IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 288 OF 2013

Dated: 12th September, 2014

Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member

IN THE MATTER OF

M/s Wardha Power Company Limited,
Having its registered office at:
8-2, 293/82/A/431/A,
Road No.22, Jubilee Hills,
Hyderabad – 500 033 .... Appellant/Petitioner

VERSUS

1. Reliance Infrastructure Limited,
Reliance Energy Centre,
Santacruz (E),
Mumbai-400 055

2. Maharashtra Electricity Regulatory Commission,
Through its Secretary,
13th Floor, Centre No.1, World Trade Centre,
Cuffe Parade,
Colaba, Mumbai-400 005 .... Respondents

Counsel for the Appellant(s) … Mr. Sanjay Sen, Sr. Advocate
Mr. Hemant Singh
Ms. Shikha Ohri
Ms. Ruth Elwin

Counsel for the Respondent(s) … Ms. Anjali Chandurkar
Mr. Hasan Murtaza
Mr. Aditya Panda for R-1

Mr. Buddy A. Ranganadhan
Mr. Raunak Jain for R-2

JUDGMENT

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The present Appeal has been preferred by M/s Wardha Power Company Limited (in short the 'Appellant-Petitioner'), against the impugned order, dated 13.08.2013, passed by the Maharashtra Electricity Regulatory Commission (in short, the '**State Commission'**) in Case No. 39/2012, in Wardha Power Company Limited vs. Reliance Infrastructure Limited, on the Petition of the Appellant-Petitioner, filed under Section 86(1)(b) and 86(1)(f) of the Electricity Act, 2003 (in short, '**The Act'**), in the matter of dispute between a Generating Company and the Distribution Licensee as a result of deliberate and willful failure of the distribution licensee to make payments on account of change in law as per the terms of Power Purchase Agreement (in short, '**PPA'**), dated 4.6.2010, whereby the petition has been disposed of with the following directions:

(a) that all the notifications, mentioned in para 7.1 in clause (a) to (d) of the impugned order, which had been issued by the Central Government and the State Government, are within the meaning and scope of 'law' including Rules and Regulations pursuant to such law, as also these notifications either change the tax or introduces a new tax, to be borne by the seller. As such, these notifications are within the scope of Article 10.1 of the PPA. Article 10.3.2 of the PPA provides that compensation for any decrease in revenue/increase in expenses of the seller is in excess of an amount equivalent to 1% of the value of the Letter of Credit in aggregate for relevant Contract Year. The Central Government Notifications and Amendment to Maharashtra VAT Regulations, etc, have been issued between September, 2010 to 2011, which are much beyond the bid deadline and the date of PPA. Therefore, change in law has occurred subsequent to bid deadline date and as per provisions

of the bid documents, the economic position of the bidder should be restored as of 7 days prior to bidding date.

(b) that the compensation shall be calculated with the same base as used for the bid and will be effective from the date of Government Circular/Ordinance. The claim shall be made on pro-rata basis based on total energy supplied during the billing period to Reliance Infrastructure Limited (herein Respondent No.1, herein before us). The calculations shall be cross verified by both parties and payment shall be claimed through supplementary bills complete with back up documentary evidence. The Respondent No.1 shall settle the bills promptly post verification. The entire process, from bill submission to settlement, shall be completed in 60 days.

(c) that the bid was based on domestic coal and PPA was accordingly signed. The responsibility of fuel was entirely with the bidder. The bidder was to arrange fuel and meet the supply obligations. Here the bidder, who is Appellant-Petitioner (herein before us), chose to import the expensive high Gross Calorific Value (GCV) Coal to increase efficiency of the plant at his own volition. The State Commission has not found any merit in the Appellant-Petitioner's demand for reimbursement of cost of extra duties, borne by it on a separate base rate (of imported coal) and hence its claim on this account has been rejected.

(d) that on the issue of extra VAT on secondary fuel, the State Commission has noted that VAT rate has undergone revision from 4% to 5%, and this 1% increase is acceptable to Respondent No.1, in case of spares but not in case of secondary fuel. Accordingly, this inconsistency shall be corrected and the contention of the Appellant-Petitioner has been accepted with the direction that the Respondent No.1, shall reimburse additional VAT incurred by Appellant-Petitioner in secondary fuel subject to verification of documents.

2. The Appellant-Petitioner made a claim by reason of "Change in Law" by taking recourse to the provisions of Article 10 of the Power Purchase Agreement (PPA) upto 31.03.2012 in respect of costs alleged to have been incurred by the Appellant-Petitioner. The claim fell under the following four heads:

i. Excise Duty on Coal consumed; Clean Energy Cess on Domestic Coal consumed and VAT on Domestic Coal consumed.

ii. Customs duty on Generation using Imported Coal;

The amount claimed under the aforesaid heads was proportionate to the supply of power by the Appellant-Petitioner to the Respondent No.1 (Reliance Infrastructure Limited).

3. As per the impugned order, out of the amount of Rs.27,63,26,212/- claimed by the Appellant-Petitioner, the State Commission has allowed a sum of Rs.19,25,44,640/- as the Appellant's entitlement under change in law, which has been paid by the Respondent No.1. The balance amount has not been found payable by the State Commission.

4. The relevant facts for deciding this Appeal are as under:

(a) that the Appellant-Petitioner is a generating company having total installed capacity of 540 MW (4x135 MW) and has declared a net available capacity of 480 MW after allowing auxiliary consumption. The Respondent No.1, Reliance Infrastructure Limited (RIL) is a Distribution Licensee and Respondent No.2 - Maharashtra Electricity Regulatory Commission, is a State Electricity Regulator.

(b) that the PPA has been entered into pursuant to Case-I bidding procedure as per the Guidelines issued by the Ministry of Power, Government of India, for determination of tariff by

bidding process for procurement of power by distribution licensees (in short, **'Guidelines'**)

(c) that the Appellant submitted its bid on 10.9.2009, which was accompanied by a format for qualification requirement as per clause 2.1.2.2 of the Request for Proposal (**'RFP'**) wherein documents enclosed related to procurement of coal from Western Coalfields Limited (**'WCL'**). Such procurement was domestic coal and the quality of coal required for the Power Station at normative availability on an annual basis and supporting computation for the same was 2.13 million tonnes per annum.

(d) that the Appellant Company had executed a PPA, dated 4.6.2010, with the Respondent No.1 licensee for selling of available capacity upto the aggregate contracted capacity of 260 MW starting from 1.4.2011 to 31.3.2014 for a period of three years. This quantity is out of the declared net capacity of 480 MW.

(e) that the relevant clauses of the PPA, dated 4.6.2010, in so far as the present Appeal is concerned, are as follows:

> ***"1.1 Definition:*** *……*
> *"Tariff Payment": shall mean the payments to be made under Monthly Bills as referred to in Schedule 4 and the relevant Supplementary Bills."*
> *"1.2 Interpretation*
> *Save where contrary is indicated, any reference in this agreement to:*
> *1.2.1 "Agreement": shall be construed as including as reference to its Schedules, Appendices and Annexures."*
>
> 10 ARTICLE 10: CHANGE IN LAW
> **10.1 Definitions**
> *In this Article 10, the following terms shall have the following meanings:*
> 10.1.1 *"Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline resulting into any*

additional recurring/ non-recurring expenditure by the Seller or any income to the Seller:

……..

- *any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement.*

…….

10.2 Application and Principles for computing impact of Change in Law

10.2.1 *While determining the consequence of Change in Law under this Article 10, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through monthly Tariff Payment, to the extent contemplated in this Article 10, the affected Party to the same economic position as if such Change in Law has not occurred".*

…….

10.3 Relief for Change in law.

…….

10.3.2 During Operating Period

The compensation for any decrease in revenue or increase in expenses to the Seller shall be payable only if the decrease in revenue or increase in expenses of the Seller is in excess of an amount equivalent to 1% of the value of the Letter of Credit in aggregate for the relevant Contract Year.

10.3.3 For any claims made under Articles 10.3.1 and 10.3.2 above, the Seller shall provide to the Procurer and the Appropriate Commission documentary proof of such increase/ decrease in cost of the Power Station or revenue/ expense for establishing the impact of such Change in Law.

10.3.4 The decision of the Appropriate Commission, with regards to the determination of the compensation mentioned above in Articles 10.3.1 and 10.3.2, and the date from which such compensation shall become effective, shall be final and binding on both the Parties subject to right of appeal provided under applicable Law.

10.4 Notification of Change in Law

10.4.2 If the Seller is affected by a Change in Law in accordance with Article 10 and the Seller wishes to claim relief for such a Change in Law under this Article 10, it shall give notice to the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.

10.4.3 Notwithstanding Article 10.4.2, the Seller shall be obliged to serve a notice to the Procurer under this Article 10.4.3, even if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurer contained herein shall be material.

Provided that in case the Seller has not provided such notice, the Procurer shall have the right to issue such notice to the Seller.

10.4.4 Any notice served pursuant to this Article 10.4.3 shall provide, amongst other things, precise details of:

(a) the Change in Law; and

(b) the effects on the Seller.

10.5 Tariff Adjustment Payment on account of Change in Law

10.5.1 Subject to Article 10.2, the adjustment in monthly Tariff Payment shall be effective from:

(i) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or

(ii) the date of order/ judgment of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law.

4. Schedule 4: TARIFF

4.1 General:

…….

ii) The Tariff shall be paid in two parts comprising of Capacity Charge and Energy Charge as mentioned in Schedule 8 of this Agreement.

iii) For the purpose of payments, the Tariff will be Quoted Tariff as specified in Schedule 8, duly escalated as provided in Schedule 6 for the applicable Contract Year ……."

(f) that Schedule 8 gave the Quoted Tariff and specifically stated that the same was from Format 4.10 of RFP of the Selected Bid as annexure and the capacity charges, energy charges as well as transportation charges were quoted to be non-escalable. The quoted tariff itself formed a part of Schedule 8 which was the Financial Bid of the Appellant.

(g) that, thereafter, the Appellant served notice for Change in Law dated 9.11.2011. The said notice was replied by the Respondent

No.1 by its letter dated 9.12.2011. The said reply was not accepted by the Appellant and the Appellant approached Respondent No.2-the State Commission, under the provisions of Articles 10.3.3 and 10.3.4 of the PPA by filing Case No.39/ 2012 on 23.4.2012 for the aforesaid reliefs. The Appellant was purporting to recover taxes and levies on expenditure incurred by the Appellant, which according to the Respondent No.1, could not and did not form a part of the energy charges (which were non-escalable) as well as expenditure incurred for procuring imported coal.

5. We have heard Mr. Sanjay Sen, the learned senior counsel for the Appellant-Petitioner and Ms. Anjali Chandurkar, the learned counsel for the Respondent No.1-Distribution Licensee and Mr. Buddy A. Ranganadhan, the learned counsel for the Respondent No.2-the State Commission. We have deeply gone through the evidence and other material available on record including the impugned order and written arguments filed by the rival parties.

6. The two **issues** arising for our consideration are:

(i) Whether the State Commission was correct to link the computation of compensation payable to the Appellant under Change in Law provision of the PPA with the base used in the bid i.e. energy charges quoted in the bid by the Appellant?

(ii) Whether the Appellant is entitled to claim compensation on account of customs duty on imported coal under the Change in Law provision of PPA when the Appellant's bid was based on domestic coal?

7. The following submissions have been made on behalf of the Appellant-Petitioner:

(a) that from a reading of the Article 10, dealing with change in law of the PPA it is evident that the Appellant is entitled to

compensation under the Article 10 of the PPA, in terms of any occurrence of certain events after the date, which is seven (7) days prior to the bid deadline resulting into any additional recurring/non-recurring expenditure by the seller. The compensation envisaged in Article 10 of the PPA is in the nature of any recurring/non-recurring expenditure. Further, the events under which the Appellant is entitled for such change in law compensation is "any change in tax or introduction of any tax made applicable for supply of power by the seller"

(b) that Article 10.2.1 of the PPA provides that while determining the consequences of change-in-law under Article 10 of the PPA, the parties shall have due regard to the principle that "the purpose of compensating the party affected, in such change-in-law is to restore through monthly tariff payment, to the extent contemplated in the said Article, the affected party to the same economic position as if such change-in-law has not occurred". In view of Article 10.1.1 of the PPA, any change in tax or introduction of any tax applicable for "supply of power" by the seller in terms of the agreement will fall within the definition of change-in-law. The Caveat/condition provided under Article 10 of the PPA is that such occurrence should have taken place after the date, which is 7 days prior to the bid deadline.

(c) that it is clear from the terms of the PPA that any additional expenditure recurring or non recurring incurred by the seller/ Appellant, herein, which qualifies within the occurrences described in Article 10.1.1 of the PPA, will be allowed through monthly tariff payment, on account of change-in-law. Therefore, the enquiry for purposes of application of change-in-law is limited to incurring of additional recurring/ non-recurring expenditure by the seller/Appellant, which expenditure falls within the various categories provided in Article 10.1.1. Once

the computation of such change in tax, which qualifies under the change-in-law definition, is made, the Appellant becomes entitled to compensation through monthly tariff payment. There is no other enquiry which can be made for computation of change-in-law compensation.

(d) that the parties to a PPA cannot envisage all the risks attached to the production and supply of electricity. Further, the generation of electricity is also intricately connected and wholly dependent upon the source of fuel (coal). Without fuel/coal, energy cannot be generated. In India, the procurement and distribution of coal has also been regulated. Therefore, a PPA is affected by the regulatory powers of a Commission as well as the prevalent scenario in the field of coal distribution and procurement. Hence, there are various risks attached for the generator of electricity which cannot be envisaged by the parties to a PPA at the time of the bid.

(e) that while a generator quotes a tariff in a bid, it is free to quote escalable and non-escalable energy or capacity charges. When a generator quotes non-escalable energy charges, as in the present case, it means that the generator has locked its risk for that particular base price of coal, in which event the generator cannot later on seek an enhanced payment for any increased base price of fuel/coal. In case a generator quoting escalable energy charges, then the said generator is eligible for claiming compensation under a different mechanism in accordance with the annual escalation index issued by the Central Commission. The said compensation is not part of the present Appeal. Hence, the excalable/non-escalable energy charges are not for calculating compensation under Article 10 of the PPA.

(f) that having quoted non-escalable energy charges, the Appellant can be held to the locked price of coal for the purposes of compensation as per a different mechanism in terms of

issuance of annual escalation index fixed by the Central Commission (CERC). The same is also on account of the fact that by quoting non-escalable coal cost, the generator has taken a risk based on the prevalent coal market. Taking risk on the market driven parameters is an acceptable part of bargaining.

(g) that the Appellant is entitled to claim compensation according to the PPA, in terms of tax, which has been imposed on coal. The Appellant is required to comply with the requirement of Article 10.1.1 of the PPA dealing with the "change in law". The main thrust of arguments of the Appellant is on the phrase of PPA, namely; *supply of power.* Saying that the Appellant being a power generator is to supply power to the Distribution Licensee, and due to the change in law, the Distribution Licensee/Respondent No. 1 is obliged to reimburse the Appellant, the amount of tax paid by the Appellant, for supply of power. **The term "*supply of power*" is broad enough to include the tax payable on the prevalent price of coal**, since the same is necessary for power generation by the Appellant, which is supplied to the Distribution Licensee.

(h) that the test for deciding the price of coal, on which tax incident is to be calculated for computing compensation under change in law, is the language of Article 10 of the PPA, which language of Article 10 is unambiguous, and does not give any right to the Respondent No.1 to deny tax on the prevalent price of coal. The Appellant quoted Rs. 1.25 per kWh as the non-escalable energy charges for the first year and Rs. 0.80 per kWh for the rest two years of the term of the PPA. The same only meant that the Appellant took a risk of not seeking any increased base price of coal. The Appellant intended to absorb any increase in the base price of coal. However, Article 10 of the PPA is a clear provision, which cannot be interpreted in a narrow sense, by limiting the

compensation under change in law and holding that any such compensation has to be made on the price of coal quoted by the Appellant at the time of bid.

(i) that the Appellant is not demanding the increased base price of coal since the same is not the intent of the Article 10 of the PPA. What the Appellant is asking, is only the tax component, which it is actually incurring for "supply of power".

(j) that for computing compensation under change in law, the Respondents cannot at all go into the assumptions made by the Appellant at the time of the bid. Article 10 of the PPA dealing with change in law, grants a right to the Appellant, the same cannot be taken away by reading down the said provision. The escalable/non-escalable coal price quoted at the time of the bid is irrelevant for the purposes of calculating compensation under change in law. Hence, the Appellant is entitled for tax on the prevalent price of coal, as per Article 10 of PPA, even if it had quoted the price of coal under escalable parameters or if it had quoted Rs. 0/- (zero) per kWh as non-escalable coal charges. Article 10 does not talk about the price of coal quoted at the time of the bid so as to arrive at the compensation.

(k) that the compensation calculated under Article 10 of the PPA cannot be linked to the escalable and non-escalable energy charges. For the purposes of Article 10 of the PPA, the said escalable and non-escalable energy charges are irrelevant.

(l) that it is apparent from the reading of Schedule 6 of the PPA, the escalation parameters viz. the escalable or non-escalable energy and capacity charges, are only required to compute the escalation rates, to be paid to the Appellant, on account of the escalation index issued annually by the Central Commission.

(m) that the escalation index issued annually by the Central Commission is for computing a certain compensation, which compensation is different from the change in law, and as such is not the subject matter of the present Appeal. Hence, the only relevance of the escalable/ non-escalable parameters is qua the escalation index issued by the Central Commission. The Respondents have erred in linking the said escalable/ non-escalable parameters for computing compensation under Article 10 (change in law) of the PPA, when the said Article does not at all says so.

(n) that the stand of Respondent No.1 to the effect that Article 10.1.1 of the PPA states that change in law means "any change in tax or introduction of any tax made applicable for supply of power by the seller as per the terms of this Agreement" and that the Article 10 of the PPA has to be interpreted keeping in mind the escalable/non-escalable parameters quoted by the Appellant is wrong and if the said argument of the Respondent No.1 is accepted, then there was no need to insert Article 10.2.1 in the PPA. The Article 10.1.1 and Article 10.2.1 of the PPA has to be interpreted and distinguished that escalable/ non-escalable parameters are only meant for giving benefit to a generator as per the escalation index issued annually by the Central Commission, which is a separate mechanism, distinct from the change in law. This interpretation is necessary in order to construe the true meaning and intent of Article 10 of the PPA.

(o) that regarding Appellant's entitlement to the claim of customs duty on imported coal, the following submissions have been made on behalf of the Appellant:

(i) that it is true that at the time of the bid, although domestic fuel was indicated, the condition of supply of domestic fuel incorporates supply of imported coal, which

fact is evident from the clauses of the Letter of Assurance and MOU executed with the coal supplier

(ii) that the Appellant is claiming customs duty on the electricity supplied by using imported coal and such custom duty is levied pursuant to a Government of India notification, because the supply of electricity is being made in the domestic tariff area. The use of imported coal to generate and supply electricity is not on account of non-performance by the Appellant of any term of the PPA, but is in fact a condition attached to procurement of domestic coal itself which fact is evidenced by a reading of the Letter of Assurance (LOA) and MOU issued by Western Coalfields Limited (WCL).

(iii) that the coal is nationalized, the Appellant cannot be blamed if the balance coal quantity is being procured through imported coal so that the Appellant is able to fulfill the requirements to supply a particular quantum of power to the Respondent No.1. Undisputedly, in the case of the Appellant, the Western Coalfields Limited (WCL) had assured the Appellant with the supply of 2.26 MTPA of coal. However, the WCL has executed Fuel Supply Agreements (FSAs) for only 1.625 MTPA. Therefore, there is a shortfall. For procuring the balance quantum of coal, the Letter of Assurance (LOA) itself talks about imported coal. Further, there has been a recent Cabinet Committee on Economic Affairs (CCEAA) notification, dated 21.6.2013, which mandates that the power generators are entitled to claim cost of imported coal as pass through. **However, the present claim of the Appellant is only limited to customs duty payable on imported coal and not the price of imported coal**.

(iv) that supply of coal is nationalized under the Coal Mines (Nationalization) Act, 1972. The FSA signed by M/s Western Coalfields Limited (WCL) with the Appellant itself contains the provisions for supply of imported coal. Thus, without the imported coal, the Appellant will be unable to supply power to the Respondent No. 1.

(v) that the lone objection of the Respondent No. 1 against giving customs duty on imported coal to the Appellant is that there is an observation in the impugned order that the Appellant used imported coal on its own volition. This objection of the Respondent No. 1 is misplaced because when there is a shortfall in supply of coal by the WCL, the Appellant still has to generate the requisite quantum of power (260 MW) for supply to the Respondent No. 1. For generating the said quantum of power, there are only two other options available to the Appellant with regard to coal procurement. One is imported coal and the other is E-auction coal.

(vi) that the E-auction scheme was introduced primarily to meet the needs of the non-core sector of industries who are not eligible for linkages. Thus, the Appellant had only option to procure the imported coal.

(vii) that usage of imported coal increases the efficiency of the power plant,.

(viii) that the Appellant is entitled to get the customs duty on the energy sourced from use of imported coal since the same is essential in the light of Article 10.2.1 of the PPA that the purpose of compensation under change in law is to restore the generator, through monthly tariff payments, to the same economic position, had the change in law not occurred. The Appellant, after absorbing the risk of the

base price of coal, including imported coal, cannot be expected to also bear the customs duty when the imposition of the said duty is not market driven and is solely in the hands of the government. The increase/decrease in the supply of coal or the price of coal is all market driven. The tax incidence on the said coal is not market driven, which is in the hands of the government.

(ix) that the change-in-law provisions of the PPA have been subjected to regulatory scrutiny by the Gujarat Electricity Regulatory Commission in Case No. 1080/2010, wherein the Gujarat Commission has observed that the petitioner is eligible to receive the customs duty, paid/payable by him as per G.O.I Notifications, dated 27.2.2010 and 6.9.2010, subject to the outcome of the SCA No. 3142 of 2010. The petitioner is not entitled to receive any amount paid by him towards bank guarantee. The petitioner is also eligible to receive green energy cess levied by Govt. of Gujarat for utilization of imported coal for generation of electricity.

8. ***Per-contra,*** the learned counsel for the Respondents have raised the following contentions:

(a) that the impugned order has correctly granted to the Appellant, compensation for change in law by using the base, as used in the bid and not granting change in tax or introduction of tax on the actual quantum of coal utilized for supply of power and/or imported coal used by the Appellant.

(b) that the computation of compensation by the State Commission, in the impugned order, is in line with the provisions of Article 10 of the PPA, Article 10 shows that the supplier, namely, the Appellant, is entitled to any additional

recurring/non-recurring expenditure by reason of introduction of taxes, which are made applicable on items relating to supply of power which were not contemplated by the supplier at the time of the submission of bid by the supplier, pursuant to which the PPA was entered into.

(c) that the tariff quoted by the supplier which forms the basis of the contract between the parties, pursuant to which the bid of the supplier was accepted and the PPA entered into clearly appears as a part of Schedule 8 of the PPA relating to 'Quoted Tariff' which is from Format 4.10 of RFP of the selected bid. A perusal of Schedule 8 would show that such 'Financial Bid' itself forms the said schedule and for the three contract years in question, namely; 1.4.2011 to 31.3.2014, capacity charges; energy charges and inland transportation charges are all quoted by the bidder as non-escalable and accordingly accepted by the Respondent No.1/distribution licensee. Thus, clearly energy charges have been quoted as non-escalable on the basis of 1.250, 0.800 and 0.800 per kWh respectively for the three years during which the PPA is in force.

(d) that the quoted tariff was thus on the basis of the financial bid submitted by the Appellant and in view of the aforesaid provisions in the PPA, the Respondent No.1/distribution licensee was liable to pay only the non-escalable capacity and energy charges, consequently any liability on the Respondent No.1 by reason of introduction of any tax would be restricted to such taxes being applicable to the tariff payable by the Respondent No.1 under the PPA so as to restore the Appellant to the same economic position as if such taxes/levies had not been levied 7 days prior to the bid deadline.

(e) that the Appellant's claim before the State Commission was not in terms of the provisions of Article 10 of the PPA. The Appellant was purporting to recover from Respondent No.1,

taxes/levies on expenditure incurred by the Appellant which could not and did not form a part of the energy charges and in any event are non-escalable. The Respondent No.1 was not liable to pay any escalation in energy charges as per the terms of the PPA, and thus there was no question of making payment of taxes on expenditure incurred on procurement of fuel/coal at a rate other than the one considered while quoting non-escalable energy charges.

(f) that any other procurement made by the Appellant at any other rate not contemplated under the PPA, was for the purpose of fulfillment of its obligations under the PPA and the expense/burden whereof could not have been passed on to the Respondent No.1/Distribution Licensee.

(g) that the Appellant has wrongly tried to rely on the words '*supply of power'* appearing in Article 10.1.1 of the PPA without referring to the entire sentence and the succeeding words which are '*by the seller as per the terms of this Agreement'*. The 'Change of Law' cannot extend to taxes on expenditure not agreed to be reimbursed through tariff.

(h) that the claim made by the Appellant was in respect of customs duty on proportionate generation using imported coal was clearly not maintainable. Since the procurement of coal was shown as domestic coal as evident from Schedule 5, in which the details of primary fuel are given as domestic coal. The PPA was entered into on the basis of the bid submitted by the Appellant in which the procurement of coal was shown as domestic coal. Since it was never contemplated between the parties nor was it a part either of the bid submission or of the PPA that imported coal would be used by the Appellant, there is no question of any customs duty being payable on such imported coal.

(i) that the Appellant is trying to rely upon the LOA and MOU issued by WCL, which according to the Appellant is a condition attached to the procurement of domestic coal itself under the LOA. Clause 1.1 of the LOA, provides that in the event incremental coal supply available with WCL, after meeting out the commitments already made, is less than the incremental coal demand, such incremental availability shall be distributed on pro rata basis and the balance quantity of coal requirement shall be made through imported coal available with the seller, that too shall be distributed on pro rata basis. The provisions of the LOA relate to a specific situation with regard to incremental availability of coal and the balance quantity of coal requirement being met through imported coal by WCL. This does not give the Appellant the right to claim any amount whatsoever much less under the provisions of Article 10 of the PPA with the Respondent No.1 for any quantity of imported coal unilaterally procured by the Appellant from imported sources other than being supplied by WCL.

(j) that the learned State Commission has correctly recorded a specific finding in the impugned order that it was the responsibility of the Appellant to arrange fuel and the Appellant has chosen to import expensive coal (high GCV) to increase efficiency; the bid was entirely domestic coal; thus extra duties borne by it on separate base rate of imported coal cannot be to the account of the Respondent No.1.

(k) that regarding imported coal, the bid was not on the basis of imported coal. Admittedly such imported coal was used by the Appellant to suit its own purpose and to increase its power station's efficiency, which fact has been admitted by the Appellant in the proceedings before the State Commission that fuel risk was to its account.

(l) that the Appellant's allegation that the balance coal quantity is procured through imported coal so that the Appellant is able to fulfill the requirements to supply a particular quantity of power to the Respondent No.1/Distribution Licensee and thus the Appellant claims custom duty on proportionate generation using imported coal, the said allegation is wrong because the quantum of domestic coal required by the Appellant for supply to the Respondent No.1/Distribution Licensee during the relevant period was supplied by WCL and there was no warrant or justification for the Appellant to load any taxes that it may have incurred by reason of procurement of imported coal by the power station in respect of supply of power to parties other than the Respondent No.1 of which the Respondent No.1 is not aware or concerned.

(m) that lastly, the increased excise duty of 6.18% from 5.15% as well as the royalty were never claimed in the impugned Case No. 39/2012. This point has also not been pressed on behalf of the Appellant before this Appellate Tribunal.

9. We have deeply considered the rival submissions made by the parties on the issue involved in the present Appeal. Now, we proceed to enter into the merits of the counter submissions in order to reach our conclusions and to see/examine the validity or correctness of the findings recorded by the State Commission in the impugned order.

10. As stated above, the Appellant-petitioner/Wardha Power Company Limited, who is a generating company, filed a petition invoking powers of the State Commission under Section 86(1)(b) and 86(1)(f) of the Electricity Act, 2003, requesting the State Commission to direct the Respondent No.1, Reliance Infrastructure Limited (RIL) (Distribution Licensee), to adopt change in law in terms of Clauses 10.4 & 10.5 of the PPA, dated 4.6.2010, in terms of the Petitioner's notice, dated 9.11.2011, and quash/set-aside the Distribution Licensee's letter, dated 9.12.2011, refusing to accept and

make payment of an amount of Rs.20,80,69,407/- being an amount, accrued until 30.9.2011, on account of change in law, in terms of the PPA entered into between the generating company and the distribution licensee, who are Appellant-Petitioner and Respondent No.1, respectively in the instant Appeal. The Appellant-Petitioner also sought a direction from the State Commission, in the said petition, to direct the Respondent No.1 to make payment of Rs.27,63,26,212/-, which amount has accrued until 31.3.2012, on account of change in law, in terms of Article 10 of the PPA, dated 4.6.2010.

11. Thus, the impugned petition was filed before the State Commission by the power generator-Appellant Petitioner, seeking direction to the Respondent No.1/Distribution Licensee for making above payments allegedly accrued to the Appellant on account of change in law.

12. The Appellant-Petitioner submitted before the State Commission that subsequent to signing of the PPA, the following notifications were issued by the Government of India, which amounts to change in law:-

(a) Central Government, vide Notification No. 1/2011, introduced Excise Duty @5% plus Education Cess of 2% on Excise Duty and Secondary & Higher Education Cess of 1% on Excise Duty for coal, lignite, peat, coke, tar, etc. w.e.f. 1.3.2011.

(b) Central Government vide Notification No. 1/2010 introduced Clean Energy Cess of Rs.50 per MT of Coal w.e.f. 1.3.2011.

(c) State Government amended the Maharashtra Value Added Tax Regulation, 2002 by issuing a notification No. Part IV-B No. 53, dated 27.4.2011, changing the Value Added Tax (VAT) from 4% to 5% on procurement of Coal/Consumption of spares.

(d) The Central Government, vide Notification No. 91/2010 levied Customs Duty @ basic rate at 4 paise per kWh plus Education

Cess @ 2% on Customs Duty and Secondary and Higher Education Cess @ 1% on Customs Duty, w.e.f. 6.9.2010.

13. The learned State Commission, after discussing the material on record, arrived at a specific finding on this point in para 7.1 of the impugned order, dated 13.8.2013, observing that all these Notifications issued by the Central Government and the State Government, are no doubt within the meaning and within the scope of Article 10.1 of the PPA, dealing with the change in law, as the Central Government Notifications and amendment to Maharashtra Value Added Tax Regulations, 2002, etc. had been issued between September, 2010 to 2011, which are much beyond the bid deadline and the date of the PPA. Thus, the State Commission recorded a clear finding that change in law has occurred subsequent to bid deadline date and as per the provisions of the bid documents, the economic position of the bidder/Appellant-Petitioner should be restored as of 7 days prior to bidding date.

14. The learned State Commission, in the impugned order, has further directed that compensation shall be calculated with the same base as used for the bid and will be effective from the date of Government Circular/Ordinance. The claim shall be made on pro-rata basis based on total energy supplied during the billing period to the Respondent No.1 and the calculation should be cross verified by both the parties and payment shall be claimed through supplementary bills completely supported with documentary evidence, further, directing the Respondent No.1 to settle the bills promptly post verification within 60 days. The State Commission has not found any merit in Appellant-Petitioner's demand/claim for reimbursement of cost of extra duties, borne by the Appellant-Petitioner on a separate base rate (of imported coal) and this claim has been rejected on the ground that bid was based on domestic coal and PPA was signed indicating domestic coal and it was the responsibility of the Appellant-Petitioner to arrange fuel and meet the supply obligations. The categorical finding of the State Commission on the issue in the impugned order is that

the Appellant-Petitioner chose to import the expensive high Gross Calorific Value (GCV) Coal to increase efficiency of the plant at his own volition.

15. The learned State Commission has, in the impugned order, recorded a finding that VAT rate has undergone revision from 4% to 5%, by Government of Maharashtra amendment in the VAT rate, and this increase of 1% is acceptable to Respondent No.1 in case of spares but not in case of secondary fuel. The State Commission has accepted the contention of the Appellant-Petitioner regarding 1% increase in the VAT rate with the direction to Respondent No.1 to reimburse additional VAT incurred by the Appellant-Petitioner in secondary fuel subject to, however, verification of documents. Thus, partial relief has been granted by the State Commission to the Appellant-Petitioner in the impugned order.

16. Now, we reproduce the relevant provisions of Section 86(1)b) and 86(1)(f) of the Electricity Act, 2003, which are as follows:

> *86. Functions of State Commission. – (1) The State Commission shall discharge the following functions, namely:-*
>
> *……..*
>
> *(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;*
>
> *…….*
>
> *(f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration; ……..”*

17. It is the admitted case of the Appellant-petitioner that in the bid documents, domestic fuel was indicated. The Appellant is claiming customs duty on the electricity supplied by using imported coal and such custom duty is levied pursuant to a Government of India notification. The use of imported coal to generate and supply electricity, according to the Appellant, is not on account of non-performance by the Appellant of any term of the PPA, but is in fact a condition attached to procurement of domestic coal itself which fact is evidenced by a reading of the Letter of

Assurance (LOA) and MOU issued by Western Coalfields Limited (WCL). **The Appellant is only claiming the customs duty on the imported coal and is not claiming the price of the imported coal.** It is the admitted case of the Appellant that the Appellant does not wish/desire to claim the price of imported coal but he desires to claim duty on the imported coal at the prevalent price of the imported coal. The main objection on this contention of the Appellant, as raised by the Respondents' counsel is that when the Appellant is entitled to base price of the domestic coal, he cannot legally claim customs duty on the imported coal because the Appellant has been getting the supply of imported coal on his own volition to use the imported coal of good quality having high Gross Calorific Value (GCV).

Our issue-wise considerations are as under:

Issue No. (i):

18. **Let us examine the first issue regarding linking of compensation under change in law with energy charges quoted in the bid by the Appellant**.

19. The State Commission is of the view that Change in Law has occurred as per the provisions of the bid documents and the economic position of the bidder should be restored as of 7 days prior to bidding date. However, the State Commission has held that compensation shall be calculated with the same base as used in the bid.

20. Let us examine the relevant provisions of the PPA relating to "Change in Law" and the principles for computing impact of "Change in Law".

21. The definition of "Change in Law" as given under Article 10.1.1 of the PPA is the occurrence of any of the specified events after the date which is seven days prior to the Bid Deadline resulting into any additional recurring/non-recurring expenditure by the seller or any income to the seller. Thus, the consequence of Change in Law in the definition has been

indicated in terms of additional expenditure by the seller or any income to the Seller.

22. The relevant provisions relating to application and principles for computing impact of Change in Law as given under Article 10 of the PPA are as under:

> ***"10.2 Application and Principles for computing Change in Law***
> *"10.2.1 While determining the consequence of Change in Law under this Article 10, the parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through monthly Tariff Payment, to the extent contemplated in this Article 10, the affected Party to the same economic position as if such Change in Law has not occurred".*
>
> ***10.3 Relief for Change in Law***
> *……..*
> ***10.3.2 During Operating Period***
>
> *The compensation for any decrease in revenue or increase in expenses to the Seller shall be payable only if the decrease in revenue or increase in expenses of the Seller is in excess of an amount equivalent to 1% of the value of the Letter of Credit in aggregate for the relevant Contract Year.*
>
> *10.3.3 For any claims made under Articles 10.3.1 and 10.3.2 above, the seller shall provide to the Procurer and the Appropriate Commission documentary proof of such increase/decrease in cost of the Power Station or revenue/expense for establishing the impact of such Change in Law".*

23. The provisions of the PPA regarding principles for computing Change in Law and consequential relief to the affected party in the operation stage of a power plant, as applicable in the present case, are summarized as under:

(i) The purpose of compensating the party affected by Change in Law is to restore the affected party to the same economic position as if such Change in Law has not occurred.

(ii) The compensation is payable only if the decrease in revenue or increase in expenses of the Seller is in excess of an amount equivalent to 1% of the value of the Letter of Credit for the relevant contract year.

(iii) The documentary proof that is required to be provided by the seller to establish the impact of Change in Law is the proof for increase/decrease in its revenue/expenses.

24. We find that as per the provisions of the PPA, there is no co-relation of the base price of electricity quoted by the Seller and computation of compensation as a consequence of Change in Law. The compensation is only with respect to the increase/decrease of revenue/expenses of the Seller following the Change in Law. The minimum financial impact to qualify for claim of compensation is also linked to the increase in expenses/decrease in revenue of the seller.

25. For example, if the tax on cost of coal has been increased from 5% to 8%, then for computing the impact of Change in Law, only the increase in the actual expenditure of Seller due to increase in tax from 5% to 8% has to be considered. This is because if the tax had not increased, the Seller would have paid tax of 5% on the actual cost of coal. With the Change in Law, the Seller has now to pay 8% on the actual cost of coal. Therefore, to restore the Seller to the same economic position as if such Change in Law has not occurred, the Seller has to be compensated for additional tax of 3% on the actual cost of coal. However, the Seller will have to submit proof regarding payment of tax on coal.

26. The price bid given by the Seller for fixed and variable charges both escalable and non-escalable is based on the Appellant's perception of risks and estimates of expenditure at the time of submitting the bid. The energy charge as quoted in the bid may not match with the actual energy charge corresponding to the actual landed price of fuel. The seller in its bid has also not quoted the price of coal. Therefore, it is not correct to co-relate the compensation on account of Change in Law due to change in cess/excise duty on coal, to the coal price computed from the quoted energy charges in the Financial bid and the heat rate and Gross Calorific value of Coal given in the bidding documents by the bidder for the purpose of establishing the

coal requirement. The coal price so calculated will not be equal to the actual price of coal and therefore, compensation for Change in Law computed on such price of coal will not restore the economic position of the Seller to the same level as if such Change in Law has not occurred.

27. For example, if the price of coal calculated on the same base as used in the bid is more than the prevalent price of coal, then using the base price of coal for computing the compensation for Change in Law will result in over compensation to the Seller. Similarly, if the coal price calculated on the same base as used in bid is less than the actual price of coal, it will result in under compensation to the Seller. In both these cases, the affected party will not be restored to the same economic position as if such Change in Law has not occurred, as intended in the PPA.

28. The State Commission has wrongly considered that the economic position of the bidder has to be restored as of 7 days prior to the bidding date. As per the provisions of the PPA, the affected party has to be restored by compensation to the same economic position as if such Change in Law has not occurred, at the time of occurrence of Change in Law and not seven days prior to bidding date. 7 days prior to bidding date is relevant only as the base date with respect to which the occurrence of Change in Law has to be recognized. We find that the State Commission has not interpreted the provisions of the PPA correctly and have added words to the provisions of the PPA while giving the interpretation which is not permissible.

29. We also find that the State Commission in the impugned order has allowed extra VAT on secondary fuel due to Change in Law and has held that the Respondent shall reimburse additional VAT incurred by the Appellant in secondary fuel. Thus, the State Commission itself has allowed compensation on increase in tax on secondary fuel on the basis of actuals. However, a different yardstick was used for computation of compensation for tax on coal.

30. According to the bidding documents, the Appellant is not entitled to any increase in energy charges on account of increase in base price of fuel. However, the impact on account of change in the expenditure due to Change in Law has to be allowed as per the actuals subject to verification of proof submitted by the Appellant.

31. In view of above, we set aside the findings of the State Commission regarding calculation of compensation on the same base as given in the bid and hold that the compensation has to be computed with respect to prevalent price of coal. Accordingly, this issue is decided in favour of the Appellant.

Issue No. (ii):

32. **The second issue is relating to claim on customs duty on imported coal.**

33. We find that the PPA defines fuel as primary fuel used to generate electricity namely domestic coal. The Schedule 5 of the PPA furnished by the Appellant also clearly indicates the primary fuel as domestic coal. The source of coal has been indicated as Coal India Ltd. through coal linkage to be supplied from Western Coalfields Ltd.

34. It is clear from the bid document that at the time of submission of the bid, the Appellant had not contemplated any import of coal and it had proposed generation of electricity based on the domestic coal. The decision to import coal has been taken by the Appellant subsequently on its own volition with a view to increase the efficiency of the plant as held by the State Commission. If the Appellant wanted to import coal due to some compelling circumstances, it should have taken the consent of the Respondent No. 1 and the approval of the State Commission before procuring imported coal. Therefore, we are not inclined to interfere with the findings of the State Commission disallowing the claim of the Appellant on account of increase of import duty on coal under Change in Law. The issue is, accordingly decided against the Appellant.

35. **SUMMARY OF OUR FINDINGS:**

(A) Compensation for change in tax on coal under "Change in Law"

(a) The definition of "Change in Law" as given under Article 10.1.1 of the PPA is the occurrence of any of the specified events after the date which is seven days prior to the Bid Deadline resulting into any additional recurring/non-recurring expenditure by the seller or any income to the seller. Thus, the consequence of Change in Law in the definition has been indicated in terms of additional expenditure by the seller or any income to the Seller.

(b) We find that as per the provisions of the PPA, there is no co-relation of the base price of electricity quoted by the Seller and computation of compensation as a consequence of Change in Law. The compensation is only with respect to the increase/decrease of revenue/expenses of the Seller following the Change in Law. The minimum financial impact to qualify for claim of compensation is also linked to the increase in expenses/decrease in revenue of the seller.

(c) The State Commission has wrongly considered that the economic position of the bidder has to be restored as of 7 days prior to the bidding date. As per the provisions of the PPA, the affected party has to be restored by compensation to the same economic position as if such Change in Law has not occurred, at the time of occurrence of Change in Law and not seven days prior to bidding date. 7 days prior to bidding date is relevant only as the base date with respect to which the occurrence of Change in Law has to be recognized. We find that the State Commission has not interpreted the provisions of the PPA correctly and has added words to the provisions of the PPA while giving the interpretation which is not permissible.

(d) We set aside the findings of the State Commission regarding calculation of compensation on the same base as given in the bid and hold that the compensation is to be computed with respect to prevalent price of coal subject to verification of proof submitted by the Appellant.

(B) <u>Change in custom duty on imported coal:</u>

The PPA clearly defines the fuel as primary fuel used to generate electricity namely domestic coal. The source of coal has been indicated as Coal India Ltd. through coal linkage. The bidding documents submitted by the Appellant also indicate that the Appellant had not envisaged use of imported coal for power generation. The decision to import coal has been taken by the Appellant on its own volition with a view to increase the efficiency of the power plant, as held by the State Commission. Therefore, we are not inclined to interfere with the findings of the State Commission disallowing the claim of the Appellant for customs duty on imported coal as a consequence of Change in Law.

36. In view of above, the Appeal is partly allowed as indicated above. No order as to costs.

<u>PRONOUNCED IN THE OPEN COURT ON THIS 12TH DAY OF SEPTEMBER, 2014.</u>

(Justice Surendra Kumar)	**(Rakesh Nath)**
Judicial Member	**Technical Member**

√ **<u>REPORTABLE/~~NON-REPORTABLE~~</u>**

vt