In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)

Appeal No. 210 of 2017
And
IA No. 05 of 2018

Dated: 13th April, 2018

Present: Hon'ble Mr. I. J. Kapoor, Technical Member
Hon'ble Mr. Justce N.K. Patil, Judicial Member

In the matter of :-

Adani Power Ltd.
9th Floor, Shikhar, Mithakali Six Road
Navrangpura
Ahmedabad- 380009
Gujarat **... Appellant**

Versus

1. **Central Electricity Regulatory Commission**
3rd& 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi 110 001 **...Respondent No. 1**

2. **Uttar Haryana Bijli Vitran Nigam Ltd. (UHBVNL)**
Vidyut Sadan, Plot No. C-16, Sector 6
Panchkula Haryana- 134112 **...Respondent No. 2**

3. **Dakshin Haryana Bijli Vitran Nigam Ltd. (DHBVNL)**
Vidyut Nagar, Vidyut Sadan,
Hissar, Haryana- 125005 **...Respondent No. 3**

4. **Gujarat Urja Vikas Nigam Ltd. (GUVNL)**
Sardar Patel Bhawan, Race Course Circle
Vadodara, Gujarat- 390007 **...Respondent No. 4**

Counsel for the Appellant(s): **Mr. Amit Kapur**
Ms. Poonam Verma

Ms. Abhia Zaidi
Mr. Malav Deliwala
Mr. Vikram N.

Counsel for the Respondent(s): Mr. G. Umapathy
Mr. Aditya Singh
Mr. R. Mekhala for R-2 to R-3

Mr. M.G. Ramachandran
Mr. Anand K Ganeshan
Ms.Swapna Seshadri
Ms.Ranjitha Ramachandran
Ms. Poorva Saigal for R-4

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

1. The present Appeal is being filed by M/s Adani Power Ltd. (hereinafter referred to as the **"Appellant"**) under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the **"Act"**) challenging the Order dated 4.5.2017 (**"Impugned Order"**) passed by the Central Electricity Regulatory Commission (hereinafter referred to as the **"Central Commission"**), in Petition No. 235/MP/2015 regarding denial of claim of the Appellant arising out of Change in Law events under Power Purchase Agreements (**PPAs**) with the Respondent Nos. 2 to 4, Carrying Cost and Station Heat Rate (**SHR**).

2. The Appellant is a is a generating company in terms of Section 2(18) of the Act and is having a 4620 MW coal fired power Station at Mundra, Dist. Kutch, Gujarat.

3. The Respondent No. 1 is Central Electricity Regulatory Commission (CERC)exercising jurisdiction and discharging functions in terms of the Act.

4. The Respondent Nos. 2 and 3 are Uttar Haryana Bijli Vitran Nigam Ltd. and Dakshin Haryana Bijli Vitran Nigam Ltd. respectively (collectively referred to as "**Haryana Discoms**") which are the distribution licensees in the State of Haryana.

5. The Respondent No. 4 i.e. Gujarat Urja Vikas Nigam Limited ("**GUVNL**") is a company incorporated under the provisions of Companies Act, 1956. It has been assigned with the task of procuring power by the State of Gujarat.

6. **Facts of the present Appeal:**

a) The Appellant has established 4620 MW power plant in Special Economic Zone (SEZ) at Mundra, Gujarat in four phases consisting of four Units of 330 MW in Phase I and II, two Units of 660 MW in Phase III and three Units of 660 MW in Phase IV.The Appellant has entered into PPA dated 02.02.2007 for supply of 1000 MW power ("**Gujarat Bid-02 PPA**") from Phase- III at levelized tariff of Rs. 2.35 per kWh and PPA dated 06.02.2007 for supply of 1000 MW ("**Gujarat Bid-01 PPA**") from Phase I & II at levelized tariff of Rs. 2.89 per kWh with the Respondent No.4. The

Appellant has also entered into PPAs dated 07.08.2008 with Respondent Nos. 2 & 3 for supply of 1424 MW power (712 MW each) ("**Haryana PPAs**") from Phase IV of Mundra Power Station at levelized tariff of Rs. 2.94 per kWh.

b) The above PPAs were executed pursuant to Case-1 competitive bidding process under taken by the Respondents 2 to 4. The Cut-off Date i.e. the date 7 days prior to bid deadline which is directly linked to the Change in Law events under the PPAs for Gujarat Bid-02, Gujarat Bid-01 and Haryana are 26.12.2006, 4.01.2007 and 19.11.2007 respectively.

c) Govt. of India (**"GoI"**) on 23.06.2005 enacted Special Economic Zone Act, 2005 (**"SEZ Act"**). Section 26 of the SEZ Act provides that every Developer (which includes Co-Developer) shall be entitled to exemption from any duty leviable under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and/or Central Excise Tariff Act, 1985 on goods imported/ procured for authorized operation. On 10.2.2006, GoI issued the SEZ Rules, 2006. On 07.06.2006, Ministry of Commerce and Industry (**"MoC&I"**), GoI approved the Appellant as a Co-Developer. MoC&I vide letter dated 19.12.2006 has granted approval to the Appellant for setting up power sector specific SEZ.

d) MoC&I vide Notification dated 27.2.2009 issued Guidelines for Power Generation, Transmission and Distribution in a SEZ (**"2009 Guidelines"**). MoC&I issued revised Guidelines for Power Generation, Transmission and Distribution in a SEZ on 21.3.2012

(**"2012 Guidelines")**. MoC&I vide notifications dated 06.04.2015 has withdrawn the exemption of all the duties under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and/or Central Excise Tariff Act, 1985 on goods imported/procured by the Appellant for authorized operations w.e.f. 01.04.2015. Further MoC&I by a separate notification on same date stipulated that those power plants which are presently situated in processing areas shall be demarcated as non – processing area and no Operation and Maintenance (O&M) benefits will now be available for such plants.

e) MoC&I vide Notification dated 16.02.2016 issued revised Guidelines for Power Generation, Transmission and Distribution in Special Economic Zone ("**2016 Guidelines**") withdrawing fiscal benefits including exemption of service tax on power plants approved prior to 27.02.2009 due to which the Appellant continues to be not entitled for exemption of duties under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and/or Central Excise Tariff Act, 1985 which it was entitled to as on Cut-Off date and exemption from Service Tax on taxable services which the Appellant was entitled to has been withdrawn.

f) On 15.10.2015, the Appellant has filed Petition No. 235/MP/2015 before the Central Commission seeking compensation for Change in Law invoking Article 13 of the respective PPAs along with Section 79(1)(b) of the Act.

g) On 04.5.2017, the Central Commission passed the Impugned Order wherein the Central Commission has disallowed certain claims of the Appellant regarding Change in Law, Carrying Cost and actual SHR. Aggrieved by the Impugned Order the Appellant has preferred the present Appeal before this Tribunal.

7. **Questions of Law:**

The Appellant has raised the following questions of law in the present appeal:

a) Whether the Central Commission has:-

(i) Failed to give effect to Article 13 of the PPAs and not consider the SEZ Notifications issued by MoC&I i.e. an Indian Governmental Instrumentality as Change in Law Events contrary to the judgments of this Tribunal?

(ii) Misconstrued and/or misinterpreted the true meaning and legal effect of the SEZ Notifications which seek to deny the benefits in relation to O&M, which benefits were available, and known to the Appellant, at the time of the bid, but have been subsequently taken away, and thereby increasing the cost of generation by an incidence of additional tax?

(iii) Failed to appreciate that although the power plant continues to be in the processing zone, without amending Rule 27 of the Special Economic Zones Rules, 2006 (“SEZRules”) by virtue of the Circular/Guidelines/Notification, the tax benefits have

been denied, notwithstanding the absence of the notification under Section 26(2) of the SEZ Act?

(iv) Erred in holding that the Appellant is not entitled for duty concessions/ exemptions at the time of bid submissions contrary to its own finding at Para 35 of the Impugned Order that *"It is pertinent to mention that under Section 26 of the SEZ Act, the Petitioner was* ***entitled to benefits of duty and tax exemption during the construction as well as operation period"***?

(v) Failed to appreciate that the term 'others' used in the notification dated 19.12.2016 of MoC&I cannot be restricted mean either SEZ or EOU and also covers power supplied to DTA?

(vi) Failed to appreciate that the Appellant could not have been aware about the methodology to be adopted in the future by an Indian Governmental Instrumentality under Section 26(2) of the SEZ Act? This is contrary to the admitted position of GUVNL and the findings of the Gujarat Electricity Regulatory Commission ("**Gujarat Commission**") recorded vide its order dated 21.10.2011 in Petition No. 1080 of 2010 which has attained finality?

(vii) Failed to appreciate that these Guidelines/Circulars/ Notifications have not been issued under 26(2) of the SEZ Act and, therefore, the mere presence of Section 26(2) in the statute book, does not mean that the Appellant was aware of the power of the Central Government to deny the benefits based on the SEZ Act and SEZ Rules?

b) Whether the Central Commission has erred in not allowing levy of taxes on spares and consumables as Change in Law events under the Gujarat Bid-01 PPA while the same have been allowed under the other 3 PPAs (Gujarat Bid-02 PPA and the Haryana PPA) and has therefore failed to appreciate that:-

(i) Article 13.1.1 of the Gujarat Bid-1 PPA has to be interpreted in view of mechanism for tariff adjustment for Change in Law provided under Article 13.2.1 and Article 13.2.2 of the PPA?

(ii) In terms of Article 1.2.14 of the Gujarat Bid-01 PPA different parts of the PPA are to be taken as mutually explanatory and supplementary to each other and any inconsistency between or among the parts of the PPA has to be interpreted in a harmonious manner so as to give effect to each part?

(iii) In terms the observations of the Hon'ble Supreme Court, it ought to have exercised its regulatory powers under Section 79(1)(b) of the Act to vary the tariff discovered/adopted under Section 63 and therefore grant relief to the Appellant?

c) Whether the Central Commission has erred in not allowing the Carrying Cost and therefore-

(i) Defeated the very purpose of RESTITUTIVE RELIEF provided under Article 13.2 in the PPAs of restoring the

affected party to the same economic position as if the Change in Law Event had not occurred?

(ii) Acted contrary to the settled position of law?

(d) Whether the Central Commission erred in considering that:-

(i) SHR of 2150 kcal/kWh and 2206 kcal/ kWh for GUVNL and Haryana PPAs respectively on the basis of earlier order dated 07.01.2013 issued by Gujarat Electricity Regulatory Commission while ignoring the change in circumstances which resulting into increased SHR?

(ii) that the SHR allowed by the Central Commission is contrary to the allowable margin for operating the plant under different conditions as per the CERC (Terms and Conditions of Tariff) Regulations, 2009?

8. We have heard learned counsel for the Appellant and the Respondents at considerable length of time and we have carefully perused their respective written submissions. Gist of the same is discussed hereunder.

9. The principle submissions on issues raised for our consideration in the instant appeal by the learned counsel for the Appellant are as follows-

a) **Issue No. 1:The SEZ Notifications are be considered as Change in Law Events**

a) The Appellant had bid for supply of power to the Respondents 2 to 4 on the assumption that setting up of power plants in SEZ to carry on the authorized operations is entitled to certain exemptions/benefits in terms of Section 26 of the SEZ Act. Sub-section 2 of Section 26 of the SEZ Act vests power in the Central Government to prescribe the manner in which terms and conditions subject to which the exemptions, concessions, drawback or other benefits shall be granted to the Project Developer in SEZ under sub-section 1. This is an admitted position as recorded in the Gujarat Commission's Order dated 21.10.2011 in Petition No. 1080 of 2010.

b) MoC&I on 27.02.2009, in exercise of powers under Section 26(2) of SEZ Act, issued 2009 Guidelines. By the said Guidelines, GoI specified that:-

(i) A power plant to be set up by Developer/Co-Developer in an SEZ will be in a non – processing zone of the SEZ.

(ii) Such power plant will be entitled to fiscal benefits during the time of setting up. Further, such power plant will not be entitled to fiscal benefits concerning operations and maintenance (i.e. during operations)

Accordingly, the exemptions from any duty under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and/or Central Excise Tariff Act, 1985 on goods imported/procured by it for authorized operations as on the cut-off dates, which were taken away by the above guidelines.

c) The Central Commission has misinterpreted the true meaning and legal effect of the said SEZ Notifications which deny the benefits during O&M phase. These benefits were available and known to the Appellant at the time of the bid. The Central Commission has failed to appreciate that although the power plant continues to be in the processing zone, without amending Rule 27 of the SEZ Rules which provides for exemption, by virtue of the Circular/Guidelines/ Notifications, the tax benefits have been denied, notwithstanding the absence of the notification under Section 26(2) of the SEZ Act.

d) The findings of the Central Commission are contrary to the judgement of this Tribunal dated 19.04.2017in case of Sasan Power Limited Vs. CERC &Ors. in Appeal No. 161 of 2015 and judgment dated 23.04.2014in case of Nabha Power Limited Vs. Punjab State Power Corporation Limited in Appeal No. 207 of 2012, wherein it has been held that the notifications issued under a statute qualify as Change in Law event. The PPAs involved in the said matters have similar change in law provision as in the present PPAs. The findings of the Central Commission are also inconsistent with its own observation at paragraph 35 of the Impugned Order wherein it has held that any change in taxes which have been imposed pursuant to the Acts passed by the Parliament shall be covered under Change in Law.

e) The Central Commission has erred in its reasoning that the term “others” used in the notification dated 19.12.2006 issued by MoC&I shall take colour from the words preceding it and will refer to other units engaged in “export” of goods and cannot cover the Domestic Tariff Area (DTA). MoC&I vide notification dated 19.12.2006,

granted approval to the Appellant for setting up sector specific SEZ for power sector. The project details mentioned in the approval are as under:

"To set up a sector specific Special Economic Zone for power sector for supply of power to SEZs, EOUs in Gujarat and other SEZs, EOUs ***and others****."*

The letter contemplates three situations- (i) setting up a SEZ for supply of power to SEZ, (ii) setting up a SEZ for supply of power to EOUs and (iii) setting up a SEZ for supply of power to 'others'. The meaning of the term 'others' mentioned herein above cannot be restricted to either Export Oriented Units (EOUs) or SEZs and shall mean something which is neither SEZ nor EOU, hence it would imply any other zone i.e. Domestic Tariff Area (DTA) where power is being supplied. The supply to SEZ and EOU are already covered and therefore there is no reason of word "others" taking it color from the words preceding and engaged in "export". In this regard the Appellant has relied on the judgment of the Hon'ble Supreme Court in the case of U.P. SEB Vs. Hari Shankar Jain, (1978) 4 SCC 16 (Para 29) wherein it has been held that rules of construction have to be "applied with caution and not pushed too far".

f) Accordingly, the notifications dated 27.02.2009, 21.03.2012, 05.04.2015 and 16.02.2016 issued by MoC&I i.e. a Government of India Instrumentality, shall qualify as Change in Law Event as per the PPAs.

b) Issue No. 2: **Impact of certain Change in Law Events under the Gujarat Bid-01 PPA**

a) The Central Commission has erred in holding that the Appellant would not be entitled to reimbursement for duties under Customs

Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and Central Excise Tariff Act, 1985 on import/procurement of any other goods and withdrawal of exemption from Service Tax as the provisions of Gujarat Bid -01 PPA does not cover these elements under Change in Law. The definition of Change in Law provided under Article 13.1.1 has to be interpreted in harmony with Article 13.2 which is the foundation of the relief to be provided to the Appellant. The intention of the parties was to restitute for a change in cost and revenue on account of a Change in Law event and therefore restrictive interpretation of Article 13.1.1 without considering Article 13.2 cannot be adopted. In this regard, it may be noted that Article 1.2.14 of the PPA provides that different parts of the PPA are to be taken as mutually explanatory and supplementary to each other and if there is any inconsistency between or among the parts of the agreement, they shall be interpreted in a harmonious manner so as to give effect to each part. The Change in Law provision covers, *inter alia*, change with regard to generation of electricity which includes O&M, plants and machinery from which the Appellant supplies electricity to the Respondent No. 4.

b) The generation of electricity cannot be seen in isolation and the input cost incurred in generation is to be considered as a part of the single transaction. In this regard, the Appellant has relied on the Judgment of the Hon'ble Supreme Court in the case of State of Andhra Pradesh Vs. NTPC reported as 2002 5 SCC 203 wherein it has been held that generation, supply and consumption of electricity supply are instantaneous and have to be treated as one transaction. The relevant extract is reproduced below:

"29. … However, we are dealing with the case of electricity as goods, the property whereof, as we have already noted, is that the production (generation), transmission, delivery and consumption are simultaneous, almost instantaneous. Electricity as goods comes into existence and is consumed simultaneously; the event of sale in the sense of transferring property in the goods merely intervenes as a step between generation and consumption. In such a case when the generation takes place in one State wherefrom it is supplied and it is received in another State where it is consumed, the entire transaction is one and can be nothing else excepting an inter-State sale on account of instantaneous movement of goods from one State to another occasioned by the sale or purchase of goods, squarely covered by Section 3 of the CST Act."

Accordingly, levy of duty under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and/or Central Excise Tariff Act, 1985 w.e.f. 01.04.2015 on consumable and spare parts is covered within the ambit of Change in Law.

c) The Hon'ble Supreme Court in the Judgment dated 07.04.2017 in Energy Watchdog Vs. CERC &Ors. reported as 2017 (4) SCC 580 has observed that the Central Commission ought to have exercised its regulatory powers under Section 79(1)(b) of the Act to provide the Appellant its legitimate entitlement in terms of Change in Law. This entitlement is important to maintain viability of the project. In this regard, reliance is placed on the judgment of the Hon'ble Supreme Court dated 09.05.2017 in Civil Appeal No. 5040 of 2014 titled Shivshakti Sugars Ltd. Vs. Shree Renuka Sugars Limited &Ors. wherein the Hon'ble Court has laid down certain statutory principles for moulding of relief stating that public purpose ought not

be ignored and courts should lean in favour of an interpretation which sub serves the economic interest of the nation.

d) Further, as per Clause 4.7 of the competitive bidding guidelines issued by GoI, any change in law impacting cost or revenue from the business of electricity shall be adjusted separately. The Clause 4.7 does not restrict impact of change in law only to changes on water, on Primary Fuel etc. Any variation in taxes, duties and other levies which increases the cost or revenue of the Seller/Generating Company, whether it affects the cost of consumables and spares or primary fuel, is covered within the meaning of Change in Law.

e) The Change in Law provision in the PPA has to be interpreted liberally in order to compensate the Appellant for the Change in Law events. In this regard, the Appellant has relied on the judgments of the Hon'ble Supreme Court in case of Sumitomo Heavy Industries Limited Vs. Oil and Natural Gas Commission of India, reported as (2010) 11 SCC 296 and in case of Oil and Natural Gas Corporation Limited Vs. Atwood Oceanic International S.A., reported as (2008) 11 SCC 267 wherein Change in Law provision has been liberally interpreted.

f) In case if there is any ambiguity in the interpretation of the PPA, the rule of ***Contra Proferentem*** will apply. The rule of *Contra Proferentem*, provides that in case of ambiguity or two possible interpretations, the Court will prefer that interpretation which is more favourable to the party who has not drafted the standard agreement. In this regard, the the Appellant has relied on the judgments of the

Hon'ble Supreme Court in case of Bank of India & Anr. Vs. K. Mohandas &Ors., reported as (2009) 5 SCC 313 and United India Insurance Co. Ltd. Vs. Pushpalaya Printers, reported as (2004) 3 SCC 694.

c) Issue No. 3:**Denial of Carrying Cost**

a) The Central Commission has erred in denying carrying cost to the Appellant by holding that there is no provision in the PPAs that provides for the same. In terms of Article 13 of the PPAs, the affected party is to be restored to the same economic position as if the Change in Law had not occurred. "Economic position" does not limit itself to a simple correlation of increased expenditure and a corresponding compensation amount and includes compensation in terms of carrying costs incurred with respect to the Change in Law events. In case the Central Commission holds that compensation is to be paid retrospectively (i.e. with respect to a prior period), the Appellant is entitled to carrying cost for such period. Carrying costs are in the nature of compensation for money denied at the appropriate time, as held by this Tribunal in the SLS case.

b) The Hon'ble Supreme Court has in case of R.C. Cooper Vs. Union of India reported as AIR 1970 SC 564 noted that as per the dictionary meaning "compensation" means anything given to make things equal in value: anything given as an equivalent, to make amends for loss or damage". This principle has also been recognized by the Hon'ble Supreme Court in the case of N.B. Jeejeebhoy Vs. Assistant Collector, Thana Prant, Thana reported as AIR 1965 SCC 1096 has in relation to Article 31 of the Constitution

of India wherein it was held that “the expression "compensation" in Art. 31(2) of the Constitution means "just equivalent" of what the owner has been deprived of.” Compensation is a comprehensive term and is aimed at restoring a party to the same position as if no injury was caused to him, as held by the Hon’ble Supreme Court in the case of Yadava Kumar Vs. The Divisional Manager, National Insurance Co. Ltd. and Anr., reported as (2010) 10 SCC 341 and judgments in case of Secy, Irrigation Department, Govt. of Orissa Vs. GC Roy reported as (1992) 1 SCCC 508 (CB) and Board of Trustees for the Port of Calcutta Vs. Engineers-De-Space-Age reported as (1996) 1 SCC 516.

c) The principle of recovery of carrying cost/ interest and time value of money has been recognized in the following judgment of this Tribunal. Judgements of this Tribunal dated 20.12.2012 in Appeal No. 150 and batch appeals titled SLS Power Ltd v. Andhra Pradesh Electricity Regulatory Commission, in North Delhi Power Ltd v. DERC reported as 2010 ELR (APTEL) 0891 and in Tata Power Company Ltd v. Maharashtra Electricity Regulatory Commission reported as 2011 ELR (APTEL) 336.

d) Order passed by the Central Commission on 25.01.2016 in Petition No.170/MP/2013 in case of Jhajjar Power Ltd. Vs. UHBVNL and Ors. wherein the Central Commission itself has granted relief for the Force Majeure to Jhajjar Power Ltd. for FY 12-13 along with Interest @ 12% per annum till the date of payment after the issuance of the said Order on 25.01.2016.

e) The Central Commission has erred in equating carrying cost with interest. The carrying cost is compensation for time value of money. This is different from interest. Apart from the fact that Article 13 of the PPA permits grant of carrying cost, even on equity, compensation for time value of money ought to be granted. The present case is similar to the SECL case wherein the Hon'ble Supreme Court has noted that the liability is crystallized from the date of enhancement of royalty. The Central Commission has erred in relying on the case of NTPC Ltd Vs. Madhya Pradesh State Electricity Board Ltd &Ors. (2011) 15 SCC 580 (NTPC case), distinguishing the SECL case.

d) Issue No. 4: **Disallowance of actual Station Heat Rate**

a) The Central Commission has erred in disallowing margin for actual site conditions while considering SHR of 2150 kcal/kWh for the Gujarat PPAs and 2206 kcal/kWh the Haryana PPAs. The Central Commission has simply relied upon the Order dated 07.01.2013 passed by the Gujarat Commission in a different proceeding wherein the Net SHR of 2299.75 kcal/kWh (2150.27 kcal/kWh with auxiliary of 6.5%) was considered which is completely erroneous as the Central Commission has failed to appreciate that SHR 2150.27 Kcal/kwh itself pertains to only Unit 5 & 6 of Mundra power plant under the Gujarat Bid-02 PPA and that too is erroneous in view of changed fuel source and impact of high moisture content in Indonesian coal as assessed by Technical Expert in the Committee constituted by the Central Commission during proceedings of Petition No. 155/MP/2012.

b) The Central Commission failed to appreciate that merely because the Gujarat Commission adopted the SHR of 2150.27 Kcal/kWh, it does not become sacrosanct and in light of the evidence and as per the relevant details of EPC contract, the same cannot be taken to be correct for the purposes of determining the correct SHR.

c) It cannot be construed that the Appellant has waived its right since it has not challenged the decision of the Gujarat Commission. It is a settled position of law that 'waiver must be spelled out with crystal clarity for there must be a clear intention to give up a known right'. The Appellant has relied on the judgement of the Hon'ble Supreme Court in All India Power Engineer Federation &Ors. Vs. Sasan Power Ltd. & Ors. reported as (2017) 1 SCC 487.

d) The Appellant has referred to the Tariff Regulations, 2009 of the Central Commission which provides margin of 6.5% over the design value of SHR and 4thamendment to IEGC for compensation in various parameters including SHR due to part load/technical minimum operations.

e) The Appellant has also referred to the order of the Central Commission in the case of GMR Kamalanga Energy Ltd. &Anr. Vs. Dakshin Haryana Bijli Vitran Nigam Ltd. &Ors. in Petition no. 79/MP/2013 decided on 03.02.2016 wherein the Central Commission has devised a mechanism to compute actual additional cost incurred by GMR to procure imported coal and coal from open market to make up the deficit portion of coal to be received from linkage. As per the said mechanism the Energy Charge Rate (ECR)

for scheduled generation at delivery point has been computed considering SHR of 2378 kCal/kWh. An appeal against the said order has been filed by GMR before this Hon'ble Tribunal and is pending adjudication. However, the issue of SHR has not been contended in the appeal. Therefore, the SHR computed by the Central Commission therein has attained finality.

10. The principle submissions on issues raised for our consideration in the instant appeal by the learned counsel for the Respondent Nos. 2 & 3 are as follows-

a) The learned counsel while producing the relevant extracts from SEZ Act and SEZ Rules has argued that from the conjoint reading of the same it is clear that the Appellant was aware that the duties are payable by it for transfer of power from SEZ to Domestic Tariff Area (DTA). Accordingly, the Central Commission has rightly denied the claims of the Appellant.

b) MoC&I vide letter dated 19.12.2006 granted permission to the Appellant to set up sector specific SEZ for supplying power to SEZs, EOUs in Gujarat and other SEZs, EOUs & others. Thus, the SEZ Act, SEZ Rules and the permissions granted to the Appellant clearly spell out authorised operations to be carried out by it.

c) Ministry of Commerce guidelines dated 27.2.2009 provide for supply of power from processing area/ non-processing area to DTA and the quantum of duty to be levied. The guidelines of GoI dated 21.3.2012 state about sale of power from SEZ to DTA on application to Development Commissioner of SEZ and pay duty as applicable on

import of such power. GoI vide its guidelines dated 6.4.2015 provide for demarcation of area as processing/ non- processing areas and that no O&M benefits will now be available for such plants. All the schemes under SEZ Act provide for sale from SEZ to DTA that the applicable duty will be leviable. The submission of the Appellant that there was no import duty on power and therefore no duty can be leviable for sale from SEZ to DTA is untenable.

d) The notifications issued by GoI from time to time are only clarificatory in nature and do not remove the basis of statutory provisions of the SEZ Act and Rules made there under. The Central Commission has rightly held that the notification issued by MoC&I under Section 26 (2) of the SEZ Act cannot be treated as Change in Law.

e) On the issue of the word “others” to be treated as different from SEZ/EOUs, the Appellant has relied on judgement of the Hon’ble Supreme Court in case of UPSEB vs. Hari Shankar Jain which has no relevance to the present case. Further, the reliance on judgements of this Tribunal in Appeal Nos. 161/2015 & 207/2012 holding that notifications issued by MoC&I would be covered under Change in Law is untenable.

f) Further the reliance of the Appellant on the maxim “Ejusdem Generis” is misplaced. This is a fact of Noscitur a sociis which clearly states that when general words are juxtaposed with specific words then the general words cannot be read in isolation. This has also been held by the Hon’ble Supreme Court in case of

Maharashtra University of Health Sciences and Ors. vs. Satchikitsa Prasarak Mandal &Ors. reported in 2010 (3) SCC 786.

g) Haryana utilities called for Case-I tariff based competitive bidding where the project site is not specified by the procurers. The Appellant was free to select its site and the Haryana utilities were only interested in getting power at the Haryana periphery at lowest tariff. It was up to the Appellant to choose appropriate site and it was aware from very beginning of the bidding that it has to supply power outside the SEZ area. It was mandatory for the Appellant to consider the duty/taxes/ levies before submitting its bid. Further it was not mentioned in the competitive bidding or the RFP that the bidder was required to inform the procurers where the power plant of the bidder is situated and that plant will be entitled/ not entitled to the fiscal benefits.

h) As per the Impugned Order the Appellant is only allowed to raise bills upon the Respondent No. 2 & 3 after prior adjustment on net basis of increase/decrease for each contract year from the operation date. Further, in terms of Article 13. 2 (b) of the PPA, the Appellant is only entitled for adjustment in tariff if the net effect of increase/ decrease is above 1% of value.

i) The contention of the Appellant being ‘unaware’ that benefit of the custom duty, excise duty was not available to it outside SEZ is wholly misplaced. The authorisations were issued to the Appellant by GoI and hence the Appellant is not entitled to plead that he was not aware and avoid its obligation of including the taxes and duties as applicable while quoting in bid.

j) Reliance of the Appellant on the Gujarat Commission's order dated 21.10.2011 is inappropriate as the Gujarat Commission has not gone into the issue of interpretation and application of Section 26 of the SEZ Act. The proceedings before the Gujarat Commission cannot be treated as any admission of the Respondent No. 4 in aspects of the SEZ Act.

k) The contention of the Appellant that it should be allowed Carrying Cost is misplaced as there is no provision in the PPA regarding the same. The reliance of the Appellant on various case laws in support of carrying cost is highly misplaced.

l) The Appellant is eligible for compensation strictly as per Article 13.2 (b) of the PPA which provides for the Central Commission to decide on Change in Law and compensation along with date from which it is to be paid. The Carrying Cost or interest is admissible only after finalisation of amount payable and not before.

m) The reliance placed by the Appellant on the meaning of compensation is misconceived. The compensation is to be in terms of the Article 13.2 of the PPA and there is no deprivation or injury due to actions of the Respondents Nos. 2 to 4. The Appellant is seeking to import the principle of restitution and compensation for an injury into Article 13.2 of the PPA which is not permissible.

n) The Respondent Nos. 2 & 3 relied on the judgement of Hon'ble Supreme Court in case of NTPC vs. MPSEB (2011) 15 SCC 580 and distinguishes SECL vs. State of Madhya Pradesh (2003) 8 SCC 648 as the facts of the case are not similar.

o) On the issue of SHR the Central Commission has rightly held that SHR of 2206 kCal/kWh for Haryana PPAs is to be considered for Change in Law computation disregarding margin for site conditions. Only the conditions and parameters admitted by the Appellant in its bid are to be taken for the purpose of computation of Change in Law events.

p) The Appellant has not challenged the order of the Gujarat Commission and hence it is not open to the Appellant to contend that the order of the Gujarat Commission is wrong. The Appellant's reliance on committee reports in Petition No. 155/MP/2012 is wrong as the orders passed have been set aside. Further, the decision of the Central Commission in case of GMR Kamalanga is not applicable in present case and the tariff regulations of the Central Commission are not applicable in competitively bid out projects.

11. The principle submissions on issues raised for our consideration in the instant appeal by the learned counsel for the Respondent No. 4 are as follows-

a) The Central Commission has rightly held that the exemptions and concessions are not applicable to the units supplying goods to DTA which is as per the provisions of the SEZ Act as the Respondent No. 4 and Respondent Nos. 2& 3 are not located in SEZ or EOUs. The Central Commission has relied on notification dated 19.12.2006 issued by GoI to the Appellant and there is no mention of sale to DTA in the said notification. The Central Commission has held that the exemption shall be restricted to those activities, which are duly

authorised in terms of Section 26 of the SEZ Act and hence sale to DTA cannot be said to be exempted from levy of custom duty etc. on the cut-off date. The Respondent No. 4 has denied any admission before the Gujarat Commission during the pleadings regarding Section 26 of the SEZ Act. In this case, it is to be seen that what were the rates at cut-off date and subsequent increase/ decrease in them after the cut-off date. The same needs to be dealt as per the provisions of the PPAs.

b) In the above circumstances and in terms of the Impugned Order the Appellant is required to raise bills on the Respondent No. 4 giving adjustment on net basis for the increase/ decrease in every contract year from Commercial Operation Date (COD).

c) The reliance of the Appellant on the Gujarat Commission's order is misplaced as the Gujarat Commission was not dealing with the authorisation issued to the Appellant under the SEZ Act and further the Appropriate Commission for the Appellant is Central Commission in terms of the judgement issued by this Tribunal in Appeal No. 100 of 2013 which has been upheld by Hon'ble Supreme Court.

d) The Central Commission has correctly interpreted the Article 13 of the PPA dated 6.2.2007 under Gujarat Bid-01. No relief can be given to the Appellant for duties on import or procurement of any other good or service tax by way of regulatory powers or otherwise. The interpretation of Article 13.1 sought by the Appellant is erroneous. This Article provides for changes in law for taxes on water, primary fuel and generation and sale of electricity. The

provisions of Article 13.2 cannot be used to expand the scope of the Article 13.1 or to introduce change in law events not covered under Article 13.1. The term generation would not include all input cost. The rule of contra proferentum would not apply in the present case.

e) Further, the Central Commission has rightly denied the claim of Carrying Cost by the Appellant as there is no provision in the PPA for the same. The compensation payable is to be restricted strictly as per the provisions of 13.2 (b) of the PPA which provides Central Commission to decide on Change in Law, compensation and its effective date. Until the compensation is crystallised there is no occasion for consideration of Carrying Cost or interest. On this issue the Respondent No. 4 has also relied on the judgement of Hon'ble Supreme Court as done by the Respondent Nos. 2 & 3.

f) On the issue of SHR the submissions of the Respondent No. 4 are similar to that of Respondent Nos. 2 & 3.

12. We have heard the learned counsel for the Appellant and the learned counsel for the Respondents and we have gone through carefully the pleadings available on the file on various issues raised in the instant Appeal, the following issues arise for our consideration as follows:-

a) The main issues raised by the Appellant in the present Appeal are regarding notifications dated 27.2.2009, 21.3.2012, 54.2015 and 16.2.2016 issued by MoC&I under Section 26 (2) of the SEZ Act not considered as Change in Law events, denial of Carrying Cost

and disallowance of actual SHR by the Central Commission in the Impugned Order.

b) Let us first we take all the questions of law together raised by the Appellant on Issue No. 1 (SEZ Notifications are be considered as Change in Law Events)i.e. Question No. 7. a). The same is reproduced below:

Whether the Central Commission has:-

(i) Failed to give effect to Article 13 of the PPAs and not consider the SEZ Notifications issued by MoC&I i.e. an Indian Governmental Instrumentality as Change in Law Events contrary to the judgments of this Tribunal?

(ii) Misconstrued and/or misinterpreted the true meaning and legal effect of the SEZ Notifications which seek to deny the benefits in relation to operation and maintenance, which benefits were available, and known to the Appellant, at the time of the bid, but have been subsequently taken away, and thereby increasing the cost of generation by an incidence of additional tax?

(iii) Failed to appreciate that although the power plant continues to be in the processing zone, without amending Rule 27 of the Special Economic Zones Rules, 2006 (“SEZ Rules”) by virtue of the Circular/Guidelines/Notification, the tax benefits have been denied, notwithstanding the absence of the notification under Section 26(2) of the SEZ Act?

(iv) Erred in holding that the Appellant is not entitled for duty concessions/ exemptions at the time of bid submissions contrary to its own finding at Para 35 of the Impugned Order that *"It is pertinent to mention that under Section 26 of the SEZ Act, the Petitioner was* ***entitled to benefits of duty and tax exemption during the construction as well as operation period"***?

(v) Failed to appreciate that the term 'others' used in the notification dated 19.12.2016 of MoC&I cannot be restricted mean either SEZ or EOU and also covers power supplied to DTA?

(vi) Failed to appreciate that the Appellant could not have been aware about the methodology to be adopted in the future by an Indian Governmental Instrumentality under Section 26(2) of the SEZ Act? This is contrary to the admitted position of GUVNL and the findings of the Gujarat Electricity Regulatory Commission ("**Gujarat Commission**") recorded *vide* its order dated 21.10.2011 in Petition No. 1080 of 2010 which has attained finality?

(vii) Failed to appreciate that these Guidelines/Circulars/Notifications have not been issued under 26(2) of the SEZ Act and, therefore, the mere presence of Section 26(2) in the statute book, does not mean that the Appellant was aware of the power of the Central Government to deny the benefits based on the SEZ Act and SEZ Rules?, we observe as below:

i. The above questions are dealt together to find the answer to the core issue that Whether the SEZ Notifications dated 27.2.2009, 21.3.2012, 5.4.2015 and 16.2.2016 issued by MoC&I are be considered as Change in Law Events or not.

ii. It is a fact that the SEZ Act was enacted in 2005 and the Appellant was granted permission to set up power sector specific SEZ vide letter dated 19.12.2006. The earliest cut-off date for the bids submitted by the Appellant for procurement of power by the Respondents 2 to 4 was 26.12.2006 (i.e. 7 days prior to bid deadline) in respect of Gujarat Bid-02. The cut-off dates for all the bids are summarised below:

	Haryana	Gujarat Bid-02	Gujarat Bid-01
Cut-Off Date	19.11.2007	26.12.2006	04.01.2007

The first notification by which the said Change in Law event had occurred is dated 27.2.2009. Thus, it is amply clear that for all the three bids, the SEZ Act, SEZ Rules, letter dated 7.6.2006 and the notification dated 19.12.2006 forms the base for occurrence of any Change in Law Events. It is important to go into the provisions of the SEZ Act, SEZ Rules and Notification and the impugned findings.

iii. Let us consider the impugned findings of the Central Commission on this issue. The relevant extract from the Impugned Order is reproduced below:

"27. ……. Ministry of Commerce and Industry, Government of India approved the Petitioner as Co-Developer under Section 2 (f) of the SEZ Act vide letter dated 7.6.2006.By a subsequent letter dated 19.12.2006, Ministry of Commerce and Industry, Government of India granted approval to the Petitioner for setting up sector specific Special Economic Zone for power sector. The project details mentioned in the approval letter is as under:

> *"To set up a sector specific Special Economic Zone for power sector for supply ofpower to SEZs, EOUs in Gujarat and other SEZs, EOUs and others."*

Thus, the Power Project was meant for supply of power to the SEZs and EOUs in Gujarat and other States. On 14.6.2007, Office of the Development Commissioner, Ministry of Commerce and Industry, Government of India passed an order under Section 6 of the SEZ Act where under the area identified by Adani Power for setting up a power plant was demarcated as ***Processing Area.***

29. Under the above provisions, certain exemptions, drawbacks and concessionsare available to the project developers……

In terms of Section 26 (1) of the Special Economic Zone Act, 2005, Adani Power as a Project Developer of power plant in SEZ is entitled for the following benefits:

(i) Any duty leviable under Custom Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 or Central Excise Tariff Act, 1985 and Central Sales Tax Act on goods imported/procured for authorised operation by the Project Developer;

(ii) Service tax on taxable services provided to the Project Developer to carry on authorised operation in the SEZ.

30. Sub-section 2 of Section 26 of the SEZ Act vests power in the Central Government to prescribe the manner in which and terms and conditions subject to which the exemptions, concessions, drawback or other benefits shall be granted to the Project Developer in SEZ under sub-section (1). Therefore, the Nodal Ministry, namely, the Ministry of Commerce and Industry, Government of India can vary the terms and conditions of exemptions, concessions, drawback or other benefits to the project developer within SEZ.

*31. The Ministry of Commerce and Industry, Government of India issued guidelines on **27.2.2009** under Section 26 (2) of SEZ Act in respect of power plant set up by developer/do-developer within the SEZ.*

……

*As per the above notification, the power plant as the infrastructural facility will be in the **non-processing area of SEZ** and shall be governed by the following terms and conditions:*

(a) The Power Plant will be entitled for fiscal benefits only for its initial setting up;

(b) No fiscal benefits would be admissible for its operation and maintenance;

…….

(d) Area of supply of power includes

(i) other facilities located in the non processing area of the same SEZ/facilities located in the non-processing areas of other SEZs; (ii) SEZ units located in the processing area of the same SEZ/SEZ units located in the processing areas of other SEZs; (iii) facilities located in the areas of same SEZs or facilities located in the processing areas of other SEZs; and (iv) Domestic Tariff Area.

*32. In supersession of the notification dated 27.2.2009, the Ministry of Commerce and Industry, Government of India issued guidelines for power generation, transmission and distribution in SEZ vide notification dated **21.3.2012**.*

……..

***The above guidelines made a distinction between a power plant set up in processing area and power plant set up in a non-processing area**……..*

*……. **However, a power plant set up in the non-processing area was entitled to fiscal benefits under Section 26 on initial setting up and it was not entitled for fiscal benefits for operation and maintenance.***

33. On 6.4.2015, the Ministry of Commerce and Industry, Government of India issued two notifications under which guidelines issued vide letter dated 21.3.2012 were withdrawn and guidelines issued vide letter dated 27.2.2009 were restored. It was further clarified in the said letter that the power plants which are situated in the processing area of SEZ, would be demarcated as non-processing area and no operation and maintenance benefits would be available to such power plants.

34. The Ministry of Commerce and Industry, Government of India in supersession of all previous guidelines, issued guidelines dated 16.2.2016 clarifying the position of the power plants located in SEZ……
……..

35. As per the above guidelines, the power plant developed by project developer and co-developer will be in the non-processing area of SEZ only. Such power plants can supply power to the Domestic Tariff Area (DTA) after meeting the power requirements of SEZ subject to payment of custom duty, other duties and service tax. Such power plants are entitled to O & M benefits only with regard to average monthly power supplied to entities within the same SEZ. However, no O & M benefits including service tax exemption are allowed for power supplied to DTA. DTA has been

defined in the SEZ Act as —whole of India (including the territorial waters and continental shelf) but does not include the areas of the Special Economic Zone. This provision in the Guidelines is in consonance with Rule 27 (3) of the Special Economic Zone Rules, 2006 which provides as under:

> *"27 (3) The import of duty free material for setting up educational institutions, hospitals, hotels, residential and/or business complex, leisure and entertainment facilities or any other facilities in the **non-processing area** of the Special Economic Zone shall be as approved by the Board and import of no duty free material shall be permitted for operation and maintenance of such facilities."*

Therefore, the Petitioner who is supplying power to GUVNL and Haryana Utilities shall be covered under the supply of power to DTA and shall not be entitled to O & M benefits including service tax exemption. It is pertinent to mention that under Section 26 of the SEZ Act, the Petitioner was entitled to benefits of duty and tax exemption during the construction as well as operation period. However, guidelines have been issued on 27.2.2009, 21.3.2012, 6.4.2015 and 16.2.2016varying the manner and terms and conditions of benefits granted to the project developer setting up

the power plant in the SEZ under Section 26 (2) of SEZ Act.

The question for consideration is whether these guidelines shall be construed as Change in Law in terms of the PPAs entered into by the Petitioner with Gujarat and Haryana. In our considered view, Section 26 (1) permitted the duty exemption only for carrying out an authorised operation by the developer or entrepreneurs in the SEZ. The authorised operation as per the Ministry of Commerce and Industry letter dated 19.12.2016 is —to set up a sector specific Special Economic Zone for power sector for supply of power to SEZs, EOUs in Gujarat or other SEZs, EOUs and others. Here, the word "others" will take colour from the words preceding it and will refer to other units engaged in —export" of goods and cannot cover the DTA. Supply of power from the generating station set up within the SEZ to the DTA can only be in variation of the terms and conditions of permission by Government of India, Ministry of Commerce and Industry. The Petitioner was aware from the very beginning that the duty concessions/exemptions are available for supply of power to SEZ or EOU or other exporting zones only, and not to the DTA. The Petitioner quoted the bids and was selected for supply of power to Gujarat and Haryana in the year 2007 and 2008 respectively. In other words, the Petitioner while quoting the bid to supply power from the power plant located in SEZ to

the DTA was aware that there is provision under Section 26 (2) of the SEZ Act empowering the Central Government to prescribe the manner and terms and conditions under which the exemption, concessions, drawbacks and other benefits would be granted to the Project Developer. Once, the Project Developer decides to supply power to the DTA, it was expected of him to factor the taxes and duties prevailing as on the cut-off date while quoting the bid. *The notification dated 27.2.2009 only gave effect to Section 26 (2) of the SEZ Act which was already prevailing in the statute book as on the bid deadline. The subsequent notifications, particularly, notification dated 6.4.2015 restored the applicability of the notification dated 27.2.2009. The notification dated 16.2.2016 further clarified the entitlement of power plant located in non-SEZ area. In our view, the notifications dated 27.2.2009, 21.3.2012, 5.4.2015 and 16.2.2016 which have been issued by Ministry of Commerce and Industry would not amount to Change in Law in terms of the PPAs as these notifications have been issued to give effect to the provisions of SEZ Act, 2005. However, the change in rates of custom duty, excise duty, withholding tax and service tax on taxable services which have been imposed pursuant to the Acts passed by the Parliament shall be covered under Change in Law. As regards the Green Energy Cess, it was imposed after the cut-off date and satisfied the requirements of Change in Law. Accordingly, the*

Petitioner shall therefore be entitled for reimbursement of custom duty, excise duty on import/procurement of any other goods and service tax on the spares and consumables payable by it from 1.4.2015 on account of the withdrawal of exemption to the power plants located in the SEZ by the Ministry of Commercial and Industry only to the extent of difference in the duty or tax as on the cut off date and as prevailing as on 1.4.2015 and thereafter."

The Central Commission while going into the details of the SEZ Act, SEZ Rules, MoC&I letters dated 7.6.2006 &19.12.2006 and the MoC&I notifications dated 27.2.2009, 21.3.2012, 5.4.2015 & 16.2.2016 held that the Appellant was aware that it has to supply power to the DTA and the approval for setting up power plant in SEZ was for the purpose of supplying power only to SEZs or EOUs either in the State of Gujarat or other States. The Central Commission has held that the meaning of word 'others' in the letter dated 19.12.2006 meant SEZs/EOUs only and hence the Appellant is eligible for concessions, drawbacks, exemptions during construction phase only and not during O&M phase of the power plant. The Central Commission further held that the Appellant while quoting the bid to supply power from the power plant located in SEZ to the DTA was aware that there is provision under Section 26 (2) of the SEZ Act empowering GoI to prescribe the manner and terms and conditions under which the exemption, concessions, drawbacks and other benefits would be granted to the Appellant. Once, the

Appellant decides to supply power to the DTA, it was expected of him to factor the taxes and duties prevailing as on the cut-off date while quoting the bid. The Central Commission has also held that under Section 26 of the SEZ Act, benefits of duty and tax exemption are available during the construction as well as operation period.

iv. Now let us consider the various provisions of the SEZ Act, letter dated 19.12.2006 and various notifications issued by MoC&I beginning from 2009. The relevant extract of the SEZ Act is reproduced below:

> *"2(f) "Co-Developer" means a person who, or a State Government which, has been granted by the Central Government a letter of approval under sub-section (12) of section 3;*
>
> *(g)"Developer" means a person who, or a State Government which, has been granted by the Central Government a letter of approval under sub-section (10) of section 3 and includes an Authority and a Co-Developer;*
>
> *…….*
>
> *26. (1) Subject to the provisions of sub-section (2), every Developer and the entrepreneur shall be entitled to the following exemptions, drawbacks and concessions, namely: -*
>
> *(a) exemption from any duty of customs, under the Customs Act, 1962 or the Custom Tariff Act, 1975 or any other law for the time being in force, on goods*

imported into, or service provided in, a Special Economic Zone or a Unit, to carry on the authorised operations by the Developer or entrepreneur;

……

(c) exemption from any duty of excise, under the Central Excise Act, 1944 or the Central Excise Tariff Act, 1985 or any other law for the time being in force, on goods brought from Domestic Tariff Area to a Special Economic Zone or Unit, to carry on the authorised operations by the Developer or entrepreneur;

……..

(e) exemption from service tax under Chapter-V of the Finance Act, 1994 on taxable services provided to a Developer or Unit to carry on the authorised operations in a Special Economic Zone;

……

(g) exemption from the levy of taxes on the sale or purchase of goods other than newspapers under the Central Sales Tax Act, 1956 if such goods are meant to carry on the authorised operations by the Developer or entrepreneur.

(2) The Central Government may prescribe the manner in which, and the terms and conditions subject to which, the exemptions, concessions, drawback or other benefits shall be granted to the Developer or entrepreneur under sub-section (1).

From the above it can be seen that the exemptions, drawbacks and concessions or other benefits under sub-section (1) of the Section 26 were available to the Developer or Entrepreneur in the manner and terms & conditions specified by GoI. The Appellant was approved as a Co-Developer by MoC&I. As per the definition of the Developer as reproduced above, the Developer includes Co- Developer and hence the said benefits were also available to the Co-Developer. Further, the letter dated 19.12.2006 of MoC&I mentions the Appellant as a Developer of power sector specific SEZ.

v. In view of the above it becomes important to go into the terms and conditions specified by GoI from time to time regarding availability of exemptions, drawbacks and concessions or other benefits to the Appellant. If we go in a chronological manner we observe that MoC&I notified SEZ Rules in February 2006. The Central Commission has quoted Rule 27 (3) while discussing guidelines dated 16.2.2016 notified by MoC&I. The Central Commission has held that the guidelines of 2016 are in consonance with the Rule 27 (3) of SEZ rules. This Rule is reproduced below for the convenience.

> *"27 (3) The import of duty free material for setting up educational institutions, hospitals, hotels, residential and/or business complex, leisure and entertainment facilities or any other facilities in the **non-processing area** of the Special Economic Zone shall be as*

approved by the Board and import of no duty free material shall be permitted for operation and maintenance of such facilities."

From the above it can be seen that the power plant to be set up in the non-processing area of the SEZ was eligible for import of duty free material for setting up purpose only and during O&M phase import of material without duty was not permitted.

vi. Now let us consider the letter dated 19.12.2006 of MoC&I vide which approval was granted to the Appellant for setting up of power plant in the SEZ. The relevant portion of the same is reproduced below:

"To set up a sector specific Special Economic Zone for power sector for supply of power to SEZs, EOUs in Gujarat and other SEZs, EOUs ***and others****."*

The Central Commission has interpreted the word 'others' having meaning SEZs and EOUs only by describing that the word 'others' is taking colour from SEZs and EOUs and should mean the same only. After perusal of the SEZ Act we find that the it envisages supply to SEZs/EOUs/ DTA/ outside India etc. If the word 'others' is interpreted to mean only SEZs/EOUs in Gujarat and other SEZs/EOUs in India then the whole purpose of the SEZ Act will be defeated. If the word 'others' meant only SEZs/EOUs in Gujarat and other SEZs/EOUs in India then there was no requirement to put

the word “others” in the approval. Accordingly, the word ‘others’ necessarily would mean something other than SEZs/EOUs which includes DTA.

vii. It is a fact and also observed by the Central Commission in the Impugned Order that the Office of the Development Commissioner, MoC&I on 14.6.2007, passed an order under Section 6 of the SEZ Act that the area identified by the Appellant for setting up a power plant was demarcated as **Processing Area.** This demarcation was done by MoC&I based on the application made by the Appellant. The relevant part of the said order is reproduced below:

> *“And whereas M/s Adani Power Pvt. Ltd. have applied for demarcation of entire notified area of 293-88-10 hectares as Processing Area as follows:*
>
> *……..*
>
> *Therefore, in exercise of the powers conferred under Section 6 of the Special Economic Zone Act, 2005, read with Rule 11 of the Special Economic Zone Rules, 2006 and Order No. F.1/1/2006-EPZ dated 12.4.2006 issued by Government of India in the Department of Commerce (EPZ Section), the Development Commissioner, KASEZ is pleased to demarcate the above said area as the Processing Area subject to the condition that the Developer shall fulfill the other requirements under SEZ Rule 11 with regard to fencing of the Processing Area. Etc.”*

viii. Now let us have a look at the Section 6 of the SEZ Act which is reproduced below:

> *"6. The areas falling within the Special Economic Zones may be demarcated by the Central Government or any authority specified by it as-*
> *(a)* ***the processing area for setting up Units for activities, being the manufacture of goods, or rendering services****; or*
> *(b) the area exclusively for trading or warehousing purposes; or*
> *(c)* ***the non-processing areas for activities other than those specified under clause (a) or clause (b).****"*

From the above it can be seen that the processing area was meant for setting up units for activities, being the manufacture of goods or for rendering services.

ix. From the above it is clear that the power plant to be set up by the Appellant was demarcated as Processing Area in the SEZ and hence Rule 27 (3) of the SEZ Rules which was existing as on cut-off date was not applicable to the Appellant. This means that the Appellant was eligible for exemptions, drawbacks, concessions or other benefits for installing and O & M of the power plant which is contrary to the findings of the Central Commission.

x. Now let us consider when MoC&I has demarcated the power plant of the Appellant as non-processing area in the SEZ.

MoC&I on 27.2.2009 issued Guidelines for Power Generation, Transmission and Distribution in SEZs. The preamble of these guidelines begin with *" The undersigned is directed to say that various issues relating to setting up of power units and power distribution facilities in SEZ have been under examination of this Department in consultation with Ministry of Power/ Department of Revenue and Ministry of Law. After due consideration of the comments/ views received form these Ministries, following guidelines are hereby laid down:"*These guidelines provides that a power plant to be set up by developer/ co-developer in an SEZ as part of infrastructure facility will be in the non processing area of SEZ and will be entitled to fiscal benefits only for its initial setting up and no fiscal benefit would be admissible for its operation and maintenance in terms of Rule 27(3) of the SEZ Rules. These guidelines also allowed power plant units to be set up in Processing Area. It means that MoC&I was in the process of formulating guidelines for the power plants to be set up in SEZs. However, these guidelines did not change the status of the power plant of the Appellant which continues to be in Processing Area of the SEZ. MoC&I issued revised guidelines on 21.3.2012 for Power Generation, Transmission and Distribution in SEZs. These guidelines provide that a power plant to be set up by developer/ co-developer in an SEZ as part of infrastructure facility in processing/non processing area of SEZ and the benefits will accrue according to the demarcation of power plant and supply of power. The status of power plant of the Appellant remains unchanged and continues to be in

Processing Area as there is no specific issue raised by the parties in this context.

MoC&I vide notification dated 6.4.2015 has withdrawn guidelines issued on 21.3.2012 w.e.f 1.4.2015 and has also informed that henceforth setting of power plants shall be allowed in non-processing area of SEZs. Further, it was also decided that the power plants which were situated in Processing Area of SEZs shall be demarcated as non-processing areas and no O&M benefits would be available to them. Thus, it was for the first time the power plant of the Appellant was demarcated in non-processing area of the SEZ. Accordingly, exemption of all duties available to the Appellant were withdrawn w.e.f 1.4.2015.

xi. Further, MoC&I on 16.2.2016 issued revised Guidelines for Power Generation, Transmission and Distribution in SEZs. These guidelines also withdrew exemption of service tax on power plants approved prior to 27.2.2009 in addition to the benefits withdrawn vide notification dated 6.4.2015.

xii. Gujarat Commission vide order dated 21.10.2011 on a petition filed by the Appellant making claim under Change in Law under Gujarat Bid -01 PPA has also observed regarding the benefits available to the Appellant under the SEZ. The relevant extract from the said order is reproduced below:

" 4.2 The respondent had initially issued LoI vide dated 8th December, 2006 at a levelised tariff of Rs. 3.2483

per kWh. Thereafter, during the negotiation with Government of Gujarat and the respondent, it was agreed by the petitioner to reduce the levelised tariff to Rs. 2.89 per Kwh considering all the benefits and tax exemptions and incentive available to SEZ units such as exemption of Custom Duty, exemption of Income-tax or MAT etc. which was confirmed vide letter dated 11.01.2007 by the petitioner…….

……..

8.4Shri K.P.Jangid, on behalf of the respondent, submitted that …….
The petitioner has initially quoted tariff in the bid at the rate of 3.2483 per kWh which he later on agreed to reduce to the levelised tariff of Rs.2.89 per kWh considering all the benefits and tax exemption and incentive available to SEZ unit such as exemptions on custom duty, exemption of Income-tax or MAT, etc. and accordingly the tariff was revised by the petitioner in its negotiated tariff vide its letter No.AEL/RN/GUVNL/284/2006-07 dt.11.1.2007.
……..”

From the above it can be seen that the Government of Gujarat and even Respondent No. 4 were aware of the fact that the Appellant was eligible for exemptions under the SEZ Act and on negotiations the Appellant passed on the benefits in the tariff and reduced the same from Rs. 3.2483/kWh to Rs. 2.89/kWh. The same has been acknowledged by the Gujarat Commission and allowed Change in Law to the

Appellant on account of withdrawal of Custom Duty by GoI for supply of power to DTA.

xiii. The allowance of Change in Law arises from the PPAs signed between the parties. Article 13 provides the provisions for Change in Law. Perusal of the PPAs reveal that a change in interpretation of any Law by an Indian Governmental Instrumentality which final authority under law for such interpretation would be considered as Change in Law. Except Gujarat Bid-01 PPA the definitions in other PPAs are same. Here the Government Instrumentality is MoC&I/ Department of Commerce, GoI and the Appellant is affected by the notifications issued by it from time to time.

xiv. This Tribunal in the judgements in case of Sasan Power Limited Vs. CERC & Ors., (Appeal No. 161 of 2015, Judgment dated 19.04.2017) and in Nabha Power Limited Vs. Punjab State Power Corporation Limited (Appeal No. 207 of 2012, Judgment dated 23.04.2014) has held that the notifications issued by Indian Government Instrumentality under a statute shall qualify as a Change in Law event affecting the revenues of the developer.

xv. As discussed above in the foregoing paragraphs we are of the considered opinion that the notifications issued by MoC&I from 2009 to 2016 qualify as Change in Law event and the Appellant is required to be compensated for the same considering that all exemptions were available to it as on cut-off date for the respective PPAs.

xvi. Accordingly, this issue is decided in favour of the Appellant.

c) Let us now take all the questions of law together raised by the Appellant on Issue No. 2 (Impact of Change in Law Events under Gujarat Bid-01 PPA) i.e. Question No. 7. b). The same is reproduced below:

> Whether the Central Commission has erred in not allowing levy of taxes on spares and consumables as Change in Law events under the Gujarat Bid-01 PPA while the same have been allowed under the other 3 PPAs (Gujarat Bid-02 PPA and the Haryana PPA) and has therefore failed to appreciate that:-
>
> (i) Article 13.1.1 of the Gujarat Bid-1 PPA has to be interpreted in view of mechanism for tariff adjustment for Change in Law provided under Article 13.2.1 and Article 13.2.2 of the PPA?
>
> (ii) In terms of Article 1.2.14 of the Gujarat Bid-01 PPA different parts of the PPA are to be taken as mutually explanatory and supplementary to each other and any inconsistency between or among the parts of the PPA has to be interpreted in a harmonious manner so as to give effect to each part?
>
> (iii) In terms the observations of the Hon'ble Supreme Court, it ought to have exercised its regulatory powers under Section 79(1)(b) of the Electricity Act, 2003 to vary the tariff discovered/adopted under Section 63 and therefore grant relief to the Appellant?, we observe as below:

i. Let us first consider the findings of the Central Commission in the Impugned Order on this issue. The relevant part of the same is reproduced below:

> *"52. GUVNL has submitted that for the Bid-1 PPA dated 6.2.2007, the impact of Change in Law is restricted to Change in Law to cover taxes/ surcharge/ cess/ levy or similar charges on (1) water (2) primary fuel used by the generating plant (3) on generation of electricity leviable on the final output in the form of energy and (4) sale of electricity. GUVNL has submitted that Change in Law shall not be applicable in any other transaction.*
>
> *53. In view of the specific provisions in Bid 1 PPA with GUVNL dated 6.2.2007, the Petitioner shall not be entitled to reimbursement of impact of levy of duties under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and Central Excise Tariff Act, 1985 on impact/procurement of goods and service tax on the taxable services for supply of power to GUVNL under the said PPA."*

In view of the specific provisions in Gujarat Bid-01 PPA related to applicability of Change in Law, the Central Commission has not allowed the reimbursement of impact of levy of duties under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and Central Excise Tariff Act, 1985 on impact/procurement of goods and service tax on the

taxable services for supply of power to the Respondent No. 4.

ii. Now let us consider the provisions of Gujarat-01 PPA with respect to Change in Law. The relevant extract is reproduced below:

> *"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:*
> *(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any stature, decree, ordinance or other law, regulation, notice, circular, code, rule, or direction by any Governmental Instrumentality or a change in its interpretation by a Competent Court of law, tribunal, government or statutory authority or any of the above regulations, taxes, duties, charges, levies, etc., or*
> *(ii) the imposition of any Governmental Instrumentality, which includes the Government of the State, where the project is located, of any material condition in connection with the issuance, renewal, modification, revocation or non-renewal (other than for cause) of any Consent after the date of this Agreement.*
> *that in either of the above cases*
> *(a) results in any change with respect to any tax or surcharge or cess levied or similar charges by the Competent Government on water, primary fuel used by the generating plant, the generation of electricity*

(leviable on the final output in the form of energy), sale of electricity and,

(b) relating to consents/ compliance pertaining to environment result in any change in costs or revenue;

…….

13.2 Tariff Adjustment Payment for Change in Law

13.2.1 The Seller shall have to move the Appropriate Commission to ascertain the impact of any Change in Law on the Seller's revenues and costs. The Seller shall be responsible for submission and resolution of petition for such tariff Adjustment for Change in Law. If the Seller's fails to move the Appropriate Commission, the Procurer may, at it option, take up the matter with the Appropriate Commission,

13.2.2 If a Change in Law results in the Seller's costs directly attributable to the Project being decreased or increased by one percent [1.0%) of the estimated revenue from the Electricity for the Contract Year (considering the tariff quoted in that Contract Year and the energy corresponding to 80% of the Contracted capacity and for the purpose of above calculations the quoted tariff will be as quoted by the Seller) for which such adjustment becomes applicable or more, during Operating Period, the Tariff Payment to the Seller shall be proportionately increased or decreased."

From the above it can be seen that Change in Law provisions are applicable only in case if it results in any change with respect to any tax or surcharge or cess levied or similar charges by the Competent Government on water, primary fuel used by the generating plant, the generation of electricity (leviable on the final output in the form of energy) or sale of electricity.

iii. Only Gujarat Bid-01 PPA has the specific provisions as re-produced above. Such provision is not available in the Gujarat Bid-02 PPA and Haryana PPAs.

iv. The Appellant has relied on the Article 1.2.14 of the Gujarat Bid-01 PPA for its claim. The same is reproduced below:

> *"1.2.14 Different parts of this Agreement are to be taken as mutually explanatory and supplementary to each other and if there is any inconsistency between or among the parts of this Agreement, they shall be interpreted in a harmonious manner so as to give effect to each part."*

This provision provides for harmonious interpretation of various Articles of the PPA.

v. The Appellant has also relied on the competitive bidding guidelines issued by GoI which emphasises on adjustment of tariff due Change in Law. The Appellant has also contended that the Central Commission ought to have exercised its regulatory powers available for interpreting wider implications

of Change in Law events in terms of the judgement of Hon'ble Supreme Court and should not have limited it to strictly in terms of the Gujarat-01 Bid PPA. The Respondent No. 4 has submitted that Article 13.2 provides for relief for impact of Change in Law. The provisions of Article 13.2 cannot be used to expand the scope of Article 13.1 or to introduce Change in Law events not covered under Article 13.1.

vi. We have gone through the various provisions of the Gujarat-01 Bid PPA, competitive bidding guidelines, judgements of the Hon'ble Supreme Court and submissions made by Respondent No. 4. We are of the considered opinion that once PPA has been entered into between the parties pursuant to the competitive bidding, the rights and obligations of the parties are to be seen in terms of the agreed PPA. Accordingly, the reliance of the Appellant on various judgements of Hon'ble Supreme Court is misplaced. We also tend to agree with the submissions made by the Respondent No. 4 that Article 13.2 cannot be used to expand the scope of Article 13.1 which was consciously agreed by the Appellant.

vii. We are of the considered opinion that the Appellant has failed to make out any case. Therefore, we hold that instant issue is decided against the Appellant.

d) Let us now take all the questions of law together raised by the Appellant on Issue No. 3 (Disallowance of Carrying Cost) i.e. Question No. 7. c). The same is reproduced below:

Whether the Central Commission has erred in not allowing the Carrying Cost and therefore:-

(i) Defeated the very purpose of RESTITUTIVE RELIEF provided under Article 13.2 in the PPAs of restoring the affected party to the same economic position as if the Change in Law Event had not occurred?

(ii) Acted contrary to the settled position of law?, we observe as below:

i. Let us first consider the findings of the Central Commission on this issue in the Impugned Order. The relevant extract is reproduced below:

" (vi) Carrying Cost

55. The Petitioner has sought a direction to the respondents to pay late payment surcharge as applicable under the PPAs for the period of delay from the date of notification of Change in Law. The respondents have submitted that since there is no provision for late payment surcharge in Article 13 relating to change in law, the same cannot be granted to the Petitioner de hors the PPA.

56. The Commission has in the order dated 6.2.2017 in Petition No. 156/MP/2015 has decided that -in the absence of provisions in the PPAs regarding carrying

cost, the prayer of the petitioner to grant carrying cost on the principle of restitution from the date of occurrence of the Change in Law events till the date of raising of the
claims or invoices cannot be allowed.
57. The prayer of the Petitioner for carrying cost in the present petition is disposed of accordingly."

The Central Commission by relying on its Order dated 6.2.2017 in Petition No. 156/MP/2015 (actually the Petition No. is 156/MP/2014) has decided that carrying cost on the principle of restitution from the date of occurrence of Change in Law till the date of billing cannot be allowed to the Appellant as there is no such provision in the PPAs.

ii. The Respondent No. 4 has also produced the order of the Central Commission dated 16.2.2017 in Review Petition No. 1/RP/2016 in Petition No. 402/MP/2015 wherein in similar circumstances the Carrying Cost was denied to Sasan Power Ltd (SPL).

iii. The Appellant has contended that as per Article 13 of the PPAs the Appellant is to be restored to the same economic position as if Change in law had not occurred and it also includes compensation in terms of carrying costs incurred with respect to the Change in Law events. The relevant extract from one of the PPAs is reproduced below:

> ***" 13.2 Application and Principles for computing impact of Change in Law***
>
> *While determining the consequence of Change in Law under Article 13, the Parties shall have due regard to the principle that the purpose of compensation 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."*

From the above it can be seen that while determining the consequence of Change in Law, the affected party is to be restored to the same economic position as if such change in law has not occurred.

iv. The Appellant has submitted that interest/ carrying cost have been cornerstone of all the Acts in the Electricity Sector including the Act as well as Tariff Policy, 2016 which is a statutory document in terms of Hon'ble Supreme Court's judgement in case of Energy Watchdog vs. CERC (2017) 4 SCC 580. Comparing the sale of electricity as sale of goods the Appellant has further contended that the provision of Sale of Goods Act, 1930 is also applicable.

v. The Appellant has also relied on the judgement of Hon'ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India &Ors. (2011) 8 SCC 161 on principle of restitution and time value of money. After perusal

of the said judgement we find that the Hon'ble Court has held importance of time value of money and with restitution so long the derivation of other party is not fully compensated for, injustice to that extent remains. The Hon'ble Court has held that to do complete justice the convenient approach is to calculate interest.

vi. The Appellant has contended that the Central Commission while disallowing carrying cost has erred in relying on NTPC Case and distinguishing it with the SECL case. Now let us consider the same. The relevant extract from the order of the Central Commission in petition no. 156/MP/2014 is reproduced below:

> *"101. We have considered the submissions of the petitioner and the respondents. The petitioner is claiming carrying cost on the ground that the petitioner is incurring cost due to change in law events from the date such events came into force resulting in cash outflow for the petitioner from such dates. ……*
>
> *102. Article 13.2 of the PPAs provides as under:*
>
> *"13.2 ……."*
>
> *Article 13.4 which deals with tariff adjustment payment on account of change in law is extracted as under:*
>
> *" 13.4 Tariff Adjustment Payment on account of Change in law 13.4.1 <u>Subject to Article 13.2, the adjustment in Monthly Tariff Payment shall be effective from: (i) the date of adoption,</u>*

promulgation, amendment, re-enactment or repeal of the law or change in law; or (ii) the date of order/judgement 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.

13.4.2 The payment 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."

The above provisions do not provide for payment of carrying cost from the date the additional cost was incurred on account of change in law till the date of determination of the change in law events by the Commission. After determination of change in law events, the petitioner shall be required to claim payment on account of the change in law through the supplementary bill raised in accordance with Article 11.8 of the PPA.

Article 11.8 of the PPA provides that either party may raise a supplementary bill for payment on account of Change in Law and the bills shall be paid by the other party.

Article 11.8.3 provides that "in the event of delay in payment of a supplementary bill by either party beyond one month from the date of billing, a late payment surcharge shall be payable at same terms applicable to the Monthly Bill in Article 11.3.4."

From the above provisions, it emerges that late payment surcharge is payable only if the payment of supplementary bill by either party beyond one month from the date of billing is delayed. There is no provision in the PPAs to grant carrying cost from the date of incurring the expenditure under Change in Law.

103. The petitioner has relied upon the judgment of the Hon"ble Supreme Court in South Eastern Coalfields Limited Vs. State of Madhya Pradesh {(2003) 8 SCC 648} and has submitted that there is a specific provision in the PPAs for determination of compensation so as to restore the affected party to the same economic position and therefore, in the light of the judgment, the petitioner is entitled to carrying cost. The relevant excerpts of the said judgement are extracted as under:

> *"21. Interest is also payable in equity in certain circumstances. The rule in equity is that interest is payable even in the absence of any agreement or custom to that effect though subject, of course, to a contrary agreement (See Chitty on Contracts, 1999 Edn., Vol. II, Para 38-248 at p.712). Interest in equity has been held to be payable on the market rate even though the deed*

contains no mention of interest. Applicability of the rule to award interest in equity is attracted on the existence of a state of circumstances being established which justify the exercise of such equitable jurisdiction and such circumstances can be many. ……..

24. We are therefore of the opinion that in the absence of there being a prohibition either in law or in the contract entered into between the two parties, there is no reason as to why the Coalfields should not be compensated by payment of interest."

The respondents have submitted that the above decision has been distinguished by the Hon'ble Supreme Court in National Thermal Power Limited Vs. Madhya Pradesh State Electricity Board Limited {(2011) 15 SCC 580} wherein it has been held that no liability was payable by NTPC to the Electricity Boards after determination of the final tariff which was in excess of the provisional tariff charged by NTPC. The relevant excerpts of the judgement are extracted as under:

"24. The counsel for the Electricity Boards laid stress on the judgment of this Court in South Eastern Coalfields Ltd. Vs. State of M.P. and others reported in [2003(8) SCC 648] wherein this Court had held that a party finally found to be entitled to a relief in terms of money, would be entitled to be compensated by the award of

interest which would also be payable in equity. In this matter, the appellants were operating coal mines in the State of Madhya Pradesh. The Central Government enhanced the royalty payable on coal, and the State Government was entitled to recover the same from the appellant who would pass on the burden to their purchasers. The appellant, however, challenged the hike in royalty in the High Court of M.P. initially an interim order was passed and subsequently the notification was quashed. On appeal, the order of the High Court was set-aside. Subsequently, the State Government claimed interest from the appellant at the rate of 24% per annum in regard to the period when the enhanced royalty was delayed. The appellant passed on this claim to their consumers who challenged the same and succeeded in the High Court in reducing the interest from 24% to 12%. While dismissing the appeal filed by the appellant, this Court held that the interest would be payable even in equity and on the basis of the principle of restitution which is recognized in Section 144 of the Code of Civil Procedure.

25. In this connection, it is material to note that the claim in South Eastern Coalfields was essentially covered under Section 61 of the Sale of Goods Act, 1930, and the interest by way of damages was payable as per this statutory

provision itself. The liability had been crystallized and the interest had become payable because of the failure to pay the amount as per the liability. Besides, there was nothing in the agreement between the parties to the contrary on the issue of grant of interest. In the present matter, we have the second proviso to Regulation 79 (2) of 1999(supra) which permitted the generating company to continue to change the existing tariff for such period as may be specified in the notification by the Commission, and the notifications permitted continuation of the existing tariff as on 31.3.2011, unit the final tariff was determined. There was no provision for payment of interest therein. The very fact the interest came to be provided subsequently by a notification under the Regulations of 2004 is also indicative of a contrary situation in the present matter, viz that interest was not payable earlier."

Hon"ble Supreme Court has noted that in South Eastern Coalfield case, the claim was essentially covered under the Sale of Goods Act, 1930 and interest by way of damages was payable as per the statutory provisions itself. The Hon"ble Supreme Court has further noted that in South Eastern Coalfield case, the liability was crystallised after the enhancement of royalty by the State Government and interest became payable because of failure to pay the amount as per the liability. The facts of present case are

distinguishable from SECL case. In terms of the PPAs between the petitioner and

Haryana Utilities, there is no provision in the PPAs for payment of carrying cost for the period from the date the Change in Law events came into force till the date of approval of the Change in Law events by the Commission. Moreover, the liability for payment of compensation for Change in Law events gets crystallised after approval by the Commission and becomes payable. If there is delay in payment of the compensation on account of change in law by the respondents after determination by the Commission, then the interest is payable in terms of Article 11.8.3 of the PPAs. In our view, the judgement of the Hon'ble Supreme Court in the case South Eastern Coalfield is not applicable in the case of the petitioner.

104. The petitioner has relied upon the judgement of the Appellate Tribunal for Electricity dated 20.12.2012 in Appeal No. 150 of 2012 and other related appeals (SLS

Power Limited Vs. Andhra Pradesh Electricity Regulatory Commission). In the said case, the Appellate Tribunal held as under:

> *"The principle of carrying cost has been well established in the various judgments of the Tribunal. The carrying cost is the compensation for time value of money or the monies denied at the appropriate time and paid after a lapse of*

time. Therefore, the developers are entitled to interest on the differential amount due to them as a consequence of re-determination of tariff by the State Commission on the principles laid down in this judgment. We do not accept the contention of the licensees that they should not be penalized with interest. The carrying cost is not a penal charge if the interest rate is fixed according to commercial principles. It is only a compensation for the money denied at the appropriate time."

In the above case, the tariff was determined by the APERC which was subsequently directed by the Appellate Tribunal to be re-determined and in that context, the Appellate Tribunal directed that the developers are entitled to interest on the differential amount due to them as a consequence of re-determination of tariff by the State Commission on the principle laid down in the said judgment. The facts of the present case are different from the facts of the case in SLS Power Ltd., as there is no re-determination of tariff in the present case. The petitioner has also relied on the judgment of the Appellate Tribunal in Appeal No. 265, 266 and 267 of 2006 (North Delhi Power Ltd. Vs DERC). In that case, the Appellate Tribunal noted that "MYT Regulations provide for a carrying cost and, therefore, the contention of the State Commission that MYT Regulations do not provide for carrying cost is not tenable." In the present case, there is neither any

regulation nor there is any provision in the PPAs for granting carrying cost on the change of law events from the date of their actual occurrence till the date of raising the claims or invoices on the basis of the change in law events as approved by the Commission. The petitioner has further relied on the judgment of the Appellate Tribunal in Tata Power Co. Ltd. Vs. Maharashtra State Electricity Regulatory Commission. In the said judgement, the Appellate Tribunal has laid down certain principles for entitlement to carrying cost such as (a) where the expenditure is accepted but recovery is deferred e.g. interest on regulatory assets; (b) claim not approved within a reasonable time; and (c) disallowed by the State Commission but subsequently allowed by the Superior authority. The case of the petitioner is covered under none of the principles as noted above.

105. In view of the above discussion, the Commission is of the view that in the absence of provisions in the PPAs regarding carrying cost, the prayer of the petitioner to grant carrying cost on the principle of restitution from the date of occurrence of the Change in Law events till the date of raising of the claims or invoices cannot be allowed."

From the above it can be seen that the Central Commission has held that there is provision of payment of late payment surcharge if the payment is not made by the Respondents 2

to 4 beyond 30 days of raising of bills. There is no provision for payment of carrying cost from the effective date of Change in Law event till the Change in Law is approved by the Central Commission. Further the Central Commission has held that in case of SECL the liability was crystallised after the enhancement of royalty by the State Government and interest became payable because of failure to pay the amount as per the liability. And hence the facts of present case are distinguishable from SECL case.In NTPC case as there was no provision in regulations or the PPA hence interest is not applicable to NTPC due to revision in tariff. Regarding judgement in SLS case the Central Commission has distinguished it from the present case as there is no re-determination of tariff in present case and there was re-determination of tariff in SLS case. Hence interest is not payable in present case.

vii. After going through the SLS case we find that this Tribunal has held that the principle of carrying cost has been well established in the various judgments of this Tribunal and the carrying cost is the compensation for time value of money or the monies denied at the appropriate time and paid after a lapse of time and accordingly, the developers are entitled to interest on the differential amount due to them as a consequence of re-determination of tariff by the State Commission on the principles laid down in the said judgment.

viii. After perusal of the NTPC case we find that the interest was not payable as there was no enabling provision either

through Regulations or in terms of the PPA. In the SECL case the Hon'ble Supreme Court has also gone into the principle of Restitution and has held that in Law, the term 'restitution' is used in three senses (i) Return or restoration of some specific thing to its rightful owner or status (ii) compensation for benefits derived from wrong done to another (iii) compensation or reparation for loss caused to another. Further, after perusal of the SECL case we find that the matter was related to payment of interest for the period after the expiry of date fixed by the State Government for payment of royalty till the actual payment. Here the case is regarding payment of interest from the effective date of Change in Law till the approval of Change in Law by the Central Commission and not from the date of payment of raising of bill till the actual payment of bill after the expiry of the payment date. In our view both the cases viz SECL case and NTPC case are not applicable to the present case in view of their facts and circumstances.

ix. In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and

this time lag may be substantial. As pointed out by the Central Commission that the Appellant is only eligible for surcharge if the payment is not made in time by the Respondent Nos. 2 to 4 after raising of the supplementary bill arising out of approved Change in Law event and in PPA there is no compensation mechanism for payment of interest or carrying cost for the period from when Change in Law becomes operational till the date of its approval by the Central Commission. We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of re-determination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondent Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA. The relevant extract is reproduced below:

> *"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 from*
>
> *(a) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or*
>
> *(b) the date of order/ judgement of the Competent Court or tribunal or Indian Government instrumentality, it the Change in Law is on account of a change in interpretation of Law.*

(c) the date of impact resulting from the occurrence of Article 13.1.1.

From the above it can be seen that the impact of Change in Law is to be done in the form of adjustment to the tariff.

To our mind such adjustment in the tariff is nothing less then re-determination of the existing tariff.

x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of 'restitution' i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon'ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA.

xi. Accordingly, this issue is decided in favour of the Appellant in respect of above mentioned PPAs other than Gujarat Bid – 01 PPA.

e) Let us now take all the questions of law together raised by the Appellant on Issue No. 4 (Disallowance of actual SHR) i.e. Question No. 7. d). The same is reproduced below:

Whether the Central Commission erred in considering that:

(i) SHR of 2150 kcal/kWh and 2206 kcal/ kWh for GUVNL and Haryana PPAs respectively on the basis of earlier order dated 07.01.2013 issued by Gujarat Electricity Regulatory Commission while ignoring the change in circumstances which resulting into increased SHR?

(ii) that the SHR allowed by the Central Commission is contrary to the allowable margin for operating the plant under different conditions as per the CERC (Terms and Conditions of Tariff) Regulations, 2009?

i. Let us consider the Impugned findings of the Central Commission on this issue. The relevant extract from the Impugned Order is reproduced below:

"Operating parameters for calculation of relief under Change in Law

54. GUVNL vide its affidavit dated 13.5.2016 has submitted that the Petitioner is bound by the norms and parameters submitted by the Petitioner and adopted for the purpose of granting relief in terms of the Change in Law by the GERC in its orders dated 21.10.2011 and 7.1.2013 in Petition Nos. 1080 of 2011 and 1210 of 2012

respectively. Per contra, the Petitioner has submitted that Station Heat Rate and Auxiliary Consumption be considered as per the CERC norms. We have considered the submissions of the Petitioner and GUVNL. We have gone through the said order and noticed that the Petitioner had claimed Clean Energy Cess by considering Gross Station Heat Rate of 2150.28 kCal/kg and net Gross Station Heat Rate of 2324.62 kCal/kWh after accounting for the Auxiliary Power Consumption of 7.5%. GERC after considering the submission of GUVNL has allowed the Clean Energy Cess @`0.0221/kWh on the basis of the Station Heat Rate of 2150.27 kCal/kWh and auxiliary consumption of 6.5%. This order has not been challenged and the Petitioner has been claiming the relief for Change in Law on account of Clean Energy Cess on the basis of the said order. The Commission considers it appropriate to take the Gross Station Heat Rate of 2150.27 kCal/kWh for the purpose of calculating the relief in case of Gujarat PPA as well for the imported coal component under Haryana PPA. However, for the domestic coal component, Gross Station Heat Rate of 2230 kCal/kWh has been considered as per the bid assumption submitted by the Petitioner in its affidavits dated 1.2.2013 and 4.8.2016. In case of Haryana PPAs, SHR has been taken as 2206 kCal/kWh considering the blending of domestic and imported coal in the ratio of 70:30. In view of the above, in case of Gujarat PPA, the petitioner is entitled

to take the GSHR of 2150 kCal/kWh and in case of Haryana PPAs, GSHR of 2206 kCal/kWh is allowed for the purpose of calculating the relief."

The Central Commission has decided the issue of SHR based on the submissions made by the Appellant regarding design values of SHR before the Gujarat Commission and orders issued by the Gujarat Commission in this regard. The Central Commission has also observed that the Appellant has not challenged the said Orders and have been claiming reliefs for Change in Law based on the said orders of the Gujarat Commission.

ii. The learned counsel appearing for the Appellant has argued before this Tribunal that actual SHR based on the site conditions should have been considered by the Central Commission for arriving at correct SHR for the purpose of the compensation arising out of Change in Law events under the PPAs. In this regard the Appellant has relied on the Tariff Regulations, 2009 of the Central Commission wherein a margin of 6.5% is provided over the design SHR and also additional compensation allowed by the Central Commission in operating parameters vide 4th amendment to Indian Electricity Grid Code (IEGC) in view of part load scheduling/ technical minimum scheduling. The Appellant has submitted that 4th amendment to IEGC is also applicable to it. On the issue of waiver of its right for claiming correct SHR the Appellant has relied on the judgement of the Hon'ble Supreme Court in case of All India Power Engineer

Federation &Ors. Vs. Sasan Power Ltd. &Ors. reported as (2017) 1 SCC 487. The Appellant has also relied on Central Commission's order in case of GMR Kamalanga.

iii. We observe that the bid of the Appellant for supply of power to the Respondent Nos. 2 to 4 was based on Case-1 of the competitive bidding guidelines issued by GoI. In Case-1 bidding, the Appellant is required to quote only the tariff (and not SHR) and it is solely responsible for seeking/incorporating all the inputs in the bids for supply of power to the Respondent Nos. 2 to 4. In the present case the Appellant was not required to disclose the SHR based on which it has quoted the tariff. The issue of disclosing the SHR came for the first time before the Gujarat Commission while making claims under Change in Law Events by the Appellant. Based on the figures of SHR produced before the Gujarat Commission, the Gujarat Commission allowed to give effect to Change in Law claims based on the said SHR. The Appellant continued to claim the benefits under Change in Law based on the approved SHR by the State Commission. It is the Appellant who is only aware about the formulation of its bid including SHR for submission to the Respondent Nos. 2 to 4. The Appellant has also not challenged the said orders of the Gujarat Commission and these orders have achieved finality.

iv. In view of above the contention of the Appellant to consider margin over the design SHR as per the Central Commission's Tariff Regulations, 2009 or to consider actual

SHR whichever is lower does not arise. Further, the reliance of the Appellant on 4th amendment to IEGC is misplaced as it may already be taking the benefit of the same if the scheduling of its power station is in the range as envisaged in the amendment which is over and above the approved SHR by the Gujarat/Central Commission. The Respondent Nos. 2 to 4 have submitted that the decision of the Central Commission in case of GMR Kamlanga cannot be applied to the present case. The case of GMR Kamalanga was dealt by the Central Commission based on the submissions made by GMR regarding SHR. Further, the reliance on Committee Report in Petition No. 155/MP/2012 is not correct as the orders passed in the said petition has been set aside.

v. Further, the Appellant has submitted that the Gujarat Commission has allowed SHR for Phase III of the power station and whereas power is supplied to the Haryana Utilities from Phase IV of the power station and that to at the periphery of the Haryana State. We observe that the Phase III & Phase IV consist of all 660 MW units having similar type of design parameters. Further, the Appellant was supposed to take care of the losses in the system for supplying power at the Haryana periphery while placing its tariff bid.

vi. In view of our discussions as above the reliance placed by the Appellant on the judgement of the Hon'ble Supreme Court in case of All India Power Engineer Federation &Ors. Vs. Sasan Power Ltd. &Ors. reported as (2017) 1 SCC 487

is also not applicable to facts and circumstances of the case in hand.

vii. Accordingly, this issue is also decided against the Appellant.

ORDER

We are of the considered opinion that the issues raised in the present Appeal have merits as discussed in paragraph Nos. 12 b) & 12 d) above and accordingly the Appeal and the I.A. 05 of 2018 are hereby partly allowed.

The Impugned Order dated 4.5.2017 passed by the Central Commission is hereby set aside to the extent as indicated above and remanded to the Central Commission to pass consequential orders in terms of our observations at paragraph Nos. 12 b) and 12 d) above.

No order as to costs.

Pronounced in the Open Court on this **13th day of April, 2018.**

(Justice N. K. Patil)
Judicial Member

(I.J. Kapoor)
Technical Member

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REPORTABLE/NON-REPORTABLE

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