner, admitted the Petition. Pursuant to the directions of the Commission vide RoP dated 10.05.2023, the Petitioner filed an Additional Affidavit dated 26.05.2023 wherein they submitted that they had filed the instant Petition seeking a declaration of change in law in terms of the PPA and since cause of action arose before notification of the *Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021* (Change in Law Rules, 2021), therefore, no separate declaration is required under Rule 2(1)(c) and Rule 3(1) of Change in Law Rules, 2021. Hearing was further conducted on 15.09.2023

where the Petitioner sought time to file its Rejoinder. The petition again came up for hearing on 10.11.2023, wherein the Commission, after hearing the submissions of the parties, reserved the matter for orders and directed the parties to file their respective submissions. Pursuant to the directions of the Commission, the parties filed their respective submissions.

7. We have heard the learned counsels for the Petitioners and Respondents, carefully perused the records and considered the submissions of the parties.
8. On the basis of the submissions of the contracting parties, the following issues arise for adjudication:

Issue No. I: *Whether the introduction of Notification No.8/2021- GST issued by the Ministry of Finance, Government of India amounts to Change in Law events under Article 12 of the Power Purchase Agreement dated 11.02.2020? AND Whether the Petitioner is entitled to compensation in terms of Article 12 of the PPA towards additional expenditure on account of the Change in Law event qua the Notification No. 8/2021 and increase in rates of GST @4.9% as per Notification No. 24/2018- Central tax (Rate) dated 31.12.2018?*

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

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

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

Re: Issue No. I

Whether the introduction of Notification No.8/2021- GST issued by the Ministry of Finance, Government of India, amounts to Change in Law events under Article 12 of the Power Purchase Agreement dated 11.02.2020? AND Whether the Petitioner is entitled to compensation in terms of Article 12 of the PPA towards additional expenditure on account of the Change in Law event qua the Notification No. 8/2021 and increase in rates of GST @4.9% as per Notification No. 24/2018- Central tax (Rate) dated 31.12.2018?

10. Briefly, the Petitioner has submitted that:
 - a) The change in law has a direct impact on the Solar Power Project cost towards setting up

the 150 MW Solar Power Project under ISTS-V. While the Petitioner had dispatched and delivered the Project, the GST percentage charged by the respective authorities was at 12% for the modules during the Bill of Entry at Port. As per the *Notification No. 8/2021-Central Tax (Rate) dated 30.09.2021* (2021 GST Notification), the GST for supply is 12% with effect from 01.10.2021. Therefore, the Petitioner's EPC contractor has claimed 12% on 70% of their gross consideration towards supply and 18% on 30% of gross consideration towards services provided towards the project.

- b) The basis of claim under Change in Law is two-fold, 5% to 12% for supply of modules and 4.9% (70% of the additional 7%) for Other Supply and Services by the EPC Contractor on the project. A summary of the Petitioner's claim is set out below:

Supply of Solar Modules:

| Period | Assessable Value (INR) | Actual IGST paid (INR) | IGST at the rate prevailing on the date of submission of bid @ 5% (INR) | Claim under Change in Law @ 7% (INR) |
|--------------------------|-------------------------------|-------------------------------|--|---|
| Purchase from 01.10.2021 | 3,27,19,71,555/- | 39,26,47,882/- | 16,35,98,678/- | 22,90,49,204/- |

Other Supply and Services by EPC Contractor:

| Effective date | Invoice Base Value (INR) | GST Effective Rate @ 13.80% (INR) | GST Value at Rate applicable as on date of bid submission @ 8.9% (INR) | Claim under Change in Law @ 4.9% (INR) |
|-----------------------|---------------------------------|--|---|---|
| 01.10.2022 | 1,69,81,83,777/- | 23,43,49,261/- | 15,11,38,356/- | 8,32,11,005/- |

- c) The total GST Claim on account of the Change in Law is as below:

| S. No. | Particulars | Amount (INR) |
|---------------|---|-----------------------|
| 1. | Supply of Solar Modules | 22,90,49,204/- |
| 2. | Other Supply and Services by EPC Contractor | 8,32,11,005/- |
| | Total GST Claim under Change in Law | 31,22,60,209/- |

- d) Thus, the increase in rate of GST from 5% to 12%, pursuant to the Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 would qualify as a Change in Law event in

terms of the PPA. Moreover, the increase of an additional 4.9% in the GST paid for supply of other goods and services due to the impact of notification on the GST levied under *Notification No.24/2018 – Central Tax (Rate) dated 31.12.2018* (2018 GST Notification) since the additional 7% has to be levied on 70% of the supplies.

- e) The Petitioner has executed the following agreements for the establishment of projects:
- i. Module Supply Agreements dated 28.05.2021 and 10.06.2021 (and amendment agreements dated 25.01.2022), which were entered into exclusively for procurement of the solar panels and equipments and did not encompass any portion of services and therefore are assessable for GST @ 5% prior to the Notification dated 30.09.2021.
 - ii. Balance of Plant (BoP) contract, which was a composite contract for the supply of goods and also for services in the establishment of the Project. For such contracts, the supply portion is assumed as 70% for levy of GST and the services portion is assumed as 30% for levy of GST.
- f) Ministry of Power vide letter dated 27.08.2018 issued directions under Section 107 of the Electricity Act to the Commission to treat changes in domestic duties/levies/cess/taxes etc. issued by governmental instrumentality leading to changes in cost as change in law and be allowed as pass through.

11. *Per contra*, SECI has submitted as under:

- a) In order to qualify for any relief under Article 12 of the PPA dealing with Change in Law, the claims raised by the Petitioner should fall within the scope and ambit of the said provision. The Commission may be pleased to decide regarding the admissibility of GST Notification dated 30.09.2021 as an event of Change in Law within the scope of Article 12 of the PPA read with provisions of PSA.
- b) Subject to admissibility of notification dated 30.09.2021 as Change in Law, as per Notification dated 30.09.2021:
 - i. The applicable rate of GST on the Contract for the supply of goods has changed from 5% to 12% and
 - ii. 70% of the gross consideration of the contract value under the Contract for Supply and Services (Composite Supply Works Contract) will be taxed at 12% in terms of entry 201A read with Explanation provided in Notification dated 30.09.2021 being the GST

rate applicable on the supply of renewable energy devices and parts for their manufacture as specified therein. 30% of the gross consideration of the contract value under the contract for supply and services will be taxed at 18% (i.e. the GST rate applicable on the supply of construction, engineering, installation, commissioning or other technical services in relation to renewable energy devices). The effective change in GST in the above case is 4.9 %, i.e. from 8.9% to 13.8%.

- c) The extent to which relief admissible to the Petitioner on account of Notification dated 30.09.2021 of GST (if any) is subject to examination and verification of documents by SECI (and Bihar Discoms) to be submitted by the Petitioner.

12. We observe that Article 12 of the PPA dated 11.02.2020 stipulates as under:

“ARTICLE 12: CHANGE IN LAW

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 General; or **(v) any change in the rates of any Taxes including any duties and cess or introduction of any new ax 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 changes 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 part, 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.

Notifications regarding rates qua Goods:

13. We observe that the relevant notifications are as under:

a) Notification No.1/2017-Central Tax (Rate) dated 28.06.2017 (2017 GST Notification):

Schedule I - 2.5%

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

b) Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 (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 | <u>Following renewable energy devices & parts for their manufacture: -</u> (a) Bio-gas plant (b) Solar power-based devices (c) Solar power generating system (d) Wind mills, Wind Operated Electricity Generator (WOEG) (e) Waste to energy plants / devices (f) Solar lantern / solar lamp (g) Ocean waves/tidal waves energy devices/plants |
|----------|--------------------|--|

| | | |
|--|--|---|
| | | <p>(h) <i>Photo voltaic cells, whether or not assembled in modules or made up into panels.</i></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> |
|--|--|---|

Notifications regarding rates qua Services:

14. We note that relevant notifications are as under:

a) *Notification No. 11/2017* inter-alia, stipulates as under:

| S. No. | Chapter, Section or Heading | Description of Service | Rate (per cent.) | Condition |
|---------------|---|---|-------------------------|------------------|
| (1) | (2) | (3) | (4) | (5) |
| | | | | |
| 3 | Heading 9954 (Construction services) | <p>(i) <i>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.</i></p> <p><i>(Provisions of paragraph 2 of this notification shall apply for valuation of this service.)</i></p> | 9 | - |
| | | (ii) <i>composite supply of works contract as defined in clause 119 of section 2 of Central Goods and Services Tax Act, 2017.</i> | 9 | - |
| | | (iii) <i>construction services other than (i) and (ii) above.</i> | 9 | - |

b) The 31st GST Council Meeting was convened on 22.01.2018. The recommendations made in the GST Council are as under:

“

- **III. GST on solar power generating plant and other renewable energy plants**
- *GST rate of 5% rate has been prescribed on renewable energy devices & parts for their manufacture (bio-gas plant/solar power based devices, solar power*

generating system (SGPS) etc) [falling under chapter 84, 85 or 94 of the Tariff]. Other goods or services used in these plants attract applicable GST

- **Certain disputes have arisen regarding GST rates where specified goods attracting 5% GST are supplied along with services of construction etc. and other goods for solar power plant.**
- **To resolve the dispute the Council has recommended that in all such cases, the 70% of the gross value shall be deemed as the value of supply of said goods attracting 5% rate and the remaining portion (30%) of the aggregate value of such EPC contract shall be deemed as the value of supply of taxable service attracting standard GST rate.”**

c) Notification No. 27/2018:

| (1) | (2) | (3) | (4) | (5) |
|------|----------------------------------|---|-----|-----|
| “38. | 9954 or 9983 or 9987 | Service by way of construction or engineering or installation or other technical services, provided in relation of setting up of following, - (a) Bio-gas plant (b) Solar power based devices (c) Solar power generating system (d) Wind mills, Wind Operated Electricity Generator (WOEG) (e) Waste to energy plants / devices (f) Ocean waves/tidal waves energy devices/plants <u>Explanation:- This entry shall be read in conjunction with serial number 234 of Schedule I of the notification No. 1/2017- Central Tax (Rate), published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated 28th June, 2017 vide GSR number 673(E) dated 28th June, 2017.</u> | 9 | -”; |

d) Notification No. 24/2018:

“.....
against S. No. 234, in the entry in column (3), the following Explanation shall be inserted in the end, namely: -“**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.**”

- e) The Rajasthan Appellate Authority for Advance Ruling vide its decision dated 11.01.2022 in the case of *M/s. Utsav Corporation Gurjar ki Thadi, Jaipur*, has held as under:

In drawing our conclusions as above, we have based our findings upon the ruling dated 15.05.2019 given by the Rajasthan Appellate Authority for Advance Ruling in the case of Kailash Chandra (Proprietor of Mali Construction) involving similar situation. The Advance Ruling Authority in the instant case had held that the instant supply comprising supply of goods in the form of solar energy based bore well water pumping system along with installation and commissioning of such Water pumping system is a composite supply of works contract attracting GST @ 18% in terms of entry Sl. No. 3 of Notification No. 11/2017-Central Tax (Rate), dated 28.06.2017. However, the ruling that the composite supply of goods and services in the instant case deserves to be classified as works contract service is not supported by legal position which has been correctly interpreted by the Authority for Advance Ruling for the State of Uttarakhand in the case of M/s Premier Solar Systems Pvt. Limited as reported at 2019-T10L-79-AAR-GST by holding that the supply of solar irrigation water pumping system along with design, erection, commissioning and installation would constitute a composite supply attracting GST @ 5% on goods portion and GST @ 18% on services portion as prescribed in the relevant entry of the notification.

Thus, we observed that the effective rate of GST on supply of Goods and Services in relation to the Solar Power Based Devices upto 30.09.2021 is as follows:-

- (a) 5% on value of goods where the value of goods is to be taken as 70% of the gross consideration and*
- (b) 18% on the value of services where the value of services is to be taken as 30% of the gross consideration.*

Hence, the effective rate of GST for the composite supply will work out to 8.9% [(5% x 70%) plus (18% x 30%)]. However, with the amendments effected vide Notification No. 06/2021-Central Tax(rate) dated 30.09.2021 and Notification No. 08/2021-Central Tax (rate) dated 30.09.2021, the rate of tax on goods portion stands increased from 5% to 12% and accordingly, the effective rate of GST for the period post 30.09.2021 will stand increased to that extent.

15. The Commission notes from the submission of the Petitioner that the Petitioner had executed two contracts viz. *Module Supply Agreement* dated 28.05.2021, 10.06.2021 (and amendment agreements dated 25.01.2022) exclusively for procurement of solar panels & equipment (which did not encompass any component of services) and *Balance of Plant (BoP)* contract, which was a composite contract for supply of goods and also services for establishing the project. Consequently, the Petitioner has considered the supply portion @70%, and for the service portion, the GST is computed @30%. The Petitioner has sought compensation accordingly. SECI, in its reply dated 08.08.2023, has submitted that the rate of GST for the supply of goods

has changed from 5% to 12% and the rate of GST has changed from 8.9% to 13.8% for composite supply contracts.

16. 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) dated 30.09.2021 has been issued by the Ministry of Finance, Government of India. 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 notification viz *the 2021 GST Notification is a Change in Law event as per Article 12 of the PPA dated 11.02.2020*. 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; Order dated 16.01.2024 in Petition No. 308/MP/2022*.
17. We further note that the GST at the rate of 18% was levied (i.e., 9% of CGST and 9% of SGST) on such service contracts, in terms of Ministry of Finance's Notification No. 11/2017- Central Tax (Rate) dated 28.06.2017. *Notification No. 27/2018* stipulates a composite tax structure of 8.9% [i.e. 5% on 70% of the consolidated taxable value of contracts + 18% on 30% of the consolidated taxable value of the contracts]. Subsequently, vide *Notification No. 24/2018* against S. No. 234, for solar power generating stations, if the goods are supplied by a supplier, along with supplies of other goods and services being a taxable service, specified the taxable value of supply of goods is deemed to be *seventy per cent* and the remaining *thirty per cent* is deemed to be value of the taxable service. Hence, there is a change in the methodology of application of the rates of GST due to which the Petitioner had to incur additional costs. We note that Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021, the applicable rate of GST on the contract for the supply of goods has changed from 5% to 12%, whereas 70% of the gross consideration of the contract value under the Contract for Supply and Services (Composite Supply Works Contract) is to be taxed at 12% in terms of entry 201A read with

Explanation provided in Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021. 30% of the gross consideration of the contract value under the contract for supply and services will be taxed at 18% (i.e. the GST rate applicable on the supply of construction, engineering, installation, commissioning or other technical services in relation to renewable energy devices). Hence, the effective change in GST in the above case is 4.9 %, i.e. from 8.9% to 13.8%.

18. In the instant petition, the bid was submitted by GJIPL on 09.08.2019. The e-Reverse auction was conducted on 28.08.2019. PPA was executed between GJIPL and SECI on 11.02.2020, and the SCoD of the project was on 11.08.2021. In terms of the extended SCoD, the Project was required to be commissioned on or before 17.06.2022. GJIPL commissioned the full capacity of its project on 17.06.2022, whereas the *2021 GST Notifications* were notified on 30.09.2021. As such, GJIPL's project was affected by the impugned Notification and is entitled to relief under the GST Laws as per the terms of Article 12 of the PPA. In view of the above discussion, we hold that GJIPL is entitled to compensation towards additional expenditure on account of the 2021 GST Notification and the 2021 GST Notification read along with 2018 GST Notifications as per Article 12 of the PPA.
19. The issue is decided 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?

20. GJIPL has submitted that the Respondent be directed to compensate the Petitioner as a one-time lump sum payment/tariff increment towards a change in GST rates from 5% to 12% vide 2021 GST Notifications and change in rates of GST rates @4.9% vide 2018 GST Notifications
21. *Per contra*, SECI has submitted that the reconciled claim is to be paid on a Monthly Annuity basis unless the Distribution Licensees/Buying Entities specifically agrees to make a lump-sum payment and further duly make such payment in discharge of its obligation. In the proceedings before the Commission in Petition No. 536/MP/2020 filed by SECI, the annuity scheme had been approved for making payment of the reconciled claim amount on account of Change in Law events. The decision dated 20.08.2021 of the Commission approving the discounting factor at 10.41% was based on the interest rate specified in the Renewable Tariff Regulations,

2017, read with RE Tariff Order dated 19.03.2019 notified by the Commission at the relevant time when the said annuity methodology was considered by MNRE and implemented by SECI. However, there has been a fall in the interest rate of the loans, 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 07.11.2022 in Petition No. 14/SM/2022 for the FY 2022-2023*. The Commission vide order dated 27.03.2023 in 3/SM/2023 stated that “*Therefore order dated 07.11.2022 in Petition No. 14/SM/2022 shall also continue to be in force until further orders.*” In the above regulations read with RE Tariff Orders, the Commission has considered the interest rate of 9.12% and the term of loan payment as 15 years. The Bihar Discoms may be directed to make payment towards the evaluated change in law claims payable by SECI to Petitioner, on a back-to-back basis under the PSAs in a time-bound manner.

22. It was placed before us that this Commission in the earlier order dated 20.08.2021 in the Petition No. 536/MP/2020 has decided on the methodology of compensation due to Change in Law in the following manner:-

65.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. It is apparent that, this Commission has taken a 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, or 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 rate 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 *Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020* (RE Tariff Regulations, 2020) were applicable for the period 01.07.2020 to 31.03.2023 now stands extended to 31.03.2024 vide Order in 10/SM/2023 dated 08.09.2023.
25. The Commission has notified the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020 and RE Tariff Order dated 07.11.2022. In the said regulations read with the RE tariff Order; we have considered the interest rate of 9.12% for FY-22-23 and the term of the Loan repayment as 15 years. The Commission vide order dated 27.03.2023 in 3/SM/2023 extended the applicability of the order dated 07.11.2022 in Petition No. 14/SM/2022.
26. We note that the GJIPL's projects achieved actual commercial operation on 17.06.2022 (i.e. during FY 2022-23). The Commission notified the RE Tariff Order dated 07.11.2022 for FY 2022-23 in pursuance of the *CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020*. In the *RE Tariff order dated 07.11.2022*, the Commission considered the interest rate of 9.12% and the term of loan payment as 15 years. Thus, we hold that the *discount rate of 9.12%* and *annuity payment of 15 years* as the appropriate methodology towards change in law compensation
27. Further, the Commission holds that the liability of SECI/ Discoms for 'Monthly Annuity Payment' starts from the 60th (sixtieth) day from the date of this order or from the date of submission of claims by GJIPL, 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 GJIPL, 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 PPA/PSA.
28. The issue is decided accordingly.

Re: Issue No. III

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

29. GJIPL has submitted that it is entitled to reimbursement of carrying cost from the date of actual payment of additional goods and services tax till the order from this Commission so that Petitioner is put in the same economic position as if change in law event had not occurred. Petitioner is entitled to carrying cost on account of the Change in Law event in terms of Article 12 of the PPA and as per Hon'ble Supreme Court's directions in the *Uttar Haryana Bijli Vitran Nigam Ltd. Vs. Adani Power Ltd. (2019) 5 SCC 325 (Uttar Haryana judgement)*.
30. *Per contra*, SECI has submitted that Carrying Cost is to be restricted to the cost of financing 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 claim of carrying cost is based on the principle of restitution and is completely different from the penal rate of interest, which is the late payment surcharge payable on non-payment or default in payment of invoices by the due date. Further, the judgment of the APTEL dated 15.09.2022 has been assailed before the Supreme Court in Civil Appeal no. 8880/2022 in the case of "*Telangana Northern Power Distribution Co. Ltd. & Anr. Vs. Parampujya Solar Energy Pvt. Ltd. & Ors.*" SECI has further submitted that the final order by this Commission in this matter shall not be enforced till further orders are passed by the Hon'ble Supreme Court.
31. We observe that Article 12 of the PPA dated 11.02.2020 stipulates as under:

“ARTICLE 12: CHANGE IN LAW

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 General; or **(v) any change in the rates of any Taxes including any duties and cess or introduction of any new ax 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 changes 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 part, 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.

32. We observe that the Hon’ble Supreme Court vide *Uttar Haryana Bijli Vitran Nigam Ltd. Vs. Adani Power Ltd. (2019) 5 SCC 325 (Uttar Haryana judgement)* dated 25.02.2019. 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 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**... .. 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.

33. From the above, we observe that Article 12.1 of the PPA dated 11.02.2020 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, the Solar Power Generator/ Procurer shall be entitled to compensation. 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 had not occurred, i.e., the party must be given the benefit of restitution as understood in civil law.
34. GJIPL, in the instant petitions, shall be eligible for carrying costs starting from the date when the actual payments were made to the authorities until the date of issuance of this Order, at the actual rate of interest paid by GJIPL for arranging funds (supported by Auditor's Certificate) or the rate of interest on working capital as per the applicable RE Tariff Regulations prevailing at that time or the late payment surcharge rate as per the PPAs, whichever is the lowest. Once a supplementary bill is raised by GJIPL in terms of this order, the provision of Late Payment Surcharge in the PPAs would kick in if the payment is not made by the Respondents within the due date.
35. Accordingly, the Commission hereby directs the contracting parties to carry out reconciliation of additional expenditure on account of introduction of Amendment Notification No. 8/2021- Integrated Tax (Rate) dated 30.09.2021 and amendment Notification No. 8/2021- Integrated Tax (Rate) dated 30.09.2021 read along with GST Amendment Notification dated 31.12.2018 by the Ministry of Finance, Government of India along with carrying cost by exhibiting clear and one to one correlation with the projects and the invoices raised supported with auditor certificate.
36. The Commission further directs that the responding Discoms are liable to pay to SECI all the above-reconciled claims that SECI has to pay to the GJIPL. However, payment to the Petitioner by SECI is not conditional upon the payment to be made by the responding Discoms to SECI.

37. 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:

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*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 Projects 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.***

38. 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."

39. Therefore, given the restitution clause in the PPA the directions issued in this Order so far as they relate to additional compensation for the period pre-COD (including carrying cost) claims only shall be enforced. However, in view of the Hon'ble Supreme Court Order dated 12.12.2022, as quoted above, the directions issued in this Order so far as they relate to additional compensation (including carrying cost) for the period post-Commercial Operation Date of the projects 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. It is pertinent to mention that the view taken is consistent with the views taken in *Order dated 02.06.2023 in Petition No. 168/MP/2021; Order dated 30.11.2023 in Petition No.*

214/MP/2021; Order dated 19.12.2023 in Petition No. 171/MP/2021; Order dated 26.12.2023 in Petition No. 209/MP/2022; Order dated 07.01.2024 in Petition No. 206/MP/2021; Order dated 16.01.2024 in Petition No. 308/MP/2022 and Order dated 31.01.2024 in Petition No. 226/MP/2021 & 227/MP/2021.

40. The issue is decided accordingly.

41. The summary of our findings is as follows:

- a) The *2021 GST Notification* is a Change in Law event in terms of Article 12 of the PPA dated 11.02.2020.
- 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 *2021 GST Notification* and *2018 GST Notification*.
- 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. A late payment surcharge shall be payable for the delayed period corresponding to each such delayed Monthly Annuity Payment(s), as per the respective PPA/PSA.
- 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) Given the restitution clause in the PPA, the directions issued in this Order so far as they relate to additional compensation for the period pre-COD (including carrying cost) claims only shall be enforced. However, in view of the Hon'ble Supreme Court Order dated 12.12.2022, as quoted above, the directions issued in this Order so far as they relate to additional compensation (including carrying cost) for the period post-Commercial Operation Date of the projects 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.

- f) The contracting parties to carry out reconciliation of additional expenditure on account of introduction of Amendment Notification No. 8/2021- Integrated Tax (Rate) dated 30.09.2021 and amendment Notification No. 8/2021- Integrated Tax (Rate) dated 30.09.2021 read along with GST Amendment Notification dated 31.12.2018 by the Ministry of Finance, Government of India along with carrying cost by exhibiting clear and one to one correlation with the projects and the invoices raised supported with auditor certificate.

42. Petition No. 65/MP/2023 is disposed of in terms of the above.

Sd/-
पी. के. सिंह
सदस्य

Sd/-
अरुण गोयल
सदस्य

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जिष्णु बरुआ
अध्यक्ष