THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO.161 OF 2015 & IA NO.259 OF 2015
AND
APPEAL NO.205 OF 2015

Dated : 19th APRIL, 2017.

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I. J. Kapoor, Technical Member.

APPEAL NO.161 OF 2015 & IA NO.259 OF 2015

IN THE MATTER OF:-

SASAN POWER LIMITED,)
C/o. Reliance Power Limited, 3rd Floor,)
Reliance Energy Centre, Santacruz)
(East), Mumbai – 400 055.) ... **Appellant(s)**

AND

1a. **CENTRAL ELECTRICITY REGULATORY COMMSSION**)
3RD & 4TH Floor, Chanderlok Building,)
36, Janpath,)
New Delhi-110001)

1. **M.P. POWER MANAGEMENT COMPANY LTD.,**)
Shakti Bhawan, Jabalpur, Madhya Pradesh – 462008.)

2. **PUNJAB STATE ELECTRICITY BOARD**)
The Mall, Patiala – 147 001, Punjab.)

Also to:

PUNJAB STATE POWER CORPORATION LIMITED,
The Mall, Patiala – 147 001, Punjab.

3. **PASCHIMANCHAL VIDYUT VITRAN NIGAM LIMITED,**
Victoria Park, Meerut – 25000, Uttar Pradesh.

4. **PURVANCHAL VIDYUT VITRAN NIGAM LIMITED,**
Hydel Colony, Bhikaripur, Post – DLW, Varanasi – 221004, Uttar Pradesh.

5. **MADHYANCHAL VIDYUT VITRAN NIGAM LIMITED,**
4-A, Gokhale Marg, Lucknow – 22600_, Uttar Pradesh.

6. **DAKSHINANCHAL VIDYUT VITRAN NIGAM LIMITED,**
220-kV Vidyut Sub-Station, Mathura Agra By-Pass Road, Sikandra, Agra -282 007, Uttar Pradesh.

Also at:

U.P. POWER CORPORATION LIMITED,
Shakti Bhavan, 14, Ashok Marg, Hazrat Kanj, Lucknow – 226 001.

7. **TATA POWER DELHI DISTRIBUTION LIMITED,**
Grid Sub-Station Building, Hudson Lines, Kingsway Camp, New Delhi – 110 009.

8. **BSES RAJDHANI POWER LIMITED,**)
BSES Bhawan, Nehru Place, New Delhi – 110 019.)

9. **BSES YAMUNA POWER LIMITED,**)
BSES Bhawan, Nehru Place, New Delhi – 110 019.)

Also to:)
BSES YAMUNA POWER LIMITED,)
Shakti Kiran Building, Karkardooma, Delhi – 110 096.)

10. **HARYANA POWER GENERATION CORPORATION LIMITED,**)
Shakti Bhawan, Panchkula – 134 109, Haryana.)

Also to:
HARYANA POWER PURCHASE CENTRE, (HPPC),)
Sector 6, Shakti Bhawan, Panchkula – 134 109, Haryana.)

11. **AJMER VIDYUT VITRAN NIGAM LIMITED,**)
Hathi Bhata, City Power House, Ajmer – 305 001, Rajasthan.)

12. **JAIPUR VIDYUT VITRAN NIGAM LIMITED,**)
Vidyut Bhawan, Jaipur – 302 005, Rajasthan.)

13. **JODHPUR VIDYUT VITRAN NIGAM LIMITED,**)
New Power House, Industrial Area, Jodhpur – 342 003, Rajasthan.)

Also at:
Shed No.5, Room No.6, Vidyut)

Bhavan, Vidyut Marg, Lal Kothi,)
Jaipur – 302 005.)

14. **UTTARAKHAND POWER CORPORATION LIMITED, (UPCL)**)
Urja Bhawan, Kanwali Road,)
Dehradun – 248 001.)

Counsel for the Appellant(s) Mr. J.J. Bhatt, Sr. Adv.
Mr. Vishrov Mukherjee
Mr. Rohit Venkat

Counsel for Respondent(s) Mr. S. Ramalingam for R-1.

Mr. G. Umapathy for R-2.

Mr. Rajiv Srivastav
Ms. Gargi Srivastava
Ms. Garima Srivastava
for R-3 to R-6.

Mr. Manish Srivastava for R-7.

Mr. Abhijeet Rastogi
Mr. Rahul Dhawan for R-8 & R-9

Mr. M.G. Ramachandran
Ms. Ranjitha Ramachandran
for R-10.

Mr.Bipin Gupta
Mr.Sunil Bansal
for R-11 to R-13.

ALONG WITH
APPEAL NO.205 OF 2015

IN THE MATTER OF:-

HARYANA POWER PURCHASE CENTRE,
Shakti Bhawan, Sector-6, Panchkula, Haryana – 134 109. **... Appellant(s)**

AND

1. **SASAN POWER LIMITED**, C/o. Reliance Power Limited, 3rd Floor, Reliance Energy Centre, Santacruz (East), Mumbai – 400 055.

2. **M.P. POWER MANAGEMENT COMPANY LTD.,** Shakti Bhawan, Jabalpur, Madhya Pradesh – 462008.

3. **PASCHMIANCHAL VIDYUT VITRAN NIGAM LIMITED,** Victoria Park, Meerut – 25000, Uttar Pradesh.

4. **PURVANCHAL VIDYUT VITRAN NIGAM LIMITED,** Hydel Colony, Bhikaripur, Post – DLW, Varanasi – 221004, Uttar Pradesh.

5. **MADHYANCHAL VIDYUT VITRAN NIGAM LIMITED,** 4-A, Gokhale Marg, Lucknow – 22600_, Uttar Pradesh.

6. **DAKSHINANCHAL VIDYUT VITRAN NIGAM LIMITED,** 220-kV Vidyut Sub-Station, Mathura Agra By-Pass Road, Sikandra, Agra -282 007, Uttar Pradesh.

7. **AJMER VIDYUT VITRAN NIGAM LIMITED,**)
Hathi Bhata, City Power House,)
Ajmer – 305 001, Rajasthan.)

8. **JAIPUR VIDYUT VITRAN NIGAM LIMITED,**)
Vidyut Bhawan, Jaipur – 302 005,)
Rajasthan.)

9. **JODHPUR VIDYUT VITRAN NIGAM LIMITED,**)
New Power House, Industrial Area,)
Jodhpur – 342 003, Rajasthan.)

10. **TATA POWER DELHI DISTRIBUTION LIMITED,**)
Grid Sub-Station Building, Hudson)
Lines, Kingsway Camp, New Delhi –)
110 009.)

11. **BSES RAJDHANI POWER LIMITED,**)
BSES Bhawan, Nehru Place, New)
Delhi – 110 019.)

12. **BSES YAMUNA POWER LIMITED,**)
Shakti Kiran Building,)
Karkardooma, Delhi – 110 096.)

13. **PUNJAB STATE POWER CORPORATION LIMITED,**)
The Mall, Patiala – 147 001, Punjab.)

14. **UTTARAKHAND POWER CORPORATION LIMITED,**)
Urja Bhawan, Kanwali Road,)
Dehradun – 248 001.)

15. **CENTRAL ELECTRICITY REGULATORY COMMISSION,**)

3rd and 4th Floor, Chanderlok Building, 36, Janpath, New Delhi – 110 001.))) ... Respondents

Counsel for the Appellant(s) Mr. M.G. Ramachandran
Ms. Ranjitha Ramachandran

Counsel for Respondent(s) Mr. J.J. Bhatt, Sr. Adv.
Mr. Vishrov Mukherjee
Mr. Rohit Venkat for R-1.

Mr. G. Umapathy for R-3.

Mr. Rajiv Srivastav
Ms. Gargi Srivastava
Ms. Garima Srivastava
for R-3 to R-6.

Mr.Bipin Gupta
Mr.Sunil Bansal for R-7 to R-9.

Mr. S. Ramalingam for R-15.

J U D G M E N T

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI - CHAIRPERSON:

1. These two appeals can be disposed of by a common judgment because they challenge Order dated 30/03/2015 passed by the Central Electricity Regulatory Commission (**"CERC"**) and they arise out of the same facts. Appeal No.161 of 2015 is filed by Sasan Power Limited (**"Sasan"**). Appeal No.205 of 2015 is filed by Haryana Power Purchase Centre (**"HPPC"**).

2. The impugned order was passed by the CERC on the petition filed by Sasan under Section 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 ("**the said Act**") read with Article 17 of the PPA read with Paragraph 5.17 of the Competitive Bidding Guidelines and Regulations 82, 92 and 113 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations 1999 (**"the CERC Regulations"**). Sasan had impleaded M.P. Power Management Co. Limited as Respondent No.1 which is the successor of Madhya Pradesh State Electricity Board (**"MPSEB"**). M.P. Power Management Company Limited is the lead procurer authorized to represent all the procurers for discharging the rights and obligations of the procurers. Sasan had impleaded twelve other procurers. HPPC, the Appellant in Appeal No.205 of 2017 was Respondent No.13 before the CERC. All the procurers are the respondents in Sasan's appeal. Sasan and the procurers are the respondents in the appeal field by HPPC.

3. We must begin with the gist of the facts entered in the impugned order by the CERC. Sasan is a special purpose vehicle

("**SPV**"), which was incorporated by M/s. Power Finance Corporation Limited ("**PFC**"), the nodal agency of Government of India for implementation of its Ultra Mega Power Project initiative on 10/02/2006 for the development and implementation of a coal fired ultra mega power project based on linked captive coal mine using super-critical technology with an installed capacity of 4000 MW (plus/minus 10%) and a contracted capacity of 3722.4 MW (contracted capacity) at Sasan District, Singrauli, Madhya Pradesh (**"Sasan UMPP"**). The project as conceived by Government of India to be implemented by a developer to be selected through tariff based international competitive bidding process. Based on the competitive bidding carried out by PFC as the Bid Process Co-ordinator, Reliance Power Limited (**"R-Power"**) having quoted the lowest bid was declared as successful bidder for execution of the project. Accordingly, Letter of Intent ("**LoI**") was issued to R-Power on 01/08/2007 which was accepted. Consequently, in terms of the provisions of the Request for Proposal ("**RFP**"), R-Power acquired 100% shareholding of the SPV i.e. Sasan on 07/08/2007. PPA dated 07/08/2007 was executed between Sasan and 14 procurers who are the distribution companies in the State of Madhya Pradesh,

Uttar Pradesh, Rajasthan, Punjab, Haryana, Uttarakhand and Delhi. On 15/10/2008, a Supplemental Power Purchase Agreement was entered into between Sasan and the procurers primarily to pre-pone the scheduled date of commercial operation **("COD"**) of the various units of the Project. In the Joint Monitoring Committee meeting held on 17/09/2010, the COD of the various units of the project was revised by mutual consent. The COD of various units of Sasan UMPP as per the PPA and the Supplemental Power Purchase Agreement are as under:

Sr.No.	Unit	COD as per PPA	COD as per SPPA
1.	First	7.5.2013	31.12.2011
2.	Second	7.12.2013	31.3.2012
3.	Third	7.7.2014	30.6.2012
4.	Fourth	7.2.2015	30.9.2012
5.	Fifth	7.9.2015	31.12.2012
6.	Sixth	7.4.2016	31.3.2013

According to Sasan, the COD of the first unit at the time of filing of the petition was expected to be 31/03/2013 subject to the completion of the Procurers' condition subsequent and other procurers' obligations set out in the PPA.

4. Article 13 of the PPA relates to 'Change in Law' to which we shall soon advert. Suffice it to say at this stage that the bid

deadline in this case was 28/07/2007. This Article gives certain protection to the Appellant on account of Change in Law events that occur after the cut-off date which is 7 days prior to the bid deadline. Thus 21/07/2007 is the cut off date. If the Change in Law events which occur after 21/09/2007 have a financial impact on the costs and revenues of the Appellant, the Appellant is entitled to be compensated in terms of Article 13.

5. In the petition, Sasan submitted that the following Changes in Law have occurred during the operating period of the project, which have caused capital cost of the project to increase substantially.

(a) Increase in water charges pursuant to Notification No.–18- 1/91/Madhyam/31/436 dated 21.4.2010 issued by the Water Resources Department, Government of Madhya Pradesh.

(b) Increase in the rate of royalty on coal pursuant to Notification No. 349 (E), dated 10.05.2012 issued by the Ministry of Coal, Government of India.

(c) Levy of Clean Energy Cess by the Government of India in the Finance Act, 2010 with effect from 01.04.2010 in terms of Notification No. 03/2010-Clean Energy Cess dated 22.06.2010 issued by the Ministry of Finance, Government of India.

(d) Imposition of Excise Duty on Coal by the Government of India in the Finance Act, 2012 with effect from 01.04.2012.

(e) Increased Expenditure on account of the Mine Closure Plan which had to be formulated pursuant to a Notification No. 55011-01-2009-CPAM, dated 11.01.2012 issued by the Ministry of Coal, Government of India.

(f) Change in Income Tax Rates introduced in the Finance Act, 2012 with effect from 01.04.2012.

(g) Increase in Minimum Alternate Tax (**"MAT"**) Rates introduced in the Finance Act, 2012 with effect from 01.04.2012.

(h) Change in Merit Rate of Excise Duty pursuant to a Notification No. 18/2012- Central Excise, dated 17.03.2012 issued by the Ministry of Finance, Government of India.

(i) Change in Rate of Central Sales Tax pursuant to a Notification No. 1/2008-CST [F-No. 28/11/2007-ST], dated 30.05.2008 issued by the Ministry of Finance, Government of India.

(j) Change in Value Added Tax (**"VAT"**) Rates pursuant to a Notification No. FA 3- 22/09/i/V (16), dated 01.08.2009 issued by the Commercial Taxes Department, Government of Madhya Pradesh and the MP VAT Amendment Act dated 01.04.2010.

6. The Appellant prayed for a declaration that on account of the occurrence of the above Change in Law events which have occurred after the cut-off date i.e. 21/07/2007, there is a financial impact on the costs and revenues of the Appellant during operating period for which the Appellant is entitled to be compensated. The Appellant also prayed that the Appellant be restored to the same economic condition prior to the occurrence of Change in Law events by permitting the Appellant to raise supplementary bills in terms of Article 13.4.2 of the PPA as per the computations set out in the PPA.

7. The CERC by the impugned order allowed the following claims of Sasan:

(a) Increase in operating costs due to imposition of Royalty on coal;

(b) Increase in operating costs due to imposition of clean energy cess on coal;

(c) Increase in operating costs due to imposition of Excise Duty on coal.

The CERC has sought additional information from Sasan in order to consider the claim for increase in water charges.

8. The CERC disallowed the claims of Sasan on the following counts:

(a) Compensation for increase in expenditure on account of Mine Closure Plan;

(b) Adjust the impact of change in Income Tax through supplementary bills;

(c) Compensation for increase in expenditure due to increase in MAT Rate;

(d) Adjust the impact of change in Merit Rate of Excise Duty through supplementary bills.

(e) Adjust the impact of change in Central Sales Tax through supplementary bills;

(f) Compensation for increase in expenditure due to increase in VAT Rates.

9. Sasan has filed Appeal No.161 of 2015 being aggrieved by the above disallowances.

10. HPCC has challenged the impugned order to the extent it disallowed Sasan's claim that change in Merit Rate of Excise Duty and Changes in the rates of Central Sales Tax is Change in Law. It is HPPC's case that had the claim been allowed that would have reduced the tariff payable by HPPC to Sasan.

11. It is necessary now to refer to the rival submissions. We have heard Mr. Bhatt learned senior counsel appearing for the Appellant. We have perused the written submissions filed by him. Gist of the submissions is as under:

(a) Change in Law events, *inter alia*, include enactment/promulgation of any Law including amendment of an existing law (Article 13.1.1). Any increase/decrease in

cost of or revenue from the business of selling electricity arising due to Change in Law is to be compensated in terms of Article 13 (Article 13.2(b)). The objective of Article 13 is to restore the affected party to the same economic position as if the Change in Law event had not occurred.

(b) The ambit and scope of Change in Law has been explained by the Supreme Court in ***Sumitomo Heavy Industries Ltd. v. Oil and Natural Gas Corporation Limited***[1] and ***Oil and Natural Gas Corporation Limited v. Atwood Oceanic International S.A***[2]. These judgments state that Change in Law provisions are not akin to indemnity clauses and have to be given wide and meaningful interpretation and increase in taxes amount to increase in cost which is covered under the Change in Law provisions.

(c) The CERC erred in holding that since the quoted tariff in terms of paragraph 2.7.1.4.3 of the RFP was an all inclusive tariff, Sasan was required to take into account all costs, taxes and duties while quoting the tariff and rate in excise

[1] (2010) 11 SCC 296
[2] (2008) 11 SCC 267

duty, Central Sales Tax and MP VAT after the cut-off date of 21/07/2007 is not Change in Law. Sasan was required to quote an all-inclusive tariff on the basis of all costs, taxes and duties prevailing as on cut-off date i.e. 21/07/2007. Any increase in cost, taxes or duties on account of a Change in Law after the cut-off date was to be addressed through the Change in Law mechanism in the PPA. Draft PPA was annexed to the RFP. This position is evident from CERC's Order dated 07/03/2016 in Petition No.81/MP/2013.

(d) Paragraph 4.7 of the Competitive Bidding Guidelines provides that any Change in Law impacting cost or revenue from the business of selling electricity be adjusted separately.

(e) Revised Tariff Policy dated 28/01/2016 supports Sasan's stand.

(f) Article 13.1.1 specifically excludes change in withholding of tax on income and dividend. If change in rate of existing taxes was excluded, there was no requirement for the

proviso excluding change in rate of withholding tax. By implication, all other changes in taxes including rate of tax are included.

(g) In ***Full Bench Judgment of this Tribunal***[3] **("Full Bench Judgment")**, this Tribunal has clarified the purpose and intent of including force majeure and Change in Law provisions in the PPA.

(h) The provisions of the RFP cannot override the express right given to an affected party under the PPA to claim Change in Law so long as the said event qualifies thus in terms of Article 13.

(i) The expectation of the CERC that the bidder should have considered in its bid any year to year escalation or historical data is contrary to Article 13 of the PPA. In this Tribunal's judgment in ***Wardha Power Company Limited v. Reliance Infrastructure Limited & Anr***.[4], this Tribunal has rejected the obligation of any escalable index in order to determine the compensation due on account of Change in

[3] Judgment dated 07/04/2016 in Appeal No.100 of 2013 and Batch
[4] Judgment dated 12/09/2014 in Appeal No.288 of 2013

Law. Sasan was therefore required to take into account costs, taxes and duties as of the cut-off date while submitting the bid.

(j) The qualification "which results in any change in any cost of or revenue from the business of selling electricity" appearing in Article 13.1.1. applies to a change in permission, licenses and consents under Article 13.1.1(iii) alone and not Article 13.1.1 in its entirely. If the CERC's interpretation is to be accepted that would mean that the phrase "otherwise than for default of the Seller" would also have to be made applicable to Article 13.1.1(i) and (ii). However that cannot apply to Article 13.1.1(i) and (ii) since the parties can neither enact laws nor interpret them.

(k) If the qualification "which results in any change in any cost of or revenue from the business of selling electricity" is made applicable to clauses (i), (ii) and (iii), Article 13.2(a) will be rendered redundant and Sasan will not be able to recover increase in capital cost since increase in capital cost never impacts the operating cost/revenue and the term

"compensation for any increase/decrease in revenue or costs" in Article 13.2(b) would be rendered superfluous.

(l) The CERC has erred in holding that increase in cost of Mine Closure Plan for the captive mine of the project is not a Change in Law event.

(m) As on the cut-off date, there was no requirement to provide for and finance a Mine Closure plan. However, subsequent changes in the applicable laws have adversely affected the project economics.

(n) The CERC failed to appreciate the impact of GoI Notification dated 11/01/2012, which falls within the definition of Law and which amounts to change in consents and approvals for the Project.

(o) The CERC erred in holding that the change in rate of Income Tax and the increase in MAT rate in terms of the Finance Act, 2012 are not Change in Law events. The change in Income Tax rate from 33.99% to 32.45% and MAT

rate from 11.33% to 20.01% are Change in Law events because the change in rate is through the Finance Act, 2012 and it satisfies the criteria for Change in Law under the PPA.

(p) Cost/revenue refers to the economic position of a party. This is distinct from income/expenditure. Income Tax is specifically included as a cost in terms of Accounting Standards - AS-22. In this respect, provisions in Accounting Standards – AS-3, Indian Accounting Standards INDAS-7 are also relevant.

(q) The CERC erred in holding that the Accounting Standards are only for management of tax portfolio and do not create any additional liabilities. In this connection, reliance is placed on ***J.K. Industries Limited v. Union of India***[5]**.**

(r) According to the Accounting Standards, current tax is the amount of Income Tax that is determined to be payable on taxable income for accounting period. If there is a loss, it is

[5] (2007) 13 SCC 673

treated as "tax loss". Therefore, the fact that the liability for Income Tax as well as MAT is treated as a tax expense, would indicate that an increase/decrease in Income Tax/MAT rates comes within the purview of "Change in Law" as defined in Article 13.1.1.

(s) In ***Ajanta Pharma v. CIT***[6], the Supreme Court has observed that Section 115JB of the Income Tax Act in accordance with which MAT is computed is a self-contained Code and levies tax on deemed income. Therefore, MAT is not on the operating profit or net profit. Even a company which has no income is liable to pay MAT. Thus, MAT directly impacts revenue as any increase in MAT imposes additional burden on the company.

(t) The Central Sales Tax Rate was reduced from 3% as on cut-off date to 2% vide Notification dated 30/05/2008 issued by the Ministry of Finance which is an Indian Government Instrumentality. Therefore, it qualifies as a "Change in Law" event. The CERC erred in taking a contrary view.

[6] (2010) 9 SCC 455

(u) Increase in VAT rate is due to the enactment of the MP VAT (Amendment) Act, 2010 dated 01/04/2010. The said Act is covered by the definition of law in Article 1 of the PPA. Therefore, the CERC erred in holding that increase in VAT is not a "Change in Law" event.

(v) Submissions of HPPC in the companion appeal on change in merit rate of excise duty and change in rate of Central Sales Tax are adopted by Sasan.

(w) The CERC has allowed indirect taxes as Change in Law, subsequently, in the following matters:

(i) ***GMR Kamalanga Energy Ltd. V. DHBVNL***[7];

(ii) ***GMR Warara Energy Limited v. MSEDCL & Ors***[8].;

(iii) ***Adani Power Limited v. MSEDCL & Ors***.[9]

[7] Order dated 07/03/2016 in Petition No.81/MP/2014
[8] Order dated 01/02/2017 in Petition No.8/MP/2014
[9] Order dated 06/02/2017 in Petition No.156/MP/2014

No explanation is offered by the CERC for this divergent stand.

12. We have heard Mr. Umapathy, learned counsel appearing for Punjab State Power Corporation Ltd. which is Respondent No.2 in Appeal No.161 of 2015 and Respondent No.13 in Appeal No.205 of 2015. We have perused the written submissions filed by him. Gist of the submissions is as under:

(a) At the time of bid, the Appellant fully examined and agreed to all such factors mentioned in RFP and that any claim for compensation is always to the extent contemplated in Article 13 and in particular Article 13.2(b) i.e. operation period of the PPA. In this respect, Clause No.2.7.1.4(3), Clause No.2.7.2.1 and Clause No.2.7.2.3 are material.

(b) The Appellant agreed to various clauses of RFP where the Appellant confirmed that there would be no deviation from their bid.

(c) The parties are bound by the terms of the PPA which in any case do not provide for any increase in tax which has no

bearing on the generation of power and consequently has no nexus with the cost of generation of electricity as a Change in Law event.

(d) Conjoint reading of Articles 13.1 and 13.2(b) of the PPA shows that for the effect to be given for the Change in Law, it has to be shown that there existed a law prior to the cut-off date, which provided for certain impact and since then the law has brought about a change for an increased or decreased impact.

(e) Sub-clauses (i), (ii) and (iii) of Clause 13.1.1 are circumscribed by the qualification "which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement". Article 13.2(b) also restricts the compensation to any increase/decrease in revenues or cost to the seller.

(f) Reliance placed on Tariff Policy is misplaced as it is effective from the date of publication and has no relevance to the

case on hand. In any case, clause 6.2(4) uses the word "may" which cannot be treated as "shall".

(g) The qualifying criteria provided under Article 13.1.1 is not impact on costs/revenues of the project but the changes in cost or revenues from the business of selling electricity. This is also provided in Article 13.2(b) where any increase or decrease in revenue or cost is required to be adjusted. The impact is to be considered as restrictive.

(h) The tax on income cannot be considered as pass through in the competitive bidding process under Section 63 of the said Act. The quantum of return is not identified in the bid process nor assured by the procurers-Respondents. The tax including MAT being on revenue/profit, there is no identification of tax payable at the time of cut off date. Accordingly, it is not possible at all to factor in the increase or decrease in the tax including MAT.

(i) In contrast, in case of determination of tariff under Section 62 of the said Act, the generator is assured a return on

equity of a specified percentage and the regulations specifically provide for one of the components as tax on income. This requires the procurers/beneficiaries of the generating company to bear the tax on income at the hand of the generating company. There is no such assured return in a competitive bidding scheme and no such provision for pass through of Income Tax. Judgment of this Tribunal in ***Jaiprakash Hydro Power Ltd. v. Himachal Pradesh State Electricity Regulatory Commission***[10] is of no use to the Appellant because it was in the context of a tariff determination under Section 62 of the said Act and in that case there was an intention of reimbursement of Income Tax in the PPA which is absent in the present PPA.

(j) Tax on income including MAT or Income Tax has no nexus with the cost or revenue from business of selling electricity. The tax is post revenue and on operating profit or net profit as the case may be. It does not affect either cost or revenue of business of sale of electricity. Imposition of MAT or tax on income or any increase or decrease cannot be construed

[10] Judgment dated 21/10/2011 in Appeal No.39 of 2010

as Change in Law. Tax is not a cost. It is not paid for the purpose of earning profits. With regard to MAT, reliance placed by the Appellant on the judgment of the Maharashtra Commission in ***Rattan India Power Ltd. v. MSEDCL***[11]. is misplaced because in that the PPA provided for a pass through.

(k) Tax on income cannot be considered as cost of doing business. The Accounting Standards are for the purpose of management of tax portfolio of a business enterprise. It does not create additional liabilities on other entities such as procurer-Respondents who contribute towards the business enterprise.

(l) Any Change in Law or interpretation of law cannot be compensated irrespective of whether there is any impact on costs or revenue.

(m) Any liberal interpretation of Article 13 has to be in favour of consumers.

[11] Order dated 25/03/2015 in Case No.173 of 2013

(n) The Appellant as the Leaseholder was required to take certain protective and rehabilitative measures on closure of Mine and such obligation was existing even at the time of the cut-off date i.e. 7 days before the bid date. The expenditure to be incurred in relation to the implementation of the Mine Closure Plan was to be considered at the time of quoting of the bid. Therefore, there is no Change in Law in regard to increased expenditure on account of Mine Closure Plan which had to be formulated pursuant to the notification issued by the Ministry of Coal, Government of India.

13. We have heard Mr. Ramachandran learned counsel appearing for HPPC which is Respondent No.10 in Appeal No.161 of 2015 and the Appellant in Appeal No.205 of 2015. We have perused the written submissions filed by him. Gist of the submissions is as under:

(a) Claim for MAT/Income Tax and Value Added Tax is not admissible. The CERC has rightly disallowed the same.

(b) For the effect to be given for Change in Law, it has to be shown that there existed a law prior to the cut off date which provided for certain impact and since then the law has brought about a change for an increased or decreased impact.

(c) Mere enactment of any law or change would not amount to Change in Law as per Article 13 unless the qualifying criteria is met i.e. there is a change in any cost of or revenue from the business of selling electricity by the Seller under the terms of the Agreement.

(d) The CERC has righty held that the events covered under Article 13.1.1(i) to (iii) would have to be tested on two touchstones a) whether such changes were attributable to the Seller; and (b) whether they result in changes in cost of or revenue from business of selling electricity.

(e) The expression "otherwise than for the default of the Seller" also applies to Article 13.1.1(i) and (ii). There are circumstances under which the Changes in Law could become applicable because of defaults or reasons attributable to Sasan (Orders or decisions of the Appropriate

Commission). In such cases if there are implications of Change in Law, the same would not result in any benefit to Sasan.

(f) Article 13.2(b) under the head "Operating Period" deals with the impact of Change in Law. For Changes in Law in Operating Period, the impact provided for is compensation for any increase in revenue or cost to the Seller. Thus even assuming but not admitting that Article 13.1.1(i) or (ii) do not relate to revenue or cost of business of selling electricity, under Article 13.2(b), the impact/compensation is limited to such revenues or costs.

(g) The capital cost besides being specifically recognised under Article 13.2(a), is a cost of business of selling electricity and any changes in capital cost due to a Change in Law under the PPA are required to be considered.

(h) The above interpretation is supported by Article 14.7 of the Bidding Guidelines.

(i) Sasan is bound by the terms of the PPA dated 07/08/2007 and the relevant bid terms and conditions and there can be no reliance placed on a subsequent draft PPA or terms

proposed by the Ministry of Power. Besides if the interpretation of Sasan was correct there was no need for such amendment.

(j) The Central Commission has rightly held that the qualification applies to Article 13.1.1(i) to (iii) and not merely (iii). In this connection reliance is placed on the Order passed by the Gujarat Electricity Regulatory Commission in ***Adani Power Limited v. Gujarat Urja Vikas Nigam Ltd*** [12]. The PPA between Sasan and the procurers is identical.

(k) It is not correct that all taxes and statutory levies are linked to business of selling electricity. Revenue and cost are required to be related to business of selling electricity and not to be related to the cost and revenue of the project or profits of the company. The qualifying criteria provided under Article 13.1.1 is not impact on costs/revenues of the project but the changes in costs or revenues from the business of selling the electricity.

(l) The bidding process and the PPA dated 07/08/2007 did not provide for any assurance of return/profit to Sasan.

[12] Order dated 07/01/2013 in Petition No.1210 of 2012

Therefore, the changes in taxes which affect not the revenues or costs of business of selling electricity but which affect only the after-tax return or profit to Sasan is not covered under Change in Law.

(m) The tax on income including MAT or Income tax has nothing to do with the cost or revenue from business of selling electricity. The tax is post revenue of the business and it is on operating profit or net profit as the case may be. The tax does not affect either the cost or revenue of business of sale of electricity. The net revenue from the business of selling electricity minus the costs and expenses of generating such revenue is accounted for in profit and loss amount. After the operating income/revenue is determined from the business of selling electricity, there are always post appropriations of revenue towards certain expenses. These have nothing to do with the operating income. The items of Balance Sheet are historical aspects and are not related to the operation during the year except for the operating income being taken into the balance sheet along with the additions to the assets and liabilities.

(n) ***J.K. Industries Limited*** has been wrongly relied upon. The said decision is on the aspect of the Accounting Standards-22 dealing with Accounting for Taxes on Income.

(o) Tax is not a cost and is not paid for the purpose of earning profits and is in fact an application for profit:

i) ***Mollins of India v. CIT***[13]

ii) ***Lubrizol India Ltd. v. Commissioner of Income Tax***[14]

iii) ***Sundaram Industries Ltd v. CIT*** [15]

iv) ***A.V. Thomas and Co. Ltd v. Commissioner of Income Tax***[16]

(p) In ***Smith Kline & French (India) Ltd & Ors. v. Commissioner of Income Tax***[17] the Supreme Court has upheld the Kerala High Court's judgment in ***A.V. Thomas & Co. Ltd.*** and other decisions cited above.

(q) From the above decisions it is clear that Income Tax/MAT is the share of the Government in the profits of a Company and not expenditures for the purpose of the business.

[13] (1983) 144 ITR 317 (Calcutta High Court).
[14] (1991) 187 ITR 25(Bombay High Court).
[15] (1986 159 ITR 446) Madras High Court.
[16] (1986) 159 ITR 431 (Kerala High Court)
[17] (1996) 8 SCC 579

Therefore, imposition of Tax/MAT or any increase or decrease of such taxes cannot be said to be covered under the scope of Article 13 dealing with Change in Law.

(r) Reliance placed by Sasan on Accounting Standards is misconceived. They are intended to provide information to stakeholders. They are not relevant for determination of whether procurers are required to pay for tax on profit of Sasan.

(s) AS-22 recognizes that taxes are to be included for determination of net profit or loss which is clearly a post revenue item. This net profit is the profit after tax and is relevant for the stakeholders of the company to determine the performance of the company but is not related to revenue or cost of the business.

(t) Tax including MAT is an application of profits of the Company and not an expense to arrive at profit. It is incorrect that MAT is not payable on operating or net profit.

(u) ***Ajanta Pharma*** only states that Section 115 JB of the Income Tax Act is a self contained Code. The provision provides for tax on book profits of the company. Such book

profits are profits of the company though they may not be taxable income for the purpose of Income Tax (other than MAT). The MAT is an alternative to Income Tax and is treated the same as Income Tax.

(v) The tax on income cannot be considered as pass through in the competitive bidding process under Section 63 of the said Act. The quantum of return/revenue/profit is not identified in the bid price nor assured by the procurers. The tax including MAT being on revenue/profit there is no identification of tax payable at the time of cut-off date. Accordingly, it is not possible at all to factor in the increase or decrease in the tax including MAT. The attempt to compute the tax to be allowed will be arbitrary.

(w) In case of tariff determination under Section 62 of the said Act, there is an assured return on equity of a specified percentage and the tariff regulations provide for one of the components as tax on income. This requires the procurers of the generating company to bear the tax on income at the hand of the generating company. There is no such assured return in a competitive bidding scheme and no such provisions for pass through of Income Tax.

(x) Tax is not a cost of capital. Income Tax or MAT is the Government's share of profits/income of a company and is not the cost of capital invested by a person.

(y) ***Sumitomo Heavy Industries Limited*** is not applicable to this case. There, in the Agreement, there was a specific clause for payment of all taxes on income. The Appellant therein had taken the responsibility for tax liabilities. PPA therein was different.

(z) ***Oil and Natural Gas Corporation Ltd***. is not applicable as the said decision is in a challenge to the arbitration award wherein the scope of appeal is limited. Besides the tax in the said case was not an application of profits of the contractor but part of payment to its employees and employees cost is a cost of carrying out business. Therefore such costs were allowed as increased costs due to Change in Law.

(aa) Judgment of this Tribunal in ***Jaiprakash Hydro Power Ltd***. is not applicable to this case. This judgment involved tariff determination under Section 62 of the said Act. PPA in that case provided for payment of Income Tax on the

income of the company on account of Return on Equity and depreciation/advanced depreciation. There was an intention for reimbursement of Income Tax in the PPA. This Tribunal did not consider whether MAT is an expenditure directly or indirectly affecting the parties.

(bb) In ***Rattan India Power Ltd.*** the Maharashtra Commission has not considered the issue whether MAT is related to revenue or costs of business of selling electricity.

(cc) In the judgment of this Tribunal in ***Bangalore Electricity Supply Company Ltd. v. Tata Power Company Ltd***[18]**.** the issue was not whether the changes in rate of MAT were Changes in Law under the PPA. Further there was a specific clause in the Agreement providing for passing on of the increase or decrease in tax liability. The said judgment is therefore not applicable to this case. The judgment of this Tribunal in ***Tamil Nadu Electricity Board v. M/s GMR Power Corporation Pvt. Ltd.***[19] is not applicable to this case because there was a specific clause in the Agreement

[18] Judgment dated 29/01/2011 in Appeal No.39 of 2010
[19] Judgment dated 28/02/2012 in Appeal No.177 of 2010

providing for tariff invoice to include Income Tax. The issue was not whether increase in rate of MAT is Change in Law.

(dd) The increase or decrease of claims relating to reduction in Excise duty and Central Sales Tax is Change in Law as per Article 13 of the PPA. Such provisions reduce the cost of generation of electricity and therefore have an impact on the cost of business of selling electricity and the same should be passed on to procurers.

14. Having given the gist of submissions, we now proceed to deal with them. Article 13 of the PPA deals with Change in Law. This appeal revolves around the said provision. It is therefore necessary to quote it. It reads as under:

> ***"13. CHANGE IN LAW***
>
> ***13.1 Definitions***
>
> *In this Article 13, the following terms shall have the following meanings:*
>
> *13.1.1 "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:*
>
> > *The enactment, brining into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian*

Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurers under the terms of this Agreement, or (iv) any change in the (a) Declared Price of Land for the Project or (b) the cost of implementation of the resettlement and rehabilitation package of the land for the Project mentioned in the RFP or (c) the cost of implementing Environmental Management Plan for the Power Station mentioned in the RFP or (d) the cost of implementing compensatory afforestation for the Coal Mine, indicated under the RFP and the PPA.

But shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission.

Provided that if Government of India does not extend the income tax holiday for power generation projects under Section 90 IA of the Income Tax Act up to the Scheduled Commercial Operation Date of the Power State, such non-extension shall be deemed to be a Change in Law.

13.1.2 'Competent Court' means

The Supreme Court or any High Court or any tribunal or any similar judicial or quasi judicial body in India that has jurisdiction to adjudicate upon issues relating to the Project.

13.2 Application and Principles for computing impact of Change in Law

While determining the consequences of Change in Law under this Article 13, 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 payments, to the extent contemplated in this Article 13, the affected party to the same economic position as if such Change in Law has not occurred.

(a) Construction Period:

As a result of any Change in Law, the impact of increase/decrease of Capital Cost of the Project in the Tariff shall be governed by the formula given below:

For every cumulative increase/decrease of each Rupees Fifty Crores (Rs.50 Crores) in the Capital Cost over the term of this Agreement, the increase/decrease in Non Escalable Capacity Charges shall be an amount equal to zero point to six seven (0.267%) of the Non Escalable Capacity Charges. Provided that the Seller provides to the Procurers documentary proof of such increase in Capital Cost for establishing the impact of such Change in Law. In case of Dispute, Article 17 shall apply. It is clarified that the above mentioned compensation shall be payable to either party only with effect from the date on which the total increase/decrease exceeds amount of Rs. Fifty (50) crores.

(b) Operation Period:

As a result of Change in Law, the compensation for any increase/decrease in revenues or cost to the Seller shall be determined and effective from such date, as decided by the Central Electricity Regulatory Commission whose decision shall be final and binding on both the parties, such to rights of appeal provided under applicable law.

Provided that the above mentioned compensation shall be payable only if and for increase/decrease in revenues or cost to the Seller is in excess of an amount equivalent to 1% of Letter of Credit in aggregate for a Contract Year.

13.3. Notification of Change in Law:

13.3.1 *If the Seller is affected by Change in Law in accordance with Article 13.2 and wishes to claim a Change in Law under this Article, 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.*

13.3.2 *Notwithstanding Article 13.3.1, the Seller shall be obliged to serve a notice to all the procurers under this Article 13.3.2 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 procurers contained herein shall be material. Provided that in case the Seller has not provided such notice, the procurers shall jointly have the right to issue such notice to the Seller.*

13.3.3 *Any notice service pursuant to this Article 13.3.2 shall provide, amongst other things, precise details of the Change in*

Law; and the effects on the Seller of the matters referred to in Article 13.2.

13.4 Tariff Adjustment Payment on account of Change in Law:

13.4.1 Subject to Article 13.2, the adjustment in Monthly Tariff Payment shall be effective form:

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

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

13.4.2 The payment of for Changes in Law shall be through Supplementary Bill as mentioned in Article 11.8. However, in case of any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed Tariff."

15. It is also necessary to have a look at certain definitions contained in the PPA.

(a) "Operating Period" has been defined as "In relation to the Unit comes the period from its COD and in relation to the Power Station the date by which all units achieve COD, until the expiry or earlier termination of this Agreement in accordance with Article 2 of this Agreement.

(b) "Law" has been defined to mean "all laws including Electricity Laws in force in India and any stature, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, decisions and orders of the Appropriate Commission;"

(c) "Indian Governmental Instrumentality" has been defined to mean "the GOI, Government of States where the Procurers and Project are located and any ministry or department of or board, agency or other regulatory or quasi-judicial authority controlled by GOI or Government of States where the Procurers and the Project are located and includes the Appropriate Commission."

16. The Appellant's case is that due to Change in Law events, such as, change in Income Tax rate, increase in MAT rate, etc., there is a financial impact on the costs and revenues of the Appellant during operating period for which the Appellant is entitled to be compensated as per Article 13 of the PPA. The Appellant's grievance is about the implication of the Finance Act, 2012 and the various notifications issued by the Government. Undoubtedly, the Finance Act or the various notifications relied upon by the Appellant are covered by Article 13.1.1(i) of the PPA. But, the important question is whether the qualification "which results in any change in any cost of or revenue from the business

of selling electricity by the Sellers to the Procurers" applies to Article 13.1.1(i) and (ii) or whether it applies to only Article 13.1.1(iii). In other words, the question is whether the Appellant can claim compensation for occurrence of Change in Law events only if the increase or decrease in tax rates pursuant to the Finance Act, 2012, or various notifications issued by the Government covered by Article 13.1.1(i) results in any change in cost or revenue from the Appellant's business of selling electricity. The CERC has taken a view that this qualification is attached to Article 13.1.1(i) and (ii) also. We are inclined to agree with the said view. We will state the reasons why we have come to this conclusion.

17. If it is assumed for a moment that this qualification is only attached to Article 13.1.1(iii), then the natural corollary will be that only changes in consents, approvals, licences will become Change in Law events if they result in change in any cost of or revenue from the business of selling electricity leaving out the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal of any law contemplated in Article 13.1.1(i) or a change in the interpretation of any law by a

competent court of law, tribunal or Indian Government Instrumentality contemplated in Article 13.1.1(ii). This would result in an absurd situation. It would mean that for situations contemplated in Article 13.1.1(i) and (ii), there is no requirement of their resulting in any change in any cost of or revenue from the business of selling electricity. Relief would be granted for a Change in Law which has no impact on the change in any cost of or revenue from the business of selling electricity. Such an incongruous interpretation must be avoided.

18. This interpretation is also supported by Article 13.2(b) of the PPA which under the head "Operation Period" deals with the impact of Change in Law and inter alia provides that compensation to be paid to the Seller for any increase / decrease in revenue or cost on account of Change in Law shall be determined by the CERC. Thus, in any event, for Change in Law in "Operating Period" which is the issue in the instant appeal, the impact provided for is compensation for any increase in revenue or cost to the seller. Thus, assuming as per the interpretation of Sasan that Article 13.1.1(i) or (ii) need not relate to revenue or

cost of business of selling electricity, under Article 13.2(b), the impact of compensation is limited to such revenues or costs.

19. Mr. Ramachandran, learned counsel for HPCC, drawing support from the reasoning of Gujarat Electricity Regulatory Commission in its Order dated 07/01/2013 in Petition No.1210 of 2012 submitted that though the four sub-clauses (i) to (iv) are separated by "or", there is no comma before the word "or" preceding sub-clauses (ii) and (iii), whereas the word "or" preceding sub-clause (iv) has a comma before it and this indicates that the first three sub-clauses are under one category and the last is a different category. We are inclined to agree with him. Thus, mere coming into force of an enactment, amendment, modification, repeal, etc. in law or change in interpretation by the competent court is not to be considered as a Change in Law under Article 13.1.1 unless it results in any change in any cost or revenue from the business of selling electricity.

20. Mr. Bhatt, learned senior counsel appearing for the Appellant submitted that such an interpretation would be wrong because the qualification "which results in any change in any

cost of or revenue from the business of electricity" is preceded by the words "otherwise than for default of seller" which can go with change in any consents, approvals or licences available or obtained for the project but not with change brought about by any enactment of any law, etc. or change in interpretation of any law by court of law contemplated in Article 13.1.1(i) and (ii) respectively. In this connection, we appreciate the submission of Mr. Ramachandran, learned counsel for HPCC that in the PPA "law" is defined as inclusive of orders and decisions of the Appropriate Commission. If on account of default of the seller, any order or decision of the Appropriate Commission is given in a particular way and if due to that there are any implications of Change in Law, that would not result in any benefit to the seller. It is not possible to hold that such situations will never occur.

21. It is necessary to deal with another submission of the Appellant which is connected to the above submission. It is submitted that Change in Law event can affect the project in two ways i.e. increase/decrease in capital cost or increase/decrease in revenue and/or cost. Increase and decrease in capital cost will be covered by Article 13(2)(a) which relates to Change in Law

during construction period. Increase or decrease in revenue and/or cost will be covered by Article 13(2)(b) which relates to Change in Law during operating period. It is submitted that if the qualification "which results in any change in any cost of or revenue from the business of selling electricity" is made applicable to classes (i), (ii) and (iii) of Article 13.1.1 that would render Article 13.2(a) redundant and Sasan will not be able to recover increase in capital cost since increase in capital cost never impacts the operating cost/revenue and the term "compensation for any increase/decrease in revenues or cost in Article 13.2(b)" would be rendered superfluous.

22. It is not possible for us to accept the submission that capital cost would never impact revenue and cost of business of selling electricity. Pertinently, 'capital cost' is specifically recognized under Article 13.2(a). Article 13.2(a) gives the formula which governs the computation of impact of income or decrease of capital cost of the project. Thus capital cost is a cost of business of selling electricity and any changes in capital cost due to Change in Law under the PPA are required to be considered. Article 13.1.1 does not refer to operating costs. Article 14.7 of

the Bidding Guidelines supports this interpretation. It reads thus:

> *"4.7: Any Change in Law impacting cost or revenue from the business of selling electricity to procurer with respect to the law applicable on the date which is 7 days before the last date for RFP Bid submissions shall be adjusted separately."*

23. Thus, the claims of the Appellant will have to be considered only if the Change in Law events result in any change in cost of or revenue from the business of selling electricity. It is only then that the seller i.e. the Appellant will get compensation as per the principles for computing impact of Change in Law laid down in Article 13.2 of the PPA. Therefore, it is necessary to examine whether each of the claims of the Appellant disallowed by the CERC and challenged by the Appellant in this appeal needs to be allowed because, it has resulted in change in cost of or revenue from the business of selling electricity.

24. Two claims of the Appellant can be considered together. The Appellant has alleged that change in Income Tax or increase in MAT is Change in Law. The CERC has disallowed these claims

on the ground that Income Tax or MAT are payable on the net profits of the business enterprise and therefore they do not affect the cost of or revenue from the business of selling electricity.

25. In order to examine whether this conclusion is correct, it is necessary to have a look at certain judgments to which our attention is drawn by counsel for HPCC. In ***Mollins of India Limited***, the Calcutta High Court was concerned with the question whether the Tribunal was right in holding that the surtax liability under the Companies (Profits) Surtax Act, 1964, for the relevant year should not be deducted in arriving at the total income under the Income Tax Act, 1961. The Calcutta High Court considered relevant judgments on the point and came to a conclusion that the liability to pay surtax cannot be allowed as a deduction from the total income of the assessee as expenditure wholly and exclusively laid out for the purpose of its liabilities. It is necessary to refer to and reproduce the quotations from some of the judgments referred to by the Calcutta High Court. In ***CIT v. Sitaldas Tirathdas***[20], which is quoted by the Calcutta High Court, the Supreme Court stated the principle of real income. It

[20] (1961) 41 ITR 367

is observed that where, by the obligation, income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. Following are the relevant observations:

> *"In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive factor. There is a difference between an amount which a person is obliged to apply out of his income and an amount, which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible ; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable."*

Following relevant paragraphs from ***Mollins of India Limited*** could also be quoted with advantage:

> *"11. When a tax is imposed on the income of the company the company will have to pay that tax but it*

cannot be said that a part of the income of the company was received for and on behalf of the Revenue. In the case of L.C. Ltd. v. G.B. Ollivant Ltd. [1945] 13 ITR (Suppl.) 23 (HL), varying a famous phrase of Lord Machaghten, Viscount Simon L.C., observed : "excess profits tax, if I may be pardoned for saying so, is a tax on profits". The Companies (Profits) Surtax is also a tax on profits. Until and unless the profits are earned, the liability to pay income-tax or surtax does not arise. It is only because the income has reached the assessee that the tax is being imposed.

12. The I.T. Act imposes a charge on the total income of an assessee. The C. (P.) S.T. Act levies an additional tax on the total income of a company after certain adjustments in accordance with the principles laid down in that Act. Income or profits on their coming into existence attract tax at that point, but if no profit or income was earned or received by an assessee, there will not be any question of imposition of income-tax or surtax. Charge of surtax presupposes existence of income; it does not prevent accrual of income or receipt of income by diverting a portion of the income to the Revenue at source.

……..

22. An argument similar to what has been contended in this case was repelled in the well-known case of Ashton Gas Co. v. Attorney-General [1906] AC 10 (HL). In that case it was statutorily provided that the profits of the Ashton Gas Company to be divided among the shareholders in any year should not exceed the rate of 10% per annum on the ordinary share capital. The company distributed 10% as dividend tax-free. The argument on behalf of the company was that the income-tax was a charge on the profits before distribution to the shareholders; it was one of the charges which had to be deducted before arriving at the profits and calculating the dividend. The tax was charged upon the company and the company was

entitled to adopt the principle upon which it had acted. Buckley J. (Attorney-General v. Ashton Gas Co. [1904] 2 Ch 621, 624 (Ch D & CA)) observed as follows:

> *"The profits are not arrived at after deducting income-tax. The income-tax is part of the profits--namely, such part as the Revenue is entitled to take out of the profits. A sum which is an expense, which must be borne whether profits are earned or not, may no doubt be deducted before arriving at profit. But a proportionate part of the profits payable to the Revenue is not a deduction before arriving at, but a part of, the profits themselves."*

23. On further appeal, Halsbury L.C., observed as follows ([1906] AC 10, 12(HL)):

> *"Profit is a plain English word ; that is what is charged with income tax..... The income tax is a charge upon the profits; the thing which is taxed is the profit that is made, and you must ascertain what is the profit that is made before you deduct the tax--you have no right to deduct the income tax before you ascertain what the profit is. I cannot understand how you can make the income tax part of the expenditure. I share Buckley J.'s difficulty in understanding how so plain a matter has been discussed in all the courts at such extravagant length."*

.....

30. Viscount Simon L. C. observed at p. 26 of 13 ITR (Suppl.):

> *"The word 'divisible' or 'distributable' does not occur in the agreement from beginning to end,*

> *and, to my mind, the profits of a trading company when ascertained in accordance with ordinary commercial practice are the profits before, and not after, deducting the direct taxation which has to be paid in respect of them. It is not to be disputed that this is the case with income tax, for income tax is not a deduction which has to be made in order to arrive at profits; it is the Crown's share of the profits. All this has been explained once and for all in the well-known case of Ashton Gas Co. v. Attorney-General [1906] AC 10 (HL). Counsel for the respondents admitted that this would be true whether the express provision excluding income tax was in the agreement or not.*
>
> .....

60. In the case before us the question of capacity or the character of the taxpayer really does not arise. The real question is whether a tax which has been imposed on the total income of a company after some adjustments can be allowed as a deduction in computing total income of that company under the I.T. Act. Is it a business expenditure of the company? In his concurring judgment in the case of Indian Aluminium Co. Ltd. v. CIT the distinction between the two types of taxes were brought out by Beg J., in the following words (p. 749):

> *"In other words, where profits, the net gains of business determined after making all permissible deductions, are taxed, the disbursements to meet such taxes cannot be deducted. But, where the tax was levied, as it was in Harrods' case [1964] 41 TC 450 (CA), on capital or assets used for the purpose of earning these profits, it was a permissible deduction in calculating profits."*

61. The question of deducibility of excess profits tax paid by a company as business expenditure came up for consideration before the House of Lords in the case of IRC v. Dowdall O'Mahoney& Co. Ltd. [1952] 33 TC 259. In that case the House of Lords held unanimously that such payments were not deductible. It was held that it could not be allowed as a deduction on the ground that excess profits tax was a tax on profits and it could not be allowed on the same principle that income-tax was not allowed as a deduction in making assessment of income. This case is important for our purpose and the principle laid down in this case is equally applicable to surtax which is a tax, of the same character as income-tax or excess profits tax.

62. Lord Oaksey observed, at p. 274 of the report, as follows:

> *"On the first question I am of opinion that taxes such as those now in question, namely, income-tax, corporation profits tax and excess profits tax, are not, according to the authorities, wholly and exclusively laid out for the purposes of the company's trade in the United Kingdom. Taxes such as these are not paid for the purpose of earning the profits of the trade they are the application of those profits when made and not the loss so that they are exacted by a dominion or foreign government. No clear distinction in point of principle was suggested to your Lordships between such taxes imposed by the United Kingdom government and those imposed by dominion or foreign governments."*

……

69. It has also been argued on behalf of the assessee that the earning of profit and payment of taxes are not isolated and independent activities. Those activities are continuous and take place from year to year. The liability to pay income-tax and surtax arises because a person is carrying on the business by which he earns profits. Therefore, the liability to pay the tax is an incidence of carrying on of the business through which he earns profits. Strong reliance has been placed on the decisions in Dehra Dun Tea Co. Ltd. v. CIT and Mitsui Steamship Co. Ltd. v. CIT . But these two cases merely reiterate the principles laid down in the case of Indian Aluminium Co. Ltd. v. CIT , which we have noted earlier. In the first of these two cases the Supreme Court allowed the tax levied by the U. P. Large Land Holdings Tax Act, 1957, on the ground that the tax was levied on the business assets by applying the ratio of the decision in the case of Indian Aluminium Co. Ltd. This was done on the basis of the finding that the tax was levied on lands owned by the assessee-company as its business assets. In the case of Mitsui Steamship Co, Ltd. v. CIT , the question was whether the property tax paid by the assessee in Japan on its vessels was allowable and the Supreme Court held that the expenditure was as owner-cum-trader and incidental to the carrying on of its business.

70. The question in this case is whether a tax imposed on the profits of a company is allowable as deduction in computing the total income of the company. The subject-matter of the tax is profits. Whatever profits the company has made are being brought to the charge of surtax. The tax will be calculated according to the amount of profits that the assessee has earned. It is very difficult to see how the tax proposed to be levied on the profits can be deducted from the profits on expenditure wholly and exclusively laid out for business. Without an express provision to that effect there is no scope for deducting the estimated amount of

surtax from the profits for the purpose of arriving at the taxable income.

……..

72. But the problem in this case is quite different. Law charges incurred has been justified as business expenditure on the ground of protection and preservation of assets and also on the ground that a businessman will legitimately try to get a larger share of the profit by reducing his tax liability. The assessee stands to gain by reduction of the burden of tax. Costs, charges and expenses for the purpose of reducing or avoiding liability for payment of income-tax or surtax may well be expenditure wholly and exclusively incurred for the purpose of business. But the tax imposed on the, total income of an assessee cannot be allowed on that ground as a business expenditure in the computation of total income. How can the tax that is sought to be imposed on income be a deduction from the very income which is being subjected to tax? The tax imposed by the C. (P.) S. T. Act is essentially of the same character as income-tax or excess profits tax. Liability to pay this tax depends upon whether profits are made or not. It is a. tax which can only be measured and the liability to which can be ascertained only after the total income of the company has been finally determined and the income-tax payable thereon has been computed and deducted. To use the language of Lord Macmillan it is a super income-tax. In our opinion, having regard to the nature of the tax and the scheme of the Surtax Act, the liability to pay surtax cannot be allowed as a deduction from the total income of the assessee as expenditure wholly and exclusively laid out for the purpose of its business."

26. Similar view is taken by the Bombay High Court in ***Lubrizol India Ltd.***, by the Madras High Court in ***Sundaram Industries Ltd.*** and by the Kerala High Court in ***A.V. Thomas & Co.***.

27. The above decision of the Kerala High Court was challenged in the Supreme Court in ***Smith Kline & French (India) Ltd. & Ors.*** and the Supreme Court upheld not only the decision of the Kerala High Court but also the above decisions of other High Courts including the decisions cited above.

28. Thus, when a tax on income is paid by the company, it cannot be said that a part of the income of the company was received for and on behalf of the Revenue. The Income Tax is charged upon the profits; the thing which is taxed is the profit that is made. Profit has to be ascertained first and Income Tax being a part of profits – namely, such part as the Revenue is entitled to take, is to be deducted from profits. When the net gains of the business determined after making all permissible deductions, are taxed, the deduction to meet such taxes cannot be deducted. Income Tax is not allowed as a deduction in making assessment of income. Income Tax or MAT are not part of the

expenses of the company incurred for the purpose of carrying on the business and earning profits. Income Tax and MAT are post profit. Income Tax and MAT are the application of the profits when made. Income Tax and MAT are not an expenditure laid out for the purpose of the business of the company.

29. Before the CERC, the Appellant placed reliance on the following paragraphs of Accounting Standards 22.

> *"9. Tax expense for the period, comprising current tax and deferred tax, should be included in the determination of the net profit or loss for the period.*
>
> *10. Taxes on income are considered to be an expense incurred by the enterprise in earning income and are accrued in the same period as the revenue and expenses to which they relate. Such matching may result into timing differences. The tax effects of timing differences are included in the tax expense in the statement of profit and loss and as deferred tax assets (subject to the consideration of prudence as set out in paragraphs 15-18) or as deferred tax liabilities, in the balance sheet."*

30. Our attention is drawn by Mr. Bhatt, learned counsel for the Appellant to paragraph 145 of ***J.K. Industries.*** It reads thus:

"145. It is an important item of P&L account. Taxes on income are considered as expenses incurred by a company in earning revenues. It is an expense which is recognized in the same period as revenue and expense to which they relate. This is called as matching principle. Such matching, results in what is called as timing differences. Tax effects of timing differences are included as tax expense in the statement of profit and loss and as deferred tax asset (DTA) or as deferred tax liability (DTL) in the balance-sheet. In short, deferred tax should be recognized for timing differences. This is the basic mandate of AS 22. This mandate is based on an important principle of accounting, namely, that every transaction has a tax effect. However, DTA is subject to the principle of prudence and certainty that in future the company will have adequate income. This principle of prudence states that DTAs are recognized and carried forward only to the extent of their being a reasonable certainty of their realization, i.e., in future there would be taxable income. Therefore, under the rule of prudence, DTAs are to be recognized only to the extent of their being timing differences, the reversal whereof will result in sufficient taxable income in future against which they can be realized. On the other hand, DTL is to be recognized as liability under the said standard as it results in future cash outflow in the form of payments to the Income tax Department in the case of TOIs."

31. Relying on the above paragraph, it is contended that taxes on income are expenses and, therefore, any change in the tax rate

results in the change in the revenue from the business of electricity and is covered under "Change in Law". The CERC has rejected this contention on the ground that provisions of AS-22 are for the purpose of management of tax portfolio of a business enterprise and the methodology for accounting of tax expenses in the balance sheet of the enterprise and these provisions do not create additional liabilities on other entities who contribute towards the income of the business enterprise like the procurers. This view is correct. In ***J.K. Industries***, the Supreme Court was considering the question "Whether Accounting Standards-22 entitled 'accounting for taxes on income' insofar as it relates to deferred taxation is inconsistent with and ultravires the provisions of the Companies Act, 1956, the Income Tax Act, 1961 and the Constitution of India". While dismissing the challenge to the constitutional validity of the Accounting Standards-22, the Supreme Court examined the meaning and purpose of Accounting Standards and *inter alia* held that in its origin Accounting Standards is a policy statement which establishes rates relating to recognition, measurement and disclosures thereby ensuring that all enterprises that follow them are comparable and that their financial statements are true, fair and

transparent. The Supreme Court observed that accounting income is normally used as a relevant measure by most stakeholders. Paragraph 145 of the judgment has to be understood in the context of the issue which the Supreme Court was examining. In paragraph 145, the Supreme Court has referred to Profit and Loss Account and has dealt with treatment of accounting for taxes on income. The statement of profit and loss in Illustration 1 of the judgment contained in paragraph 198 refers to tax expense as independent of cost of business. Read in context, the above observations of the Supreme Court do not help the Appellant.

32. According to the Appellant, MAT is payable on the 'book profit' which is computed in accordance with Section 115 JB(2) of the Income Tax Act. It is submitted that in ***Ajanta Pharma***, the Supreme Court has observed that Section 115 JB is a self-contained Code and levies a tax on deemed income. Therefore, MAT is not a tax on the net profit. Even a company which has no taxable income can be liable to pay MAT and, therefore, it directly impacts the revenue as any increase in MAT imposes an additional burden on the company. It is not possible to accept

this submission. In ***Ajanta Pharma***, the Supreme Court observed that the scheme for levy of minimum tax on companies having 'book profits' introduced by the Finance (No.2) Act, 1996 envisages payment of minimum tax by deeming 30% of the book profits computed under the Companies Act as taxable income, in a case where the total income as computed under the Income Tax Act is less than 30% of the book profit. The Supreme Court further observed that Section 115 JA of the Income Tax Act, which provides for MAT is a self contained Code. 'Book Profit' was explained by the Supreme Court in following manner:

> *"9. The word "book profit" has been defined in Section 115-JA(2) read with the Explanation thereto to mean the net profit as shown in the profit and loss account, as increased by the amount(s) mentioned in clauses (a) to (f), and as reduced by amount(s) covered by clauses (i) to (ix) of the Explanation. These may be called for the sake of brevity as "upward and downward adjustments". From the above it is clear that Section 115-JA is a self-contained code and will apply notwithstanding any provisions in the 1961 Act."*

33. Thus, book profits are profits of the company. MAT is a tax on income computed in a manner different from regular Income Tax. MAT is an alternative to Income Tax and is treated as

Income Tax. MAT is Income Tax. Once this clarity is achieved, further conclusion must follow that MAT is post profit. It is an application of profits of the company and not an expense to arrive at profit. MAT is not related to or is not the cost of the business of selling electricity and has, therefore, rightly been disallowed.

34. We must also bear in mind that we are concerned here with competitive bidding process under Section 63 of the said Act. We appreciate the submission of Mr. Ramachandran, learned counsel appearing for HPCC that tax on income cannot be considered as pass through in the competitive bidding process under Section 63 of the said Act. The tariff is a per unit tariff allowed on the electricity generated and supplied and such a bid submitted by bidder is inclusive of all elements. There is no separate return on equity or reasonable return. The quantum of return revenue/profit is not identified in the bid price nor assured by the procurers. Income Tax including MAT being on profit, there is no identification of tax payable at the time of cut-off date. It is, therefore, not possible at all to factor in the increase or decrease in the Income Tax - including MAT. The Commission cannot therefore speculate what return the company

had assumed for submission of the bid. Therefore, it will not be possible to compute the tax to be allowed.

35. As against this, in case of determination of tariff under Section 62 of the said Act, there is an assured return on equity of a specified percentage. The tariff regulations framed by the Central Commission / State Commissions provide for one of the components as tax on income. Regulation 25 of the CERC (Terms and Conditions of Tariff) Regulations, 2014 is cited as an example. It is rightly contended that this requires the procurers/beneficiaries of the generating company to bear the tax on income at the hand of the generating company. In case of competitive bidding scheme, there is no assured return and no provision for pass through of Income Tax.

36. We must now deal with certain judgments on which reliance is placed by the Appellant. In ***Sumitomo Heavy Industries Limited***, the agreement related to an international contract. The contractor had undertaken the responsibility of the tax liability of the sub-contractor and ONGC had undertaken the tax liability of the contractor. Even the Change in Law clause was wide. It

referred to all necessary and reasonable costs. The PPA in the instant case refers to costs in the business of selling electricity. Therefore, reliance placed on this judgment is misplaced.

37. In ***Oil and Natural Gas Corporation Limited***, challenge was to the arbitration award wherein the scope of appeal was limited. In that case, the contractor under the agreement was responsible for the taxes payable by the employees of the contractor. Therefore, the tax in the said case was not an application of profits of the contractor but part of payment to its employees and employees' cost is a cost of carrying out business. Therefore, such costs were allowed as increased costs due to Change in Law. This judgment is clearly distinguishable from the present case.

38. In ***Jaiprakash Hydro Power Ltd.***, this Tribunal was concerned with a tariff determination under Section 62 of the said Act. The argument was that since MAT was already provided in the Income Tax Act before signing of the PPA, the same cannot come under the purview of enactment or enforcement of any law envisaged in sub-clause (b)(i) of Clause

20.21 of the PPA. Thus, the issue was whether amendment of law is covered under Change in Law or not. The question whether MAT affects the cost or revenue of business of selling electricity was not considered by this Tribunal.

39. Even in ***Rattan India Power Ltd.***, on which reliance is placed, the Maharashtra Commission has not examined the issue whether MAT is related to revenue or costs of business of selling electricity. It is necessary to refer to this Tribunal's judgment in ***Bangalore Electricity Supply Company Limited v. Tata Power Company Limtied & Anr.***[21] on which Maharashtra Commission has placed reliance in ***Rattan India Power Ltd.*** In that case, the issue was not whether the changes in rate of MAT were Changes in Law. There was a clause in the PPA regarding reimbursement of the PPA. This judgment refers to judgment of this Tribunal in ***Tamil Nadu Electricity Board v. M/s. GMR Power Corporation Limtied***[22]. There again this Tribunal was not concerned with the question whether MAT is a Change in Law. The question was whether the Tamil Nadu Electricity Board was liable to pay interest for delay in reimbursement of MAT.

[21] Judgment dated 02/05/2014 in Appeal No.330 of 2013
[22] Judgment dated 28/02/2012 in Appeal No.177 of 2010

Therefore, ***Tata Power Company Ltd. & Anr.*** is not applicable to this case.

40. We must also refer to the judgment of this Tribunal in ***Bangalore Electricity Supply Company Limited v. Karnataka Electricity Regulatory Commission*** [23] . That judgment, in our opinion, is not applicable to this case. There, the question was of reimbursement of MAT. Moreover, the tariff was determined vide Tariff Order 2009 passed under Section 62 of the said Act. In that case, pass through of Income Tax including MAT was an integral component of the tariff determined by the Tariff Order 2009. Besides, Regulation 23 of the CERC Tariff Regulations clearly stated that taxes and duties shall be allowed as pass through. Moreover, this Tribunal was not concerned with the question whether MAT was part of the expenses of the company incurred for the purpose of carrying on the business of selling electricity and, therefore, covered by the Change in Law provision. This judgment is, therefore, clearly not applicable to this case. In view of the above, the CERC's finding

[23] Judgment dated 21/03/2017 in Appeal No.225 of 2015

that changes in Income Tax or increase in MAT are not Changes in Law must be confirmed and is accordingly confirmed.

41. We must now go to Reduction in Merit Rate of Excise Duty, Reduction in rate of Central Sales Tax and increase in Value Added Tax. It is submitted by the Appellant that the CERC has held that the quoted tariff according to the provisions of paragraph 2.7.1.4.3 of the RFP shall be an inclusive one including statutory taxes, duties and levies and, therefore, the Appellant was expected to take into account all cost including capital cost and the operating cost, statutory taxes, duties, levies, while quoting tariff in the bid. Therefore, the claim of Change in Law in respect of the above items cannot be allowed. It is submitted that RFP cannot override the express right given to an affected party under the PPA to claim Change in Law as long as the said event qualifies as Change in Law event in terms of Article 13. It is the Appellant's contention that the bidder was required to take into account statutory taxes prevailing as on the cut-off date and the expectation of the CERC that the bidder should have considered in its bid any year to year escalation or historical data is contrary to Article 13 of the PPA. In this connection

following paragraphs of judgment of this Tribunal in ***Wardha Power Company Limited*** are relied upon:

> *"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.*
>
> *xxx xxx xxx*
>
> *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.*
>
> *xxx xxx xxx*

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.

xxx xxx xxx

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."

It is submitted by the Appellant that in this judgment, this Tribunal has expressly rejected the obligation of any escalable index or indexing of cost of fuel in order to determine the compensation due on account of Change in Law. It is submitted that Sasan ought to be compensated for the difference in the rate of statutory taxes which prevailed as on the cut-off date of the bid and actual rate of statutory taxes which prevail as on date.

42. We must first consider the nature of these taxes and whether any changes in them result in any change in cost or

revenue from the business of selling electricity so that they can qualify to be categorised as "Change in Law" events. In this connection, we may again refer to Kerala High Court's judgment in ***A.V. Thomas & Co. Ltd.*** which was upheld by the Supreme Court in ***Smithkline & French (India) Ltd.*** While holding that Income Tax is not an expenditure laid out for the purpose of the business, the Kerala High Court held that taxes such as sales tax or excise duty are expenditures incurred for the purpose of carrying on the trade. Following are the relevant observations of the Kerala High Court:

> *"On the other hand, where taxes such as sales tax or excise duty have been paid, or liability incurred therefor, courts have held that they are not cases of application of the income, but expenditure incurred for the purpose of carrying on the trade and, therefore, deductible in computing the profits and gains of business: Kedarnath Jute Mfg. Co. Ltd. v. CIT [1971] 82 ITR 363 (SC) and Pope the King Match Factory v. CIT [1963] 50 ITR 495 (Mad). Liability to pay sales tax or excise duty or like taxes does not depend upon whether profits are made or not. It is a payment which the assessee is compelled to make if he has to carry on his trade. The fundamental distinction is that such payment, unlike in the case of income-tax or similar charge on income, is not an application of the income, but a cost or expenditure incurred before earning the income. Such taxes are paid to ensure that the trade is*

allowed to continue. They are paid wholly and exclusively for the purposes of the business and are, therefore, allowable as deduction in computing the profits and gains, This was the position in Harrods (Buenos Aires) Ltd. v. Taylor-Gooby [1964] 41 TC 450 (cited with approval by the Supreme Court in Indian Aluminium Co. Ltd. v. CIT [1972] 84 ITR 735). It is true that the expression "for the purposes of the business " in Section 37, as stated in CIT v. Malayalam Plantations Ltd. [1964] 53 ITR 140 (SC), is wider than the expression "for the purpose of earning the profits" (per Lord Davey, Strong & Co. of Romsey Ltd. v. Woodifield [1906] 5 TC 215), but that makes no difference to this fundamental distinction."

The above observations make it clear that Sales Tax and Excise Duty are expenditure incurred for the purpose of carrying on the trade. The CERC is, therefore, not right in disallowing the said expense and it clearly falls in the category of Change in Law event as defined in the PPA.

43. We are informed that the Central Commission has subsequently allowed change in Merit Rate of Excise Duty and change in rate of Central Sales Tax as Change in Law events in the following matters:

a) ***GMR Kamalanga Energy Limited v. DHBVNL & Ors.***

b) ***GMR Warora Energy Limited v. MSEDCL & Ors.***

c) ***Adani Power Limited v. UHBVNL & Ors.***

It is not understood why the CERC has taken a different stand in this case. So far as VAT is concerned, it is levied on procurement of materials by the seller. Therefore, it affects the cost of business of generation and sale of electricity. Hence, the CERC has erred in disallowing increase in VAT by the Madhya Pradesh Government.

44. It is true that according to the provisions of the RFP, the quoted tariff shall be inclusive one including statutory taxes, duties and levies. But the PPA gives express right to an affected party to claim Change in Law if the event qualifies thus in terms of Article 13. The RFP cannot override this right if an event qualifies as a Change in Law. The Competitive Bidding Guidelines (Article 4.7 thereof has already been reproduced hereinabove) and the PPA have to be read together. If an event

qualifies as a Change in Law event then the compensation must follow because otherwise Article 13 of the PPA will become redundant. But, this will of course depend on facts and circumstances of each case. Facts of each case will have to be carefully studied before granting such a relief. It is rightly pointed out that in ***Wardha Power Company Limited***, this Tribunal has rejected the obligation of any escalable index or indexing of cost of fuel in order to determine the compensation due on account of Change in Law. Sasan will have to be compensated keeping the law in mind.

45. HPPC has supported the Appellant on the aspect of Reduction in Excise Duty and Central Sales Tax. It is HPPC's submission that the said reduction reduces the cost of generation of electricity and therefore have an impact on the cost of business of selling electricity and, hence, the same may be passed on to the procurers.

46. Having regard to the nature of Excise Duty and Central Sales Tax and VAT which have an impact on the cost of or revenue from the business of generation and sale of electricity, in our opinion, the same should be allowed as Change in Law event.

47. We may mention that so far as Mine Closure Plan is concerned, no arguments were advanced. In any case, we find the CERC's view on this aspect correct and legal and we confirm it.

48. In the circumstances, we confirm the impugned order of the CERC to the extent it disallows the claim of the Appellant of adjustment of Income Tax and MAT as Change in Law events. We set aside the impugned order to the extent it disallows the Appellant's claim on Merit Rate of Excise Duty, Central Sales Tax and VAT. We remand the matter to the CERC. We direct the CERC to compute the impact of the same on the cost of or revenue from the business of selling electricity of the Appellant and pass appropriate orders to give relief to the Appellant in terms of the PPA.

49. Both the appeals are disposed of in the aforestated terms. Needless to say that the interim applications, if any, shall also stand disposed of.

50. Pronounced in the open court on this **19th day of April, 2017.**

I.J. Kapoor	**Justice Ranjana P. Desai**
[Technical Member]	**[Chairperson]**

√**REPORTABLE/~~NON-REPORTABALE~~**