

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

**APPEAL NO. 131 OF 2019 &**  
**IA NO. 1551 OF 2018**

**Dated: 3<sup>rd</sup> October, 2019**

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson**  
**Hon'ble Mr. Ravindra Kumar Verma, Judicial Member**

**In the matter of:**

**DNH Power Distribution Company Ltd.**  
**(Previously Electricity Department,**  
**Union Territory of Dadra and Nagar Haveli)**  
**VidyutBhavan, Opp. Secretariat,**  
**Silvassa-396230, Dadra & Nagar Haveli** **...Appellant(s)**

**Versus**

**1. Central Electricity Regulatory Commission,**  
**Through its Secretary**  
**3<sup>rd</sup> & 4<sup>th</sup> Floor, Chanderlok Building,**  
**36, Janpath, New Delhi- 110001** **...Respondent No.1**

**2. GMR Warora Energy Limited**  
**Through its Chairman and Manaing Director**  
**(formerly EMCO Energy Limited)**  
**701/704, 7<sup>th</sup> Floor, Naman Centre,**  
**A-Wing, Bandra-Kurla Complex, Bandra**  
**Mumbai-400051** **...Respondent No.2**

**Counsel for the Appellant(s) : Mr. Anand K. Ganesan**  
**Ms. Swapna Seshadri**  
**Mr. Amal Nair**

**Counsel for the Respondent(s) : Mr. Amit Kapur**  
**Mr. Vishrov Mukerjee**  
**Ms. Raveena Dhamija**

Mr. Yashawi Kant for R-2

**JUDGMENT**

**PER HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER**

**1. Prayer of the Appellant.**

- (a) Allow the appeal and set aside the order dated 14.03.2018 passed by the Central Commission to the extent challenged in the present appeal.
- (b) Pass such other Order(s) and this Hon'ble Tribunal may deem just and proper.

**2. Questions of Law:**

1. Whether a general order can be passed qua all beneficiaries/ procurers to pay GST Compensation Cess @ Rs. 400 per MT.
2. Whether introduction of GST Compensation Cess is a Change in Law in terms of Article 10 of the relevant PPA between the Appellant and the Respondent No. 2 ?

**3. Brief facts of the Case**

- 3.1 The présent Appeal has been filed by DNH Power Distribution Company Ltd. (hereinafter referred to as the "**Appellant**") under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the "**Act**") against the Order dated 14.03.2018 ("**Impugned Order**") passed by the 14.03.2018 (hereinafter referred to as the

“**Central Commission/CERC**”) in Original Petition. No. 13/MP/2017.

- 3.2 DNH Power Distribution Company Ltd., the Appellant is the successor in interest of the Electricity Department of Union Territory of Dadra and Nagar Haveli in regard to the distribution and retail supply activities for the Union Territory of Dadra and Nagar Haveli.
- 3.3 The Central Electricity Regulatory Commission is the Respondent No.1 exercising powers and discharging functions under the provisions of Section 79 of the Electricity Act, 2003.
- 3.4 GMR Warora Energy Limited is the Respondent No. 2, a generating company having established a 600 MW generating station in the State of Maharashtra comprising of two units of 300 MW each.
- 3.5 In March, 2012, the Appellant, intending to procure power through competitive bidding under Section 63 of the Act and the Competitive Bidding Guidelines initiated a competitive bidding process through issuance of a RFP document dated March, 2012 for procurement of power on Long Term Basis under Case-I bidding procedure for meeting its base load power requirement. The Bid Deadline date was 08.06.2012.
- 3.6 On 07.06.2012, Respondent No.2 submitted its bid. Respondent No.2 emerged as one of the successful bidders, for supplying Aggregated Contracted Capacity of 200 MW to the Appellant with a levelised tariff of Rs.4.618 per Unit. On 14.08.2012 the Appellant issued the Letter of Intent for procurement of 200MW of power.

3.7 The Chronological dates of events are as under -

<b>Cut-off date</b>	01.06.2012
<b>Bid Submission date</b>	07.06.2012
<b>PPA/ PSA executed on</b>	21.03.2013
<b>Start of supply of power</b>	01.04.2013

3.8 Pursuant to the said bidding process, on 26.09.2012 the Appellant filed Petition No. 87/2012 before the Joint Electricity Regulatory Commission (**Joint Commission**) for approval of the PPA and adoption of tariff. In the said proceedings, Respondent No.2 also filed an application and joined as a co-petitioner and the relief was sought jointly by the parties.

3.9 By order dated 19.02.2013, the Joint Commission approved the purchase of power by the Appellant pursuant to the competitive bidding process.

3.10 Pursuant to the above, the Appellant and the Respondent No.2 executed the PPA dated 21.03.2013 for procurement of electricity.

3.11 The PPA, in Article 10 only provided for specified taxes to be allowed as a Change in Law, namely, taxes applicable for supply of power. In this regard, Article 10 of the PPA reads as under:

“ ...

10. *ARTICLE 10: CHANGE IN LAW*

10.1 *Definitions*

*In this Article 10, the following terms shall have the following meanings:*

*10.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline resulting into any additional recurring/ non-recurring expenditure by the Seller or any income to the Seller:*

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
- a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;*
- **any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement***

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

*regulatory measures by the Appropriate Commission including calculation of Availability”*

3.12 With effect from 1<sup>st</sup> July 2017, the Parliament has brought into force the following Acts in order to introduce a unified indirect tax structure in the form of Goods and Services Tax (GST) which has replaced various Central and State level taxes:

- ii) Central Goods and Services Tax, Act, 2017
- iii) Integrated Goods and Services Tax Act, 2017
- iv) Union Territories Goods and Services Act, 2017
- v) Goods and Services Tax (Compensation to States) Act, 2017

The respective State Legislatures have enacted the States Goods and Services Act, 2017.

3.13 Therefore, certain taxes and duties that were paid by the generators for generation and supply of electricity have now been replaced by either Central GST or State GST. In addition, certain existing taxes have been abolished and certain new taxes have been introduced.

3.14 In terms of the above Acts, the following taxes have been merged either in Central GST or State GST:

- a. Central GST
  - (a) Central Excise Duty
  - (b) Additional Duties of Customs (commonly known as CVD)
  - (c) Special Additional Duty of Customs (SAD)

- (d) Service Tax
  - (e) Central Surcharges and Cesses so far as they relate to supply of goods and services
- b. State GST
- (a) State VAT
  - (b) Central Sales Tax
  - (c) State Surcharges and Cesses so far as they relate to supply of goods and services.

3.15 Certain taxes have been abolished through the Taxation Laws Amendment Act, 2017. The taxes which are relevant for the electricity sector are enumerated below:

- (a) Cess on coal introduced in terms of the Coal Mines (Conservation and Development) Act, 1974.
- (b) Education Cess on Excisable Goods introduced through the Finance (2) Act, 2004.
- (c) Secondary and Higher Education Cess on Excisable Goods introduced through the Finance Act, 2007.
- (d) Clean Energy Cess introduced through the Finance Act, 2010.
- (e) Swachh Bharat Cess introduced through the Finance Act, 2015.
- (f) Infrastructure Cess and Krishi Kalyan Cess introduced through the Finance Act, 2016.

3.16 Further, the Goods and Services (Compensation to States) Act, 2017 (hereinafter referred to as the Compensation Act) provides

for the mechanism for compensation to States for loss of their revenues.

3.17 As per the Taxation Laws Amendment Act, 2017, Clean Energy Cess which stood at Rs. 400 per tonne has also been abolished with effect from 1.7.2017. In accordance with the Goods and Services Tax (Compensation to States) Act, 2017, GST Compensation Cess @ Rs.400 per metric tonne on coal and lignite has been introduced to be leviable from 1.7.2017.

3.18 In the above background, the Central Commission in 2017 initiated a *suo moto* Petition being Petition No. 13/SM/2017 for settlement of the dues arising out of the aforementioned change in law events. The Central Commission sought to assess the impact of abolition of Clean Energy Cess, introduction of GST in place of host of indirect taxes and introduction of GST Compensation Cess effective from 01.07.2017.

3.19 During the proceedings, in order to ascertain the impact of GST and IGST, the Central Commission had called upon the generators and discoms/ beneficiaries to submit vide affidavit along with supporting documents, detailed submissions regarding the increase or reduction in taxes and duties on account of GST being introduced.

3.20 The Respondent No.2 herein had filed their submissions on the impact of GST, wherein some generators have submitted that there has been a reduction in taxes and duties on account of GST,



while others have contended that the taxes and duties have increased on account of the same.

- 3.21 The Respondent no.2 herein has in fact taken an inconsistent stand on the issue. The Respondent No. 2 vide affidavit dated 03.01.2018 submitted that overall impact of GST on cut-off date is reduction in taxes and duties by Rs.47 per tonne and subsequent reduction of Rs.2 per tonne thereafter. On 05.02.2018, the Respondent No.2 also revised the impact to reduction of taxes and duties by Rs.47.28 per tonne on 01.07.2017 and reduction in duties and taxes by Rs.143.72 per tonne subsequently.
- 3.22 Thereafter, the Respondent No.2 has also contended that the impact of change in law as increase in taxes and duties on 9.1.2018 by Rs.96.42 per tonne, Rs.41.53 per tonne and Rs.7.92 per tonne in respect of PPA with MSEDCL, DNH (Appellant herein) and TANGEDCO, respectively.
- 3.23 The Central Commission vide order dated 14.03.2018, has held the introduction of Goods and Services Tax Compensation Cess is a change in law event that is applicable on all PPAs even covered under section 63 and having composite scheme. The Central Commission has further directed beneficiaries/ procurers (including the Appellant herein) to pay the GST compensation cess @ Rs. 400/ MT to the generating companies w.e.f. 01.07.2017.

3.24 Further, in the impugned order, the Central Commission has also observed that calculations submitted by generators and beneficiaries showed varying impacts. While the Commission was of the view that introduction of GST and subsuming/ abolition of such taxes, duties and levies has resulted in some savings for the generators having generation based on domestic coal, the Commission has directed the parties to work out the details of the impact and given liberty to approach the Commission in case of any dispute regarding the amount of refund.

3.25 The Central Commission has passed a general direction qua all beneficiaries/ procurers to pay GST Compensation Cess @Rs. 400 per MT of coal. The order applies even to cases of Section 63 PPAs, including the PPA of the Appellant with the Respondent No.2.

3.26 Aggrieved by the Order dated 14.03.2018, the Appellant has presented the instant appeal.

#### **4. Submissions of the Appellant**

4.1 The learned counsel appearing the Appellant submitted that the challenge to the Impugned Order by the Appellant is only on the aspect of Rs. 400/- per MT to be paid as GST compensation cess.

4.2 Though the Appellant had filed an application seeking stay of the order for the payment of Rs. 400/- MT, the Appellant has not pressed the stay application and has paid the amounts, without

prejudice to its rights in the Appeal. The Appellant has pleaded that the stay application may be disposed of as not pressed, without prejudice to the rights in the main appeal.

- 4.3 In the impugned order, while allowing the GST compensation cess, the Central Commission has held that any benefit from GST to the generators should be passed on to the beneficiaries. However, GMR refused to pass on the benefit including that of Stowing Excise Duty, Central Sales Tax and Terminal Surcharge.
- 4.4 The Central Commission held that in case of dispute, the Respondents have liberty to approach the Central Commission for adjudication. In terms of the GMR filed Petition No. 39/MP/2019 before the Central Commission, which is pending. The matter has been heard and orders reserved.
- 4.5 In the impugned order, the Central Commission has noted the Terminal Surcharge also, as a contention of the procurers/distribution licensees.
- 4.6 The impugned order has not been challenged by GMR. There is no application filed by GMR in the present appeal, in any event, GMR cannot make any independent claims in the Appeal of the Appellant.
- 4.7 The claim of GMR in the present appeal for the Terminal Surcharge to be paid is misconceived. This is not an issue at all in the present appeal, the only issue being of GST compensation cess of Rs. 400/- MT, which is being paid by the Appellant.

- 4.8 On other issues, including Stowing Excise Duty, Central Sales Tax, Terminal Surcharge, GMR disputed the claims of the Appellant and has filed petition in Central Commission. There is no basis for the claims to be made in the present appeal of the Appellant.
- 4.9 The test is, even if the present appeal is to be dismissed, can GMR get any benefit on other issues apart from GST Compensation Cess, it is clearly no.
- 4.10 Further without prejudice to the above, it is submitted that in terms of the impugned order, the benefit of taxes, duties and other levies being subsumed or abolished on account of GST was expressly directed by the Central Commission to the generators, to pass on to the beneficiaries. Accordingly, GMR was also to pass on this benefit to the Appellant.
- 4.11 In this regard, the issue that had arisen was on account of GMR not being transparent about the benefit it had availed on account of imposition of GST, and also not passing the benefit in a fair and transparent manner.
- 4.12 While some of the benefits were passed on to the Appellant by GMR by way of deducting the same in its monthly bills, other benefits such as Stowing Excise Duty, Central Excise Duty, Coal Terminal Surcharge etc. were not passed on.
- 4.13 Since the benefits were not passed on, the Appellant disputed the non-passing of these benefits and only paid the undisputed portion

of the bills. The PPA also provides for a situation where there is a dispute with regard to monthly bills raised by the generator. The Appellant has paid GMR strictly in terms of the PPA.

- 4.14 The contention of GMR that since the terminal surcharge was not paid or claimed earlier, cannot be a change in law is misconceived. The change in law is with reference to the cost of GMR and not the tariff paid by the Appellant. If the cost of GMR has reduced because of the terminal surcharge being abolished by operation of law, the benefit to GMR is to be passed on to the Appellant. This substantive issue is to be decided by the Central Commission.
- 4.15 In any event, there is no basis for GMR seeking the adjudication of this substantive issue of change in law in the present appeal, which is not even of GMR, and particularly at an interim stage.
- 4.16 The above stated issue formed part of Petition No. 39/MP/2019 before the Central Commission which was the liberty availed by GMR in terms of the impugned order.
- 4.17 In this background, it is relevant to note that in the present Appeal before this Tribunal, the Appellant has since the beginning maintained that it would not be pressing the Interim Application for Stay, as the amounts had in any case been paid by the Appellant to GMR.
- 4.18 Further while GMR has not filed any Interim Application for any relief whatsoever, it has sought certain interim reliefs from this Tribunal which also form part of the reliefs sought in Petition No. 39/MP/2019 before the Central Commission.

4.19 GMR cannot seek adjudication of a substantive issue, in the appeal of the Appellant, even without an interim application of GMR, the matter not even been adjudicated by the Central Commission, GMR having preferred a separate petition before the Central Commission on this issue, and the present appeal being restricted only to the GST Compensation Cess of Rs. 400/-MT, which is being paid without prejudice to the rights of the Appellant.

## **5. Submissions for Respondent No.2.**

5.1 The learned counsel appearing or the Respondent No.2 submitted that DNH Power Distribution Co. Ltd. (“DNH”) has filed the present Appeal challenging Order dated 14.03.2018 passed by the Central Electricity Regulatory Commission in Petition No. 13/SM/2017 wherein the Central Commission held that introduction of Goods and Services Tax (“GST”) and levy of GST Compensation Cess qualifies as a Change in Law.

5.2 During hearing held on 27.08.2019, DNH had contended that withdrawal of Coal Terminal Surcharge/Railway Terminal Surcharge was subsumed within GST. In response, it was submitted on behalf of GMR Warora Energy Limited that GST did not subsume Coal Terminal Surcharge/Railway Terminal Surcharge. During the hearing, GWEL had submitted that the levies abolished by GST were specified in The Taxation Law (Amendment) Act, 2017 (“Taxation Amendment Act”).

5.3 That Section 18 read with the 3<sup>rd</sup> Schedule of the Taxation Amendment Act lays down the levies which were abolished which *inter-alia* includes Clean Energy Cess (levied under Chapter VII, Finance Act, 2010), Swachh Bharat Cess (levied under Chapter

VI, Finance Act, 2015) and Krishi Kalyan Cess (levied under Chapter VI and VII, Finance Act, 2016).The relevant portion of the Taxation Laws Amendment Act is reproduced hereunder:-

**“18. (1) The enactments specified in the third column of the Third Schedule are hereby repealed to the extent specified in the fourth column thereof.**

[...]

**THIRD SCHEDULE**

<i>Year</i>	<i>No.</i>	<i>Short Title of Enactments</i>	<i>Extent of Repeal</i>
[...]			
2010	14	The Finance Act, 2010	Chapter VII
2015	20	The Finance Act, 2015	Chapter VI
2016	28	The Finance Act, 2016	Chapter VI and VII

5.4 The 3<sup>rd</sup> Schedule does not include Railway Terminal Surcharge/Coal Terminal Surcharge. Further, GWEL had submitted that there is no positive finding in the Impugned Order which records that Coal Terminal Surcharge/Railway Terminal Surcharge was subsumed within GST.

5.5 GWEL had submitted that DNH is making unilateral deduction from the bills raised by GWEL on account of alleged benefit of Coal Terminal Surcharge/Railway Terminal Surcharge being subsumed in GST which had to be passed on by GWEL to DNH.

5.6 As regards deductions made by DNH towards Railway Terminal Surcharge (“RTS”)/Coal Terminal Surcharge (“CTS”), the following may be noted:-

- (a) As on the Cut-Off Date, i.e. 01.06.2012, RTS/CTS was not levied.
- (b) The said levy was imposed by the M/o Railways (through Railway Board) by way of Circular dated 22.08.2016.
- (c) On 10.07.2017, Coal Board withdrew imposition of Railway Terminal Surcharge by way of Circular dated 06.07.2017. A copy of Circular dated 06.07.2017 issued by the Railway Board withdrawing RTS/CTS is annexed hereto and marked as *Annexure R-3*.
- (d) In any event, *Coal Terminal Surcharge was disallowed as Change in Law by Ld. CERC as per Order dated 16.03.2018 in Petition No. 1/MP/2017 titled GMR Warora Energy Ltd. vs. MSEDCL & Ors.*
- (e) Accordingly, GWEL never billed DNH for the same.

5.7 However, despite the foregoing, DNH has already deducted Rs. 14.93 Crore till March 2019 and is continuing to deduct approximately Rs. 1 Crore per month (i.e Rs. 110 per ton) towards RTS/CTS on the basis that RTS / CTS has been subsumed in GST. I say that this is incorrect. RTS/CTS was never part of the tariff billed by GWEL and has not been subsumed/replaced by GST.

5.8 Post 01.07.2017 (and 15.01.2018 for BSS and DS), all benefits accruing to DNH have been duly passed on by GWEL in terms of:-

- (a) Supplementary Invoice dated 15.03.2018 for post GST Period, i.e. July 2017 to January 2018;



(b) Supplementary Invoice dated 13.08.2018 *qua* benefit regarding BSS and DS being subsumed under the base freight (for the period April 2013 to June 2018);

(c) Supplementary invoices raised by GWEL on a monthly basis.

5.9 Accordingly, no occasion arises for DNH to make deductions on this account.

**6. Findings and Analysis:-**

i) The Appellant have raised the following questions of law: \_

1. Whether a general order can be passed *qua* all beneficiaries/ procurers to pay GST Compensation Cess @ Rs. 400 per MT.
2. Whether introduction of GST Compensation Cess is a Change in Law in terms of Article 10 of the relevant PPA between the Appellant and the Respondent No. 2 ?

ii) The Parliament has enacted the following Acts in order to introduce a unified indirect tax structure in the form of Goods and Services Tax (GST) which has replaced various Central and State level taxes:

- (a) Central Goods and Services Tax, Act, 2017
- (b) Integrated Goods and Services Tax Act, 2017
- (c) Union Territories Goods and Services Act, 2017
- (d) Goods and Services Tax (Compensation to States) Act, 2017

The respective State Legislatures have enacted the States Goods and Services Act, 2017.

- iii) In terms of the above Acts, the following taxes have been merged either in Central GST or State GST:
  - (A) Central GST
    - (a) Central Excise Duty
    - (b) Additional Duties of Customs (commonly known as CVD)
    - (c) Special Additional Duty of Customs (SAD)
    - (d) Service Tax
    - (e) Central Surcharges and Cesses so far as they relate to supply of goods and services
  - (B) State GST
    - (a) State VAT
    - (b) Central Sales Tax
    - (c) State Surcharges and Cesses so far as they relate to supply of goods and services.
- iv) Certain taxes have been abolished through the Taxation Laws Amendment Act, 2017. The taxes which are relevant for the electricity sector are enumerated below:
  - (a) Cess on coal introduced in terms of the Coal Mines (Conservation and Development) Act, 1974.
  - (b) Education Cess on Excisable Goods introduced through the Finance (2) Act, 2004.
  - (c) Secondary and Higher Education Cess on Excisable Goods introduced through the Finance Act, 2007.
  - (d) Clean Energy Cess introduced through the Finance Act, 2010.

- (e) Swachh Bharat Cess introduced through the Finance Act, 2015.
  - (f) Infrastructure Cess and Krishi Kalyan Cess introduced through the Finance Act, 2016.
- v) The Goods and Services (Compensation to States) Act, 2017 provides for the mechanism for compensation to States for loss of their revenues. Section 8 of the Compensation Act provides for levying of cess on supplies of certain goods for the purpose of the said Act. Section 8 of the Compensation Act is extracted as under:

*“8. (1) There shall be levied a cess on such intra-State supplies of goods or services or both, as provided for in Section 9 of the Central Goods and Services Tax Act, and such inter-State supplies of goods or services or both as provided for in Section 5 of the Integrated Goods and Services Tax Act, and collected in such manner as may be prescribed, on the recommendations of the Council, for the purposes of providing compensation to the States for loss of revenue arising on account of implementation of the goods and services tax with effect from the date from which the provisions of the Central Goods and Services Tax Act is brought into force, for a period of five years or for such period as may be prescribed on the recommendations of the Council:*

*Provided that no such cess shall be leviable on supplies made by a taxable person who has decided to opt for composition levy under Section 10 of the Central Goods and Services Tax Act.*

*(2) The cess shall be levied on such supplies of goods and services as are specified in column (2) of the Schedule, on the basis of value, quantity or on such basis at such rate not exceeding the rate set forth in the corresponding entry in column (4) of the Schedule, as the Central Government may,*

on the recommendations of the Council, by notification in the Official Gazette, specify:

*Provided that where the cess is chargeable on any supply of goods or services or both with reference to their value, for each such supply the value shall be determined under Section 15 of the Central Goods and Services Tax Act for all intra-State and inter-State supplies of goods or services or both:*

*Provided further that the cess on goods imported into India shall be levied and collected in accordance with the provisions of Section 3 of the Customs Tariff Act, 1975, at the point when duties of customs are levied on the said goods under Section 12 of the Customs Act, 1962, on a value determined under the Customs Tariff Act, 1975.”*

As per Schedule (2) to the said Act, the compensation cess has been levied on the following in so far as the generation and supply of electricity is concerned:

S.No.	Description of supply of goods and services	Tariff item, heading, sub-heading, chapter, or supply of goods or services, as the case may be	The maximum rate at which goods and services tax compensation cess may be collected
(1)	(2)	(3)	(4)
	Coal, briquettes, ovoids and similar solid fuels manufactured from coal, lignite, whether or not agglomerated, excluding jet, peat (including peat litter), whether or not agglomerated	2701, 2702 or 2703	Four hundred rupees per tonne

- vi) As per the Taxation Laws Amendment Act, 2017, Clean Energy Cess which stood at Rs. 400 per tonne has been abolished with effect from 1.7.2017. In accordance with the Goods and Services Tax (Compensation to States) Act, 2017, GST Compensation

Cess @ Rs.400 per metric tonne on coal and lignite has been introduced to be leviable from 1.7.2017.

vii) Article 10 of the PPA reads as under:-

“ ...

## 10. ARTICLE 10: CHANGE IN LAW

### 10.2 Definitions

*In this Article 10, the following terms shall have the following meanings:*

*10.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline resulting into any additional recurring/ non-recurring expenditure by the Seller or any income to the Seller:*

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
- a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining*

*such Consents, Clearances and Permits; except due to any default of the Seller;*

- *any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission or (iii) any change on account of regulatory measures by the Appropriate Commission including calculation of Availability”*

viii) The Act regarding the Goods and Services Taxes (“GST”) have come into effect from 01.07.2017. With this the taxes and duties have been replaced by either Central GST or State GST. In addition certain existing taxes have been abolished and certain new taxes have been introduced. The Goods and Services (Compensation to State) Act, 2017 provides for the compensation to States for loss of their revenue. These changes in tax may result into additional recurring/non-recurring expenditure by the seller or any income to the seller and they have also been notified after the cut off date and are also applicable for supply of power by the seller. Therefore this is a “change in law”.

ix) The Goods and Services (Compensation to State) Act, 2017 provides for compensation to States for the loss of their revenue by levying of cess on supply of certain goods. As schedule 2 of the said Act the maximum rate at which goods and services tax compensation cess may be collected is Rs. 400 per MT.

- x) The Central Commission vide order dated 14.03.2018, has held the introduction of Goods and Services Tax Compensation Cess is a change in law event that is applicable on all PPAs even covered under section 63 and having composite scheme. The Central Commission has further directed beneficiaries/ procurers (including the Appellant herein) to pay the GST compensation cess @ Rs. 400/ MT to the generating companies w.e.f. 01.07.2017.
  
- xi) Further, in the impugned order, the Central Commission has also observed that calculations submitted by generators and beneficiaries showed varying impacts. While the Commission was of the view that introduction of GST and subsuming/ abolition of such taxes, duties and levies has resulted in some savings for the generators having generation based on domestic coal, the Commission has directed the parties to work out the details of the impact and given liberty to approach the Commission in case of any dispute regarding the amount of refund.
  
- xii) We are of the opinion that the order passed by the Central Commission is in order. The Appellant and the Respondent No.2 may work out the details and the impact and approach the Central Commission in case of any dispute regarding the amount of refund.
  
- xiii) The Respondent No.2 submitted that the Appellant have been deducting the Railway Terminal Surcharge/Coal Terminal Surcharge from the bill raised by the Respondent on the plea that the same has been subsumed in the central taxes and therefore the benefit has to be passed on to the Appellant. The Appellant has been making the payment of only the undisputed amount. The

Respondent No.2 further submitted that the benefits as a result of enactment of GST Act have been passed on to the Appellant and deduction being made by the Appellant in the bills raised by the Respondent No.2 are wrong. The Respondent No.2 submitted that these Railway Terminal Surcharge were raised by the Ministry of Railway and the Central Commission did not declare as a change in law and therefore the Respondent No.2 never raised the bill for these Railway Terminal Surcharge to the Appellant. Subsequently, the Ministry of Railway withdrew these Railway Terminal Surcharges on 10<sup>th</sup> of July, 2017. Therefore, the deduction by the Appellant on account of Railway Terminal Surcharges is wrong.

xiv) The Appellant submitted that these issues have already been raised by the Respondent No.2 in a separate petition filed before the Central Commission. The matter has been heard and the Central Commission has reserved the order. Further the Respondent No. 2 have not raised this issue of payment of Railway Terminal Surcharges neither in this instant appeal nor filed any interim application seeking any such kind of relief. Under these circumstances, the Respondent No.2 has no case to seek any kind of relief on a issue which is pending for adjudication before the Central Commission and the order is reserved by the Central Commission. The Appellant submitted that this Tribunal should therefore not consider the submission made by the Respondent No.2 regarding the Railway Terminal Surcharge.

xv) We have heard both the Appellant and Respondent No.2 on the issue of deduction of Railway Terminal Surcharges by the Appellant from the bills raised by the Respondent No.2. Since the



matter is pending before the Central Commission and the matter has been heard and the order has been kept reserved therefore we are not expressing any opinion on the subject at present.

**ORDER**

Having regard to the facts and circumstances of the case as stated above, Appeal filed by the Appellant is hereby dismissed as devoid of merits.

The Impugned Order dated 14.03.2018 passed by the first Respondent/the Central Commission is hereby upheld.

In view of the Appeal No.131 of 2019 being disposed of, the relief sought in IA No. 1551 of 2018 does not survive for consideration and, hence, stands disposed of.

No order as to costs.

Pronounced in the Open Court on this **3<sup>rd</sup> day of October, 2019.**

**(Ravindra Kumar Verma)**  
**Technical Member**

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**REPORTABLE/NON-REPORTABLE**

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**(Justice Manjula Chellur)**  
**Chairperson**