

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 75/MP/2022**

**Coram:**

**Shri Jishnu Barua, Chairperson  
Shri Ramesh Babu V., Member  
Shri Harish Dudani, Member**

**Date of Order: 25<sup>th</sup> November, 2024**

**In the matter of**

Petition under Sections 79(1)(b) and 79(1)(f) of the Electricity Act, 2003, read with the Letter of Intent dated 13.2.2021, and Bid Document dated 17.12.2020, thereby seeking directions from this Commission for quashing the erroneous Compensation Bills/ Tax Invoices raised upon the Petitioners by the Respondent qua levy of alleged liquidated damages, and also to restrain the said Respondent from levying the IGST on such liquidated damages, payment of illegally withheld amongst with applicable Delay Payment surcharge and amongst other consequential reliefs.

**And**

**In the Matter of:**

**1. Jindal India Thermal Power Limited,**

Plot No. 2, Pocket-C, 2nd Floor,  
Nelson Mandela Road, Vasant Kunj,  
New Delhi – 110070  
Through its Authorised Signatory

**2. Tata Power Trading Company Limited,**

Shatabdi Bhawan,  
B-12-13, Sector- 4,  
Noida – 201301  
Through its Authorised Signatory

**..... Petitioners**

**VERSUS**

**BSES Rajdhani Power Limited,**  
BSES Bhawan, 2nd Floor, B-Block,  
Nehru Place, New Delhi – 110019

**...Respondent**

**Parties present:**

Shri Sajjan Poovayya, Sr. Advocate, JITPL  
Shri Hemant Singh, Advocate, JITPL  
Ms. Ankita Bafna, Advocate, JITPL  
Ms. Lavanya Panwar, Advocate, JITPL  
Shri Biju Mattam, Advocate, JITPL



Shri Hasan Murtaza, Advocate, BRPL  
Shri Sameer Sharma, Advocate, BRPL  
Shri Ankit Sinha, Advocate, BRPL  
Ms. Megha Bajpai, BRPL  
Ms. Sweta Chaudhary, BSES  
Ms. Jaya, BSES

## ORDER

The Petitioner No.1, Jindal India Thermal Power Limited (hereinafter 'JITPL'), a generating company, and Petitioner No.2, Tata Power Trading Company Limited (hereinafter 'TPTCL'), a trading licensee, have filed the present Petition under Section 79(1)(b) and (f) of the Electricity Act, 2003 (hereinafter referred to as "the Act") read with the Letter of Intent dated 13.2.2021, and Bid Document dated 17.12.2020, for quashing the erroneous compensation bills/ tax invoices raised upon the Petitioners by the Respondent, BSES Rajdhani Power Limited (hereinafter 'BRPL') *qua* levy of alleged liquidated damages and to restrain the Respondent from levying the IGST on such liquidated damages and consequential reliefs. The Petitioners have made the following interim relief(s) and prayers:

### Prayers

- "a) Quash various erroneous Bills/ Invoices (detailed in Annexure – H) raised upon the Petitioners by the Respondent No. 1 qua levy of alleged liquidated damages being unsubstantiated in law;*
- b) Direct the Respondent No. 1 to adhere to the specific terms and conditions of the LOI dated 13.02.2021 and should raise bills (Compensation Bills) on the Petitioners on monthly basis instead of fortnightly basis and also by considering all the declared capacity as declared by the Petitioner;*
- c) Hold and declare that imposition of liquidated damages upon the Petitioner is a part of the tariff stream of the Respondent and an integral specie of its distribution of electricity business;*
- d) Hold and declare that the Respondent could not have raised Goods and Services Tax (GST/ IGST) upon the Petitioners in the impugned invoices/ bills raised for levying liquidated damages;*
- e) In the alternate, if prayer (d) is not granted, hold that the responsibility to pay GST/ IGST lies with Respondent in terms of the LOI dated 13.02.2021 read with the bid document dated 17.12.2020;*



f) *Direct the Respondent to refund the amount which has been illegally withheld from the Petitioners, in terms stated in the present petition, along with applicable interest/ carrying costs and legal costs;*

g) *In the interim, as an immediate relief this Commission may graciously be pleased to direct as follows:*

i. *Direct the Respondent No. 1 to forthwith make payment of 75 % of the deducted amount alongwith applicable Delay Payment Surcharge, subject to the outcome of the present proceedings, to tide over the financial crisis situation;*

h) *Pass any other or further orders as this Commission may deem fit in the present facts and circumstances of the case and in the interest of justice.”*

### **Factual Background**

2. On 17.12.2020, the Respondent, BRPL, issued a Request for Proposal (RFP) document for procurement of a total of up to 700 MW on a short-term basis to be supplied for the period from 1.4.2021 to 30.9.2021 in accordance with the Guidelines for Short-Term (i.e., for a period of more than one day to one year) Procurement of Power by Distribution Licensees through the Tariff Based Bidding Process dated 30.6.2016 as issued by the Ministry of Power, Government of India. In response thereof, Petitioner No.2, TPTCL, submitted its bid for the sale and supply of Round the Clock power to BRPL, and on 13.2.2021, a Letter of Intent (LoI) was issued to Petitioner No.2, TPCL, for the supply of power ranging from 250 MW to 300 MW for the period May 2021 to September 2021 with the Petitioner No.1, JITPL being the identified source of generation. In terms of Clause 7 of the said LoI, the failure to supply the instructed capacity was subject to the payment of Liquidated Damages, and as per the said clause, the Respondent, BRPL, proceeded to levy the Liquidated Damages upon Petitioner No.2, TPTCL, who in turn, adjusted such amount from the payment to be made to Petitioner No.1, JITPL. In addition, BRPL also levied the Goods & Service Tax (GST) @ 18 % on the compensation amount claimed as per Clause 7 of the LoI.

Although a series of correspondence was exchanged between the parties on the above aspect, the issues could not be resolved, and in the above background, the Petitioners have proceeded to file the present Petition.

### **Submissions of the Petitioners**

3. In support of their prayers, the Petitioners have mainly submitted as under:

(a) As per Clause 7(b) of the Lol dated 13.2.2021, the deviation of 15% from the contracted energy is required to be calculated on a 'monthly' basis. However, the Respondent, BRPL, calculated the alleged Liquidated Damages on the shortfall in supply of power by JITPL on a 'fortnightly' basis, which is in complete derogation of the express terms and mandate of the Lol along with the Bid documents dated 17.12.2020.

(b) While there was a certain shortfall in supply of power by JITPL during the period of supply, JITPL, as a matter of fact, had offered the day ahead additional Declared Capacity viz. (i) 37 MW for the period between 8.5.2021 to 12.5.2021, 23.5.2021 and 31.5.2021, (ii) 20 MW for the period between 19.7.2021 to 31.7.2021 and 12.9.2021 to 15.9.2021 and (iii) 250 MW, 257 MW, 100 MW and 257 MW during 8.9.2021 to 11.9.2021, which it had denied to schedule. Despite the above denial by BRPL itself for scheduling of power, BRPL alleged short-supply of power by the Petitioners and erroneously raised compensation vide the invoices raised from May to September 2021.

(c) It is settled percept of law that terms of a contract cannot be unilaterally changed or deviated from at the whims and fancies of a contracting party. In this regard, the reliance has been placed on the judgment of the Hon'ble Supreme Court in (i) Ssangyong Engineering & Construction Co. Ltd. v. National Highway Authority of India, [(2019) 15 SCC 131], (ii) Suresh Kumar Wadhwa v. State of M.P, [(2017) 16 SCC 757], and (iii) Citi Bank N. A v. Standard Chartered Bank, [(2004) 1 SCC 12].

(d) BRPL has also wrongfully levied IGST / GST on the alleged Liquidated Damages, which are otherwise not leviable. The Bid document dated 17.12.2020 specifically stated that the Bidder should quote a single tariff at the delivery point (i.e., BRPL's periphery), which is inclusive of all taxes, duties, and cess, etc., imposed by the Central Government/ State Government/ Local Bodies. The liquidated damages

are nothing but a claim of damages for the number of units short-supplied at a pre-defined rate of 20% of the Lol tariff. As such, liquidated damages are part of the ARR of the Respondent and become part of the overall tariff structure of the said Respondent. Therefore, being part of the tariff structure, the liquidated damages are imposed as part of the distribution of electricity, which is exempted from the levy of the GST/ IGST in terms of the notification dated 28.06.2017 issued by the Central Government.

(e) The Petitioners can never be imposed IGST, as the tariff defined in the bid document is inclusive of all taxes and duties, and when the bidding was concluded, GST was in force, and it was the deliberate choice of the Respondent not to specify levy of GST in clause 7 of the Lol which dealt with the liquidated damages. Hence, without prejudice, and even otherwise, if GST is leviable, the same is to be paid by the BRPL only.

(f) The liquidated damages are in the nature of the power purchase cost of the distribution licensee; the said liquidated damages, in the present case, are not for the purpose of tolerating an act or a situation, as contemplated under Entry 5 of Schedule II of Section 7(1A) of the Central Goods and Services Tax Act, 2017, and thus, no GST can be levied. In this regard, the reliance has been placed on (i) judgment of Customs, Excise & Service Tax Appellate Tribunal dated 22.12.2020 in Service Tax Appeal No. 50567 of 2019 titled as M/s South Eastern Coalfields Ltd. v. Commissioner of Central Excise and Service Tax, (ii) judgment of Customs, Excise & Service Tax Appellate Tribunal, Principal Bench dated 9.7.2021 in Service Tax Appeal No. 51117 of 2019 titled as Ruchi Soya Industries Ltd. v. Commissioner of Customs Central Goods and Central Excise, Indore, and (iii) Customs, Excise and Service Tax Appellate Tribunal South Zonal Bench, Chennai dated 26.7.2021 in Appeal No. ST/41666 titled Neyveli Lignite Corporation Ltd. v. Commissioner of Customs Central Excise and Service Tax, Chennai.

(g) The Petitioner has a composite scheme of generation and supply of electricity in more than one State as envisaged in Section 79(1)(b) of the Act. Besides the supply to BRPL at the relevant point in time, the Petitioner also has long-term PPAs with KSEB for 100 MW and Bihar Distribution Companies for 300 MW. Thus, this Commission has the necessary jurisdiction to adjudicate the dispute(s) involved in the present case.

## **Hearings:**

4. The matter was first listed on 29.7.2022, and during the course of the hearing, learned counsel for the Petitioners reiterated the submissions made in the Petition and also pressed for the interim relief, i.e., direction to BRPL to forthwith make the payment of 75% of the deducted amount along with applicable delay payment surcharge subject to the outcome of the present proceedings to tide over the financial crisis situating as being faced by JITPL. Whereas, learned counsel for the Respondent, BRPL, accepted the notice and sought liberty to file a reply in the matter. Learned counsel also pointed out that the Petition was not supported by an affidavit of Petitioner No.2, TPTCL. After hearing the learned counsel for the parties, the matter was admitted and notice was issued permitting the parties to complete the Pleadings in the matter.

5. Thereafter, the matter was listed for the hearing on several occasions, viz. 16.3.2023, 13.4.2023, 16.8.2023, 25.10.2023, 3.1.2024, 12.1.2024 and finally on 15.3.2024. In the meantime, Petitioner No.2 filed its affidavit supporting the instant Petition. Whereas, Respondent, BRPL, and Petitioner No.1, JITPL, also filed their reply and rejoinder, respectively. In addition, JITPL and TPTCL also filed additional affidavits furnishing certain details/information as called for vide Record of Proceedings for the hearing dated 16.8.2023.

6. The Respondent, BRPL vide reply dated 24.4.2023, has mainly submitted as under:

(a) The Petitioners have opted for the course of pick-and-choose terms and clauses from the Lol dated 13.02.2021 and the Bid Documents dated 17.12.2020, which best serves their case and/ or the present matter. The Lol and the Bid Documents, by definition, are agreements that are binding on both

parties and, therefore, require a holistic reading and not a limited consideration. Since the requisition period as per Clause No.1, i.e., "QUANTUM" of the BRPL's Lol dated 13.02.2021, was on a fortnightly basis, it becomes evidently clear that the power supply in the present tender was divided on a fortnightly basis and not on a monthly basis. The tariff, as well as the Quantum of Power quoted by the Petitioners during the entire contract period, was on a fortnightly basis and not on a monthly basis, a fact which is evident from the prices quoted by the Petitioners for the months of May, July, and August.

(b) Each requisition period, as mentioned/ highlighted in the Lol and the Bid Documents, is identifiable as a separate unit for the purpose of contractual obligations with distinct quantum and price. Hence, each requisition will have its own implication for the billing, payment, compensation, etc. The said principle was accepted/ admitted and subsequently applied by TPTCL and other generators in the previous months of billings.

(c) The auction in the present tender was conducted separately for each requisition period, and the bidder (TPTCL in the present case) had the choice to participate in any requisition period. Similarly, the Respondent also had the choice of placing the Lol for any of the requisition periods, depending upon the suitability of the rates that were determined in the reverse auction or for any other such reasons. Therefore, it becomes abundantly clear that the calculations for the compensation of the liquidated damages levied by BRPL upon the Petitioners were separate for each requisition period and not for the entire month as sought and contented by the Petitioners in the present Petition.

(d) On the issue of imposition of IGST on the liquidated damages, it is pertinent to mention that even though the supply of electricity is exempt under GST the amounts that are charged as Compensation/ Liquidated Damages are taxable under the scheme of the GST Act. Such amounts are squarely covered by entry 5(e) of Schedule II of the Act. On a bare reading of entry 5(e), it is clear that the compensation/ Liquidated damages form part of the activities or transactions which are to be treated as a supply of goods or supply of services and, thus, fall under the category of 5(e) of the Act. GST is applicable on the Liquidated Damages/ Compensation under the above provisions of the Act. The legal matrix and precedents, as relied upon, hold that GST is applicable on

liquidated damages. In this context, the reliance has been placed on (i) order of the Maharashtra Appellate Authority for Advance dated 11.9.2018 in the matter of Maharashtra State Power Generation Co. Ltd., (ii) order of Maharashtra Authority for Advance Ruling dated 11.7.2018 in the matter of North American Coal Corporation India Pvt. Ltd., (iii) order of Gujarat Authority for Advance Ruling for Goods and Service Tax dated 4.3.2019 in the matter of Dholera Industrial City Development Project Ltd., and (iv) order of Maharashtra Appellate Authority for Advance Ruling for Goods and Service Tax dated 14.3.2019 in the matter of Bajaj Finance Limited.

(e) In view of the observations held by the Authorities and Appellate Authorities in the above precedents, it is abundantly clear that GST is applicable on liquidated damages in cases of non-performance, under-performance, and/or late performance of a contract, which in the present case is also highlighted on account of breach of contract by the Petitioners due to non-supply of power in the month of July 2021 that being their contractual obligations.

(f) Entry No. 62 of Notification No. 12/2017 Central Tax (rate) dated 28.6.2017, which states that services provided by the Central Government, State Government, Union territory, or local authority by way of the tolerating non-performance of a contract for which consideration in the form of fines or liquidated damages is payable to the Central Government, State Government, Union territory or local authority under such contract.

(g) Therefore, only in cases where Liquidated Damages are received by the Government is GST exempted. However, in all other cases (present cases included), the intention of the law is clear that GST is applicable to Liquidated Damages. All the other traders/ generators have already paid GST on the compensation bills that were raised by the Respondent in cases where there was a failure on the part of the generators to provide the contracted capacity power.

(h) The calculations made by BRPL in regards to levying the Liquidated Damages were correctly based on a fortnightly basis as pictured and evidenced from the LOI as well as the Notice Inviting Tender. Moreover, in view of the catena of precedents mentioned above, GST is applicable on the Liquidated



Damages and, as such, is applicable in the present case and categorized as a proper entry under Rule 5(e) of Schedule II of the CGST Act, 2017.

(i) The compensation bills/ invoices, as well as levy of the Liquidated Damages, were in accordance with the terms of the Lol, Notice inviting Tender, as well as the established tenets of the law.

(j) As regards the Petitioners' averment regarding providing the 37 MW of power to the Respondent, the Petitioners had applied for the 255 MW of Open Access initially. However, as per the directions of Petitioner No.1, JIPTL, TPTCL made a downward revision of the 221 MW on 28.4.2021. However, on 1.5.2021, the Petitioners conveyed to BRPL regarding the outage of the plant, which, in turn, resulted in reduced availability to the BRPL. The said reduced quantum continued to be supplied to BRPL till 6.5.2021. At this juncture, it is necessary to note that TPTCL always had an option to supply power from an alternate source as per the contract. It is now that the Petitioners offered 37 MW additional power to the Respondent for 8.5.2021 on a day ahead basis to, in fact, make up for the short supply of power during May 2021. Also, the power planning of BRPL on a day ahead basis is completed by 10:30 am and thus, any power offered post 10:30 is automatically not accepted. The quantum of power offered by TPTCL was made at 11:51 am, and thus, for such reason, the power was not availed by the Respondent. Therefore, the 37 MW power provided by the Petitioners was, in fact, additional power to compensate for the less power provided in May 2021.

7. The Petitioner No.1, JIPTL vide rejoinder dated 8.5.2023, has mainly submitted as under:

(a) As per clause 7(b) of the Lol, in case of deviation on the part of TPTCL is more than 15% of contracted energy for which open access has been allocated on a monthly basis, TPTCL shall pay the compensation to the Respondent at 20% of tariff per kWh for the quantum of shortfall in excess of permitted deviation of 15% in the energy supplied and pay open charges to the extent not availed by BRPL. However, BRPL, in complete derogation of the above provision of the Lol, proceeded to levy liquidated damages on a fortnightly basis instead of strictly computing the same on a monthly basis in

terms of the aforesaid clause. Lol does not specify that the damages have to be computed on a fortnightly basis but such computation can be done only on a monthly basis.

(b) Under the terms of the Lol, weekly bills shall be raised by TPTCL, and the payment shall be made within 7 days by BRPL from the date of receipt of the bill. Further, it is reiterated that under Clause 7(b), deviation has to be calculated on a monthly basis. This demonstrates that the only time period contemplated under the contract for any payment or levy is either a weekly or monthly basis. The contract nowhere states that bills for liquidated damages can be raised on a fortnightly basis. Therefore, the action of BRPL in raising the bill for short-supply on a fortnightly basis, is a completely foreign concept and dehors the terms of the Lol.

(c) As regards the BRPL's contention that the quantum of power to be scheduled from the Petitioner is on a fortnightly basis, this does not change the fact that liquidated damages are to be computed on a monthly basis. For computing the liquidated damages, BRPL can take a weighted average of the schedule and the tariff mentioned for 15-day periods in the Lol. This has to be done for harmoniously construing the Lol *qua* the intent behind Clause 7.

(d) BRPL's reliance on the provision regarding the applicability of GST on the liquidated damages as per entry 5(e) of Schedule II of the GST Act is completely erroneous and misleading as BRPL has ignored the Notification dated 28.6.2017 issued by the Ministry of Finance whereunder applicability of GST has been specifically exempted on the activity of distribution and transmission of electricity. Subsequently, the Department of Revenue and the Ministry of Finance issued a Circular dated 3.8.2022 wherein it was clarified that the Liquidated Damages, which are payable to compensate the loss caused by a party committing a breach of contract, are not 'consideration of supply' and hence, such damages are not taxable under the GST Act. GST levied by BRPL on the liquidated damages does not constitute 'consideration of supply,' and therefore, GST is not applicable to the Petitioner in view of the Circular dated 3.8.2022 issued by the Ministry of Finance.

(e) Since the liquidated damages are not a 'consideration of a contract' but merely a 'condition of a contract,' GST is not applicable on the payment of

such damages. Further, when the bid was submitted for the supply of power to BRPL, the tariff under the said bid was inclusive of all taxes and duties. Therefore, BRPL in no way can now proceed to levy the GST separately on the compensation bills raised by it for the alleged short supply of power. Any such liability qua GST (if applicable) has to be borne by BRPL. The claim raised by BRPL upon the Petitioner *qua* levy of liquidated damages is unsustainable in the eyes of the law and ought to be set aside by this Commission.

8. Pursuant to the liberty granted by the Commission vide Record of Proceedings for the hearing dated 16.8.2023, the Petitioner, JITPL, and BRPL have also filed their respective written submissions, mainly reiterating their respective submissions made in their pleadings.

9. Since the order in the matter, which was reserved on 15.3.2024, could not be issued prior to the Member of the Commission, who formed part of Coram, demitting office, the matter was re-listed for the hearing on 17.9.2024. During the course of the hearing, learned counsel for both sides submitted that the parties have already made their detailed submissions in the matter and have filed their respective written submissions, and the same may be considered.

10. After hearing the learned counsel for the parties, the Commission directed both sides to file their brief written submissions on the aspects viz. (i) jurisdiction and authority of this Commission to rule upon the applicability / non-applicability of IGST on liquidated damages under CGST Act even in the wake of Circular dated 3.8.2022 issued by the Department of Revenue, the Ministry of Finance, and (ii) whether any authority and/or the Hon'ble High Court had an occasion to consider the nature and scope of the aforesaid circular including its operation, i.e., prospective or retrospective. if so, copies thereof.

11. Pursuant to the above, only the Petitioners have filed their written submissions on the above aspects, whereas BRPL did not file any written submissions thereon. The Petitioners, in their identical written submissions, have reiterated the submissions made in the Petition and mainly submitted as under:

Re: Jurisdiction and authority of the Commission to rule upon the applicability / non-applicability of IGST on liquidated damages

(a) A court or the tribunal, which is vested with the jurisdiction over a subject matter/lis is bound to take into account the law which is in force for the time being while exercising its jurisdiction and adjudicating the lis pending before it. This Commission, having vested with the plenary power to regulate tariffs under Section 79 (1) (b) of the Act, is bound to consider and apply the applicable law, whether it is in the form of parent/principal statutes or subordinate legislations in the form of Rules or any other delegated legislations, inter alia, in the form of Regulations, Notification, Circulars, etc.

(b) The component “liquidated damages” being part of the tariff of the Respondent/ BRPL, determination of any component in the form of addition thereto or deduction therefrom would also be the subject matter for the determination while determining the tariff under Section 79 (1) (b). The alleged claim of Respondent/ BRPL qua liquidated damages at a pre-defined rate of 20% of the LOI tariff arises due to the alleged short supply of power by the Petitioners below the normative availability. On account of such alleged short-supply of power, the Respondent / BRPL is claiming liquidated damages/ compensation from the Petitioners in order to off-set/ mitigate the loss, probably caused due to purchase of expensive power from the alternative source(s), to the extent, the Petitioners allegedly failed to supply tied-up power under the LOI. Considering the aforesaid, the liquidated damages/ compensation so claimed from the Respondent shall form part of the overall power purchase cost of the Respondent/ BRPL in arranging alternate power. As such, the said liquidated damages are nothing but part of the power purchase cost and form part of the Annual Revenue Requirement (ARR) of BRPL. Therefore, it becomes part of the tariff structure of the distribution licensee.

(c) The subject matter before this Commission is to adjudicate upon the claim of liquidated damages/compensation made by BRPL, which is part of the power purchase cost/ tariff structure of the distribution licensee. Since the subject matter of

the present case involves the issue of regulation of tariff, it invariably lies within the jurisdiction of this Commission under Section 79(1)(b) of the Act, the decision of applicability or non-applicability of any component, including the GST thereupon, ought to be decided by this Commission only. Undisputedly, in view of the above issue raised by the Petitioners, a determination as to whether or not the compensation/ liquidated damages (with applicable additions/deductions, if any, as per the prevailing law, in the present case, GST Circular dated 3.8.2022) forms part of the tariff structure of the Discoms is well within the subject matter jurisdiction and plenary powers of this Commission under Section 79 of the Act.

(d) It is also a settled position of law that a court of law possesses inherent power to determine the applicability of a particular law to the subject matter under adjudication. Accordingly, the issue of applicability of GST upon the liquidated damages/ compensation in terms of the CGST Act and the prevalent circulars, also lies within the competence of this Commission, being a judicial body constituted under the Act. The jurisdiction of a court is decided based on the lis/ subject matter under adjudication. In the present case, as the lis stems from the claim of liquidated damages/ compensation by BRPL, this Commission is the appropriate authority to rule over the applicability/ non-applicability of GST upon the liquidated damages being claimed by the Respondent/ BRPL.

(e) The tariff determination being a function that is exclusively vested with this Commission (and also the state electricity regulatory Commissions as the case may be) under the Act and determination of compensation/liquidated damages forming part thereof, the determination as to addition/deduction of the GST component therein, cannot be parted with for the adjudication of another Forum. Further, taking cognizance of an exemption created by the Circular dated 3.8.2022 and applying the same in deciding the compensation/liquidated damages for ultimately determining the tariff is well within the jurisdiction of this Commission.

Re: Prospective/ Retrospective applicability of Circular dated 3.8.2022 issued by the Department of Revenue, the Ministry of Finance

(f) The invoices raised by the Respondent/BRPL seeking compensation/ liquidated damages for the period from May to September 2021 are covered by the Circular dated 3.8.2022 issued by the Ministry of Finance. Since the said Circular is in the nature of 'clarification' to the existing Notification dated 28.6.2017, the Circular dated 3.8.2022 will operate retrospectively while covering the present transaction

between the Petitioners and Respondent. This view is supported by the judgment passed by the High Court of Kerala in WP (C) No. 27373 of 2022, titled *Manappuram Finance Limited Vs. The Asst. Commissioner, Central Tax and Excise, Thrissur Division and Ors.* wherein the Hon'ble Court, while considering the same Circular dated 3.8.2022, held that since the said circular clarifies the existing law, i.e., Notification dated 28.6.2017, the same shall apply to all past transactions covered by the existing notification.

(g) The Circular dated 3.8.2022 was issued by the Ministry of Finance in order to address the lacuna of applicability of the GST on liquidated damages, compensation, penalty, late payment surcharge, etc., in cases of breach of contract or otherwise. When a notification/ circular is issued for filling a lacuna/ plugging a gap so as to smoothen a process provided under the CGST Act, the same is deemed to be issued as a 'clarification,' having a retrospective effect. In this regard, JITPL has placed reliance on the judgments, namely (a) *Zile Singh vs State of Haryana & Ors.* [reported as (2004) 8 SCC], and (b) *Shyam Sunder & Ors. Vs. Ram Kumar & Anr.*, [reported as (2001) 8 SCC 24].

(h) Even otherwise, it is a settled principle of law that the beneficial Circular must be applied retrospectively. JITPL has placed reliance on the judgment of the Hon'ble Supreme Court passed in *Suchitra Components Ltd. v. Commissioner of Central Excise* [reported as (2006) 12 SCC 452]. The subject Circular dated 3.8.2022 issued by the Ministry of Finance, being in the nature of a beneficial circular for an assessee, shall be applicable retrospectively and cover the invoices raised by the Respondent/ BRPL seeking compensation/ liquidated damages for the period from May to September 2021. Hence, by virtue of the applicability of Circular dated 3.8.2022, the Petitioners are exempted from the levy of GST on the activity of distribution and transmission of electricity.

(i) Once the distribution business/ activity as a whole is exempted from the applicability of GST, the levy of GST on the liquidated damages recoverable under the pretext of short supply of power by the Petitioners, which falls under the distribution domain of the Respondent DISCOM, is contrary to the Notifications issued by the Ministry of Finance, and hence illegal.

(j) Besides the liquidated damages being specifically exempted from the levy/ applicability of GST vide the specific law (being Circular Date 3.8.2022) as aforesaid,

such exclusion would also find weight from the law declared by the Hon'ble Customs Excise and Service Tax Appellate Tribunal (CESTAT) in its various judgments passed in viz. MPPTCL v. Principal Commissioner of GST & C. Ex., Bhopal reported in 2023 [(385) ELT 152 (Tri-Del)]; MPPTCL v. Principal Commissioner of GST & C. Ex., Bhopal reported in [(2023) 6 Centax 49 (Tri-Del)]; MPPTCL v. Commissioner of Customs & Central Excise, Bhopal reported in [(2023) 4 Centax 400 (Tri-Delhi)]; and MPPTCL v. Commissioner of CGST & Central Excise, Bhopal [reported in 2022 (67) G.S.T.L. 83 (Tri-Delhi)], wherein all the CESTAT has unequivocally held to the effect that service tax is not leviable upon liquidated damages.

(k) Since the levy of GST on the liquidated damages recovered from the Petitioners is illegal, in that case, appropriate directions ought to be issued by this Commission upon BRPL to refund/ reimburse the amount of GST illegally recovered from the Petitioners along with the liquidated damages.

### **Analysis and Decision**

12. We have considered the submissions made by the parties and perused the documents available on the record. After considering the submissions of the parties and perusal of the documents placed on record, the following issues arise for consideration:

**Issue No. 1: Whether the Petitioners are liable to pay the liquidated damages for failure to supply the instructed capacity? If so, whether it has to be computed on a fortnightly basis or a monthly basis?**

**Issue No. 2: Whether GST/IGST is leviable on the Liquidated Damages payable by the Petitioners under Clause 7 of the Lol?**

The above issues have been dealt with in the subsequent paragraphs.

**Issue No. 1: Whether the Petitioners are liable to pay the liquidated damages for failure to supply the instructed capacity? If so, whether it has to be computed on a fortnightly basis or a monthly basis?**

13. The Petitioners have submitted that during the period of supply, i.e., from May to September 2021, there was a certain shortfall in the supply of power by JITPL. However, as a matter of fact, JITPL had offered the day ahead additional Declared Capacity on various occasions, as indicated in the Petition, but the same was declined

by BRPL. It is the case of the Petitioner that despite the denial by BRPL itself for scheduling the power, it alleged short-supply of power by the Petitioners and erroneously raised the compensation invoices in terms of Clause 7(b) of the Lol dated 13.2.2021 for the period from May to September 2021. According to the Petitioners, BRPL, having denied accepting such additional offered capacity, the Petitioners cannot be held liable for short-supply of power under the Lol.

14. The Petitioners have also vehemently contested the method of computation of compensation adopted by BRPL under Clause 7(b) of the Lol. The Petitioners have submitted that as per the said Clause, in case of the deviation on the part of TPTCL is more than 15% of the contracted energy for which open access has been allocated on a 'monthly basis,' TPTCL shall pay the compensation to BRPL at 20% of tariff per kWh for the quantum of shortfall in excess of permitted deviation of 15% in energy supplied. However, BRPL, in complete derogation of the said Clause, has proceeded to levy the liquidated damages on a fortnightly basis instead of strictly computing the same on a monthly basis. The Petitioners have relied on the various authorities to submit that as per the settled principle of law, terms of a contract cannot be unilaterally changed /amended or modified at the whims and fancies of a contracting party.

15. *Per contra*, BRPL has refuted the contention of the Petitioners that BRPL has erroneously computed the compensation for the short supply of power by the Petitioners under the Lol dated 13.2.2021. Referring to the additional capacity of the 37 MW offered by the Petitioners, BRPL has submitted that the said capacity was offered to BRPL for 8.5.2021 on a day-ahead basis to make up for the short supply of power during May 2021. However, the power planning of BRPL on a day ahead basis is completed by 10:30 am and any power offered post said period is automatically not



accepted. The offer of the said quantum of power was made by TPTCL at 11:51 am and for such reason, the power was not availed by BRPL.

16. BRPL has further submitted that the Petitioners have opted to pick and choose the terms and clauses from the Lol dated 13.2.2021 and Bid Documents dated 17.12.2020, that best serve their case. Since the requisition period as per Clause 1, i.e., “Quantum” of BRPL’s Lol, was on a fortnightly basis, it is evidently clear that the power supply in the said tender was divided on a fortnightly basis and not monthly basis. The tariff, as well as the quantum of power quoted by the Petitioners during the entire contract period, was on a fortnight basis and not on a monthly basis – a fact which is evident from the prices quoted by the Petitioners for the Months of May, July, and August 2021. It has been submitted that each requisition period, as mentioned in the Lol / Bid Documents, is identifiable as a separate unit for the purpose of contractual obligations with distinct quantum and prices. Hence, each requisition will have its own implication for billing, payment, and compensation, etc. The said principle was also accepted/admitted and subsequently applied by TPTCL and other generators in the previous months of billing.

17. We have considered the submissions made by the parties. At the outset, we note that the Petitioners have *per se* not contested the liability of liquidated damages in terms of Clause 7(b) of the Lol dated 13.2.2021 in the event of failure to supply the Instructed Capacity/short supply. JITPL, in its written submissions, has also clearly stated that during the period of supply under the aforesaid Lol, there was a certain shortfall in the supply of power on the part of JITPL. However, the levy of liquidated damages by BRPL has been contented by the Petitioners on two folds, viz. (i) non-consideration of the additional day ahead capacity offered by the Petitioners, and (ii) computation of such damages on a fortnightly basis instead of a monthly basis.

18. Insofar as the Petitioners' contest to such levy on the ground of non-consideration of the additional day ahead capacity offered by the Petitioners is concerned, we have carefully perused the provisions of the Lol as well as the Bid Documents/RFP. Without going into the reasons for the non-acceptance/acceptance of such capacity by BRPL, we find that neither the Lol nor the RFP lays any mandate upon the procurer, i.e., BRPL to accept the additional capacity offered by the generator/trader to off-set the shortfall in the supply of contracted energy at a given point. As per the terms & conditions of the Lol, TPTCL (and, in turn, JITPL) was bound to supply the contracted energy to BRPL, subject to the permitted deviations in terms of Clause 7 of the Lol. Having failed to supply such contracted energy in the first place, they cannot force the procurer/BRPL to accept the additional day ahead capacity offered to re-coup such short supply, especially in the absence of any specific provisions in the Lol and/or RFP, which requires the procurer/BRPL to accept such additionally offered capacity. In support of their plea, the Petitioners have also failed to show any such enabling provisions in the Lol and/or RFP. Hence, in light of these observations, the contention of the Petitioners to the levy of the liquidated damages on the ground of non-consideration of the additional day-ahead capacity as offered by the Petitioners cannot be sustained and is, accordingly, rejected.

19. Now, coming to the issue of the appropriate manner of computation of the liquidated damages, Clause 7 of the Lol reads as under:

***“7. Payment of Liquidated Damages for failure to supply the Instructed Capacity:***

*Both the parties would ensure that actual scheduling does not deviate by more than 15% of the contracted power as per the approved open access on monthly basis.*

*a. In case deviation from BRPL side is more than 15% of contracted energy for which open access has been allotted on monthly basis, BRPL shall pay compensation at 20% of Tariff per kWh for the quantum of shortfall in excess of permitted deviation of 15% while continuing to pay open access charges as per the contract.*

*b. In case of deviation from TPTCL side is more than 15% of contracted energy for which open access has been allocated on monthly basis, TPTCL shall pay compensation to BRPL at 20% of Tariff per kWh for the quantum of shortfall in excess of permitted deviation of 15% in the energy supplied and pay for the open access charges to the extent not availed by BRPL”.*

The above clause provides for the payment of the Liquidated Damages for failure to supply the Instructed Capacity. It firstly requires both parties to ensure that the actual scheduling does not deviate by more than 15% of the contracted power as per the approved open access on a monthly basis and, thereafter, proceeds to specify the consequences in the event either of the party fails to do so at sub-clauses (a) and (b). The relevant sub-clause for the present case, sub-clause (b), provides that in case of deviation from the TPTCL side is more than 15% of contracted energy for which open access has been allocated on a monthly basis, TPTCL shall pay the compensation to BRPL @ 20% of tariff per kWh for the quantum of shortfall in excess of permitted deviation of 15% in the energy supplied.

20. A bare reading of the above clause shows that the wordings used therein is ‘monthly basis,’ and this is precisely what has been relied upon by the Petitioners in contesting the manner of computation of the liquidated damages adopted by BRPL, which has done so on a ‘fortnightly basis.’ On the other hand, BRPL has submitted that the power procurement quantum in the Lol specified the requisition period on a fortnightly basis, and each requisition period, as mentioned in the Lol and/or Bid document, was a separate unit for the purpose of contractual obligations with the distinct quantum and price - having its own implication of the billing, payment, and compensation, etc. BRPL has also stressed that the said sub-clause cannot be read in isolation/ ignorance of other clauses of the Lol and the RFP but have to be read in consonance with each other.

21. We have considered the submissions made by the parties. While at first blush, the arguments of BRPL appear to be appealing, they fail to hold the field on closer scrutiny, particularly in terms of the settled legal principles governing the interpretation of a commercial contract. It is trite that the contract, being a creature of an agreement between two or more parties, has to be interpreted giving the literal meaning unless there is some ambiguity. In this regard, we may gainfully refer to the judgment of the Hon'ble Supreme Court in Rajasthan State Industrial Development and Investment Corporation and Anr. v. Diamond & Gem Development Corporation Ltd. & Anr., [(2013) 5 SCC 470], which reads as under:

*“23. A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meaning unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely.*

22. Undisputedly, the Bid documents/RFP issued by the BRPL solicited the power procurement on the requisition period (fortnightly) basis, requiring the bidders to quote for the quantum as well as the tariff for each requisition period. Also, as pointed out by BRPL, the Lol issued in favour of TPTCL at Cl. 1, i.e., “Quantum,” specifies a requisition period on a fortnightly basis. The relevant extract of Cl.1 of the Lol is reproduced hereunder:

*“1. Quantum:*

*Arrangement : TPTCL shall supply below mentioned quantum of power to BRPL:*

<b>Month</b>	<b>Period</b>	<b>Duration</b>	<b>Quantum to be supplied to BRPL MW</b>	<b>Source</b>	<b>Price Rs/Kwh</b>
May ' 2021	1 <sup>st</sup> May ' 2021 to 15 <sup>th</sup> May 2021	RTC	250	JITPL	2.95
	16 <sup>th</sup> May ' 2021 to 31 <sup>st</sup> May 2021	RTC	250	JITPL	2.97
June ' 2021	1 <sup>st</sup> June ' 2021 to 15 <sup>th</sup> June 2021	RTC	250	JITPL	3.05
	16 <sup>th</sup> June ' 2021 to 31 <sup>st</sup> June 2021	RTC	250	JITPL	3.05
July 2021	1 <sup>st</sup> July ' 2021 to 15 <sup>th</sup> July 2021	RTC	250	JITPL	3.07
	16 <sup>th</sup> July ' 2021 to 31 <sup>st</sup> July 2021	RTC	250	JITPL	3.05
August 2021	1 <sup>st</sup> August ' 2021 to 15 <sup>th</sup> August 2021	RTC	250	JITPL	3
	16 <sup>th</sup> August ' 2021 to 31 <sup>st</sup> August 2021	RTC	250	JITPL	3.06
September 2021	1 <sup>st</sup> September ' 2021 to 15 <sup>th</sup> September ' 2021	RTC	250	JITPL	3

23. However, the bare reading of the above clause reveals that the fortnightly requisition appears to be merely an Arrangement for supply and does not reflect the intent of treating each requisition period as a separate contractual obligation for the purpose of billing, payment & compensation, etc., as averred by BRPL. The above position also gets support when read with Cl. 8 'Billing' of the Lol, which, while providing for the raising of weekly bills on a provisional schedule and a final adjustment bill after the issuance of REA, makes specific reference to the power supplied during 'a calendar month' and not to the fortnightly requisition period. The relevant extract of Cl. 8 of the Lol is reproduced below:

*"8. Billing*

*For the supply of power by TPTCL during a calendar month, TPTCL shall raise weekly bills on provisional schedule issued by SLDC/RLDC(s). For the purpose of weekly bills, each month will be divided into four parts starting from 00.00 Hrs. of the 1<sup>st</sup>, 9<sup>th</sup>, 16<sup>th</sup> and 24<sup>th</sup> Day of the month to 24:00 hrs. of 8<sup>th</sup>, 15<sup>th</sup>, 23<sup>rd</sup> and last day of the month respectively. After receipt of REA of concerned RPC / Accounting Statement of Delhi SLDC, final bill shall be raised for necessary adjustments."*

24. Hence, even upon reading the various clauses of the Lol as a whole, nowhere does it reflect the intention of the parties that the computation of Liquidated Damages had to be worked out on a fortnightly basis as contended by BRPL. In any case, it is a trite law that when the terms of the contract are explicit in their expression, it is not permissible for the Courts to make a new contract, however reasonable, if the parties have not made it themselves. In the present case, the Lol, as well as the bid document/ RFP, categorically provided that the computation of liquidated damages for the failure to supply the Instructed Capacity shall be on 'a monthly basis.' The said expression, including its literal meaning, is quite clear, and no ambiguity can be ascribed to it.

25. BRPL has also submitted that if the interpretation as put forth by the Petitioners is accepted, it will result in a fallacy, particularly if the generator/ supplier bids/is successful only for one fortnight in a month. In such cases, effectively, the base for the computation of the liquidated damages would become half of the contracted capacity, and there is nothing in the RFP, Guidelines, or Lol that could support such a construction. The above submission of BRPL is, in our view, misconceived. For the instances where the supplier has submitted its bid or has become successful only for a fortnight in a month, the computation of liquidated damages on a monthly basis would not lead to any discrepancy, as alleged by BRPL. In fact, in such instances, the amount worked out as liquidated damages ought to be the same, irrespective of whether calculated on a fortnightly basis or a monthly basis. Similarly, for the instances where the supplier has awarded a different quantum and/or tariff on fortnightly periods in a month, as rightly pointed out by the Petitioners, the computation of liquidated damages can easily be worked out by taking the weighted average of capacity and tariffs. In other words, the computation of liquidated damages on a 'monthly basis' as envisaged in Clause 7(b) of the Lol, neither renders the said Clause unworkable in

any manner nor does it lead to the outcomes which are at odds with the intendment of the parties.

26. On the contrary, even if we were to accept the submissions of BRPL *in toto*, it would amount to reading an implied term “fortnightly basis” in a contract/Lol. In the context of reading an ‘implied term’ in a contract, the Hon’ble Supreme Court in Nabha Power Ltd. v. Punjab State Power Corporation Ltd. and Anr., [(2018) 11 SCC 508] has observed as under:

*“72. We may, however, in the end, extend a word of caution. It should certainly not be an endeavour of commercial courts to look to implied terms of contract. In the current day and age, making of contracts is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it reads, as per its express terms. The implied terms is a concept, which is necessitated only when the Penta-test referred to aforesaid comes into play. There has to be a strict necessity for it...”*

For invoking the business efficacy test and reading an implied term in a contract, the above judgment provides that such implied term is required to satisfy the Penta-test comprising the following conditions: (i) reasonable and equitable; (ii) necessary to give business efficiency to the contract, (iii) It goes without saying, i.e., officious bystander test, (iv) capable of clear expression; and (iv) must not contradict any express terms of the contract. In the present case, the term ‘fortnightly basis’, as sought to be implied by BRPL, would not even satisfy the above referred Penta test inasmuch as it would clearly contradict the express contract term ‘monthly basis’ as appearing in Clause 7(b) of the Lol.

27. In view of the foregoing observations, the levy of the liquidated damages computed on a fortnightly basis by BRPL cannot be sustained as such computation has to be on a monthly basis as clearly envisaged in Clause 7(b) of the Lol.

Consequently, the excess amount paid by the Petitioners on account of such erroneous computation by BRPL shall be refunded by BRPL within 30 days from the date of this order, along with applicable interest at the rate of surcharge for the delayed payment as prescribed in the Lol.

28. The issue is answered accordingly.

**Issue No. 2: Whether GST/IGST is leviable on the liquidated damages payable by the Petitioners under Clause 7 of the Lol?**

29. The Petitioners have also vehemently contested the levy of GST / IGST by BRPL on the amount of compensation claimed under Clause 7 of the Lol on account of the short supply of power by the Petitioners. The Petitioners have submitted that even if the liquidated damages were to be levied on the Petitioners, they were part of the ARR of the BRPL and, thus, became part of the tariff structure of BRPL. It has been submitted that such liquidated damages, being imposed as part of the cost of distribution of electricity, were not subject to GST as the services of the distribution of electricity are exempted from the imposition of taxes in terms of the Ministry of Finance's Notification dated 28.6.2017. The Petitioners have also submitted that the liquidated damages in the present case were not for the purpose of tolerating an act or situation, as contemplated under Entry 5 of Schedule II of Section 7(1A) of CGST Act, 2017, and thus, no GST can be levied. The Petitioners have also strongly relied upon the Circular dated 3.8.2022 issued by the Department of Revenue, the Ministry of Finance, Government of India and have submitted that it has been amply clarified at Clause 7.14 therein that the liquidated damages which are payable to compensate the loss caused by a party committing a breach of contract, are not consideration of supply and hence, not taxable under the GST Act. Also, the said Circular, being in the nature of clarification, applies retrospectively and would cover the invoices raised by



BRPL seeking the compensation / liquidated damages for the period from May to September 2021. The Petitioners have also relied upon the various rulings, including the judgment of the CESTAT in the case of South Eastern Coalfields Ltd. v. Commissioner of Central Excise and Service Tax and the advance ruling dated 19.10.2022 of Telangana Appellate Authority for Advance Ruling (GST).

30. *Per contra*, BRPL has submitted that although the supply of electricity is exempt from the GST, any fees charged as compensation or liquidated damages falls under the category of GST taxation scheme as these charges fall within the scope of entry 5(e) of Schedule II of the CGST Act. Further, by placing the reliance on (i) the ruling of the Maharashtra Appellate Authority for Advance Ruling (GST) dated 11.9.2018 in the matter of MSPGCL, (ii) the ruling of Maharashtra Authority for Advance Ruling dated 11.7.2017 in the matter of North America Coal Corporation India Pvt. Ltd. and (iii) ruling of Gujarat Authority for Advance Ruling on GST dated 4.3.2019 in the case of Dholera Industrial City Development Project Ltd., BRPL has submitted that based on the observations of the above Authorities and Appellate Authorities, it is evident that GST was at the relevant time applicable on the liquidated damages in case of non-performance, underperformance, or late performance of a contract. It has been submitted that the present situation of breach of contract due to non-supply of power occurred in the month of July 2021, and the imposition of GST on the liquidated damages arising out of such breach of contract is consistent with the precedents holding the field during the relevant time.

31. We have considered the submissions made by the parties. Having perused the rulings of the various authorities relied upon by the parties as well as having regard to the subsequent Circular dated 3.8.2022 of the Department of Revenue, the Ministry of Finance, we are constrained to observe that the answer to the present issue would

essentially require determination of GST applicability, if any, on payment of the liquidated damages/compensation arising out of the breach of contract (due to short-supply of power) at the relevant point in time. It is pertinent to note that the levy and collection of GST are exclusively governed by the provisions of the GST Acts. Also per Section 97(2) read with Section 95(a) of the Central Goods and Service Tax Act, 2017, the jurisdiction to address the matters/questions such as (a) classification of any goods or service or both; (b) applicability of a notification issued under the Act; (c) determination of time and value of supply of goods or service or both; (d) admissibility of an input tax credit of tax paid or deemed to have been paid; (e) determination of the liability to pay tax on any goods or services or both; (f) whether applicant is required to be registered; and (g) whether any particular thing done by the applicant with respect to any goods or services or both amounts to or results in a supply of goods or services or both within the meaning of that term, is vested with the Authority constituted under Section 96 of the said Act. Thus, it appears to us that the issue involved in the instant case, as noted above, squarely fell within the matters/questions referred to under Section 97(2) of the CGST Act, 2017, and therefore, the jurisdiction and authority to rule upon such issue was with the concerned Authority constituted thereunder.

32. Section 162 of the CGST Act, 2017 provides as under:

*“162. Bar on Jurisdiction of Civil Courts: Save as provided in Sections 117 and 118, no civil court shall have the jurisdiction to deal with or decide any question arising from or relating to anything done or purported to be done under this Act.”*

33. The CGST Act, 2017 provides the mechanism for the determination of tax and also provides who are the Officers competent to determine the same and also the manner and mode of recovery of the tax dues. Section 73 of the CGST Act, 2017 also provides for the determination of tax not paid or short paid or erroneously refunded or

input tax credit wrongly availed or utilized for any reason other than fraud or any will full misstatement of suppression of the facts. In order to protect the interest of revenue of the State and to avoid delay in the recovery of taxes and also the mechanism for redressal of grievances in the said Act and for that purpose the legislature has incorporated Section 162 of the CGST Act, 2017, thereby putting a bar on the jurisdiction of Civil courts in dealing with or deciding any question arising from or relating to anything done or purported to be done under the said Act.

34. Section 95 of the Electricity Act, 2003 provides as under:

*"95. Proceedings before the Commission: All proceedings before, the Appropriate Commission shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code (45 of 1860) and the Appropriate Commission shall be deemed to be a civil court for the purposes of Sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974)."*

Thus, rendering any findings on the issue, which squarely stood covered by the matters/questions specified under the CGST Act, 2017, in our view, would amount to usurping the jurisdiction not vested with this Commission under the Electricity Act, 2003. The Petitioners, in their additional written submissions, have sought to argue that this Commission is the appropriate authority to rule upon the above issue. They have also submitted that the tariff determination is a function exclusively vested with this Commission under the Electricity Act, 2003, and the determination of compensation/liquidated damages forming part thereof, the determination as to the addition/deduction of GST component therein cannot be parted with for the adjudication of another forum. We are, however, not persuaded by such submissions of the Petitioners. Pertinently, the issue before us is not only the determination of the applicability of liquidated damages owing to the breach of contract – as we have already ruled upon the said issue in the foregoing paragraphs – but the applicability of

GST also, which is exclusively governed by the provisions of the GST Acts and the Notifications / Clarifications issued thereunder and thus, remedy to the grievance / issue, as noted above, must also lie under the GST Acts.

35. It is observed that the Petitioners have, without prejudice, also put forth an alternative line of submissions. As per the Petitioners, the bidders were required to quote a single tariff inclusive of all taxes, duties, cess, etc., and nowhere in the RFP or Lol did the parties agree that GST shall be levied separately on the liquidated damages or compensation. Hence, in terms of the Lol and/or RFP as well, no GST could have been levied upon the Petitioners, and if at all the GST were to apply, only the Respondent, BRPL, was liable to bear such GST. Again, we do not find any substance in such arguments. If a statute provides a levy and collection of tax in a particular manner or on a particular transaction or entity, the Petitioners cannot argue otherwise. Merely because the Petitioners were required to quote a single tariff inclusive of all taxes, and duties, etc., cannot, in our view, lead to an inference that even on the payment of liquidated damages, a statutory tax, if applicable, would not apply. Thus, the plea of Petitioners that in the absence of the specific provisions in the Lol and/or RFP, they cannot be made liable for the payment of GST on the liquidated damages cannot be independently accepted and is, thus, rejected.

36. This issue is answered accordingly.

37. Petition No. 75/MP/2022 is disposed of in terms of the above discussions and findings.

Sd/-  
**(Harish Dudani)**  
Member

sd/-  
**(Ramesh Babu V.)**  
Member

sd/-  
**(Jishnu Barua)**  
Chairperson

