# IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
# NEW DELHI

**(APPELLATE JURISDICTION)**

## APPEAL NO. 172 OF 2017
## AND
## APPEAL NO. 154 OF 2018

**Dated: 27th April 2021**

**Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member**
**Hon'ble Mr. Justice R.K. Gauba, Judicial Member**

## APPEAL NO. 172 OF 2017

**In the matter of:**

**Coastal Gujarat Power limited**
Through its Authorised Representative
Having its office at:
C/o The Tata Power Company Limited,
34 Sant Tukaram Road, Carnac Sunder,
Mumbai- 400 009 …. Appellant

***Versus***

1. **Central Electricity Regulatory Commission**
   Through its Secretary
   Having its office at: 3rd & 4th Floor,
   Chanderlok Building,
   36 Janpath, New Delhi 110 001

2. **Gujarat Urja Vikas Nigam limited**
   Through its Managing Director
   Having its office at: Sardar Patel Vidyut Bhavan,
   Race Course,
   Vadodara-390 *007,* Gujarat

3. **Maharashtra State Electricity Distribution Company limited**
   Through its Managing Director
   Having its office at:. 4th Floor, Prakashgad,
   Plot No. G-9, Bandra (East),

Mumbai- 400 051, Maharashtra

**4. Ajmer Vidyut Vitran Nigam limited**
Through its Managing Director ·
Having its office at: Hathi Bhata,
Old Power House,
Ajmer, Rajasthan

**5. Jaipur Vidyut Vitran Nigam Limited**
Through its Managing Director
Having its office at: Vidyut Bhawan,
Janpath,
Jaipur, Rajasthan

**6. Jodhpur Vidyut Vitran Nigam limited**
Through its Managing Director
Having its office at: New Power House,
Industrial Area,
Jodhpur, Rajasthan

**7. Punjab State Power Corporation Limited**
Through its Managing Director
Having its office at: The Mall,
Patilia, Punjab- 147001

**8. Uttar Haryana Bijli Vitran Nigam Limited**
Through its Managing Director
Having it office at: Vidyut Sad an,
Plot No. C-16, Sector 6,
Panchkula - 134 112, Haryana

**9. Dakshin Haryana Bijli Vitran Nigam limited**
Through its Managing Director
Having its office at: Vidyut Nagar,
Vidyut Sadan,
Hissar, Haryana -125 005 … Respondents

Counsel for the Appellant (s): **Mr. Amit Kapur**
Mr. Apoorva Misra
Mr. Abhishek Munot
Mr. Kunal Kaul
Mr. Tushar Nagar
Mr. Malcolm Desai

Counsel for the Respondent (s): **Mr. M.G. Ramachandran, Sr. Adv.**
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal

Ms. Anushree Bardhan
Mr. Shubham Arya
Ms. Tanya Sareen
Mr. Arvind Kumar Dubey
for R-2, 4, 5, 6, 8 & 9

Mr. Udit Gupta
Mr. Anup Jain for R-3

Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Neha Garg for R-7

## APPEAL NO. 154 OF 2018

**In the matter of:**

**Coastal Gujarat Power limited**
Through its Authorised Representative
Having its office at:
C/o The Tata Power Company Limited,
34 Sant Tukaram Road, Carnac Sunder,
Mumbai- 400 009 …. Appellant

***Versus***

1. **Central Electricity Regulatory Commission**
Through its Secretary
Having its office at: 3rd & 4th Floor,
Chanderlok Building,
36 Janpath, New Delhi 110 001

2. **Gujarat Urja Vikas Nigam limited**
Through its Managing Director
Having its office at: Sardar Patel Vidyut Bhavan,
Race Course,
Vadodara-390 *007,* Gujarat

3. **Maharashtra State Electricity Distribution Company limited**
Through its Managing Director
Having its office at:. 4th Floor, Prakashgad,
Plot No. G-9, Bandra (East),
Mumbai- 400 051, Maharashtra

4. **Ajmer Vidyut Vitran Nigam limited**
Through its Managing Director ·
Having its office at: Hathi Bhata,

Old Power House,
Ajmer, Rajasthan

**5. Jaipur Vidyut Vitran Nigam Limited**
Through its Managing Director
Having its office at: Vidyut Bhawan,
Janpath,
Jaipur, Rajasthan

**6. Jodhpur Vidyut Vitran Nigam limited**
Through its Managing Director
Having its office at: New Power House,
Industrial Area,
Jodhpur, Rajasthan

**7. Punjab State Power Corporation Limited**
Through its Managing Director
Having its office at: The Mall,
Patilia, Punjab- 147001

**8. Uttar Haryana Bijli Vitran Nigam Limited**
Through its Managing Director
Having it office at: Vidyut Sad an,
Plot No. C-16, Sector 6,
Panchkula - 134 112, Haryana

**9. Dakshin Haryana Bijli Vitran Nigam limited**
Through its Managing Director
Having its office at: Vidyut Nagar,
Vidyut Sadan,
Hissar, Haryana -125 005 … Respondents

Counsel for the Appellant (s): **Mr. Amit Kapur**
Mr. Apoorva Misra
Mr. Abhishek Munot
Mr. Kunal Kaul
Mr. Tushar Nagar
Mr. Malcolm Desai

Counsel for the Respondent (s): **Mr. M.G. Ramachandran, Sr. Adv.**
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Ms. Anushree Bardhan
Mr. Shubham Arya
Ms. Tanya Sareen
Mr. Arvind Kumar Dubey
for R-2, 4, 5, 6, 7, 8 & 9

Mr. Udit Gupta
Mr. Anup Jain for R-3

# J U D G M E N T

**PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER**

1. The denial of the claim of a generator of electricity for compensation by increase in tariff (after commissioning of the power project) founded primarily on clause on *change in law* in the long-term power purchase agreement with the procurer(s) is assailed on the grounds that the view taken by the regulatory authority is unjust, against the letter and spirit of the contract, Competitive Bidding Guidelines (CBG) and declared Tariff Policy as also in the teeth of binding law declared by the Supreme Court in judgments reported as *Energy Watchdog* v. *CERC & Ors. (2017) 14 SCC 80* and *UHBVNL & Anr.* v. *Adani Power Limited (2019) 5 SCC 325*.

2. The appellant Coastal Gujarat Power Limited (hereinafter referred to variously as “the appellant” or “CGPL” or “the generator”) is a generating company engaged in the business of generation and sale of electricity from its 4150 MW (5 x 830 MW) Ultra Mega Power Plant (for short, “UMPP”) at Mundra, Gujarat (hereinafter “the Project”). It is a wholly owned subsidiary of the Tata Power Company Limited (“Tata Power”). It has been explained that in August, 2020 the Board of Directors of CGPL and Tata Power had

approved the merger of CGPL and Tata Power, the petition for approval of merger being pending adjudication before National Company Law Tribunal (NCLT). Pursuant to a competitive bidding process, CGPL had executed a Power Purchase Agreement dated 22.04.2007 (for short, “the PPA”), for a period of twenty-five (25) years with the procuring distribution licensees of the States of Gujarat, Maharashtra, Rajasthan, Punjab and Haryana (collectively “the Procurers”). The procurers are arrayed as Respondents in these Appeals.

3. It is not contested that the PPA provides for a mechanism for restitution to the parties for loss in revenue or additional costs on account of unforeseen events – *Force Majeure* under Article 12 and *Change in Law* (for short, "CIL”) in terms of Article 13.

4. It is also not in dispute that the five Units (i.e. unit nos. 1 to 5) of the appellant CGPL were successfully commissioned on 07.03.2012, 30.07.2012, 27.10.2012, 21.01.2013 and 22.03.2013 respectively. The claim of appellant which is subject matter of these appeals is for increase in tariff as a result of CIL events that occurred after 30.11.2006 (i.e. the Cut-Off Date), during the operation period i.e. FY 2011-12 to FY 2016-17.

5. The orders under challenge were passed by the respondent Central Electricity Regulatory Commission (hereinafter referred to variously

as “CERC” or “the Central Commission” or “the Commission”). By the said Orders, CERC disposed of Petitions (nos. 157/PM/2015 and 121/MP/2017) filed by CGPL seeking relief on account of certain CIL events that occurred during the Operating Period of its power plant (during the period FY 2012 – 2017), which was claimed to have impacted its cost and revenue of or from the business of generation and sale of electricity.

*THE APPEALS*

6. There are five orders of CERC which are assailed here, they being orders passed on 17.03.2017, 31.10.2017, 29.01.2018, 21.02.2018 and 03.09.2019, the first three in connection with the first above-said petition and the last two pertaining to the other above-said petition. The first said order (dated 17.03.2017) was the main order (on Petition No. 157/MP/2015), the second (dated 31.10.2017) on review petition (Review Petition No. 22/RP/2017) preferred by the appellant and the third (dated 29.01.2018) for clarifications (on I.A. No. 26/2017). The fourth order (dated 21.02.2018) was main order rendered on a subsequent Petition (no. 121/MP/2017) and the last (dated 03.09.2019) on application (I.A. No. 71/2018) moved in wake of former.

7. The orders under challenge in first captioned appeal (no. 172 of 2017) have resulted in disallowances for Financial Years (FYs) 2012 to 2015, which are summarised as under:

(a) Increase in *Service Tax and Secondary & Higher Education Cess on Service Tax* on *Works Contract* - disallowed since the increase is on account of exercise of option by CGPL;

(b) Refund of *Green Cess* (paid by CGPL) – since the Hon'ble Supreme Court is seized of the challenge to the constitutional validity of the *Gujarat Green Cess Act*, 2011 ("Green Cess Act") and the Gujarat Green Cess Rules, 2011 ("Green Cess Rules");

(c) CIL compensation on *coal-based levies* (Clean Energy Cess, Basic Customs Duty, Countervailing Duty etc) computed on the quantum of coal taking normative bid parameters and not on the basis of actual coal consumed;

(d) CIL compensation on increase in *Gujarat VAT to be paid on fuel oil* – allowed at lower of normative bid parameters and actual;

(e) *Corporate Social Responsibility* ("CSR") expenditure mandated by the Ministry of Environment and Forest ("*MoEF*");

(f) *Carrying Cost* on the CIL compensation payable - since PPA does not permit the same; and

(g) Failure to deal with claim regarding *Clean Energy Cess*.

8. Similarly, the orders under challenge in second captioned appeal (no. 154 of 2018) have resulted in disallowances for FYs 2015 to 2017, which are summarised as under:

(a) *Krishi Kalyan Cess and Swachh Bharat Cess* on 20 services availed by CGPL – rejected since these services are not directly linked to CGPL's business of generation and sale of electricity;

(b) Pass through of costs/ expenses related to *Corporate Social Responsibility* mandated by the Companies Act, 2013 ("Companies Act") read with the Companies (Corporate Social Responsibility) Rules, 2014 ["CSR Rules"] – since CSR does not impact CGPL's cost/ revenue & passing it onto consumers will defeat its purpose;

(c) CIL compensation related to *coal-based levies* computed on quantum of coal calculated on the basis of normative parameters instead of actual coal consumed;

(d) *Carrying Cost* on compensation for CIL - since PPA does not permit the same; and

(e) Compensation for any reduction in rate of Service Tax on transportation of goods by a vessel from a place outside India to the first custom station of landing in India ("*Service Tax on Transportation of Imported Goods*").

9. There is some overlap and, therefore, we propose to deal with the issues subject-wise but after the necessary narrative of the factual matrix.

*THE BACKGROUND*

10. It is pertinent to take note, *albeit* briefly, of the chronology of events forming the backdrop of the dispute.

11. The Electricity Act, 2003 contains provisions whereunder, broadly speaking, the tariff for sale or purchase of electricity is determined in two ways, one under section 62 (commonly referred to as "cost-plus" wherein the parties – generator and procurer – would reach a consensus on negotiation as to the terms, the tariff determination being an exercise undertaken by the Electricity Regulatory Commission in accordance with and following the tariff regulations framed in exercise of power conferred by the law) and two, the price discovered through the route of bidding in terms of

Section 63. The matter at hand relates to the latter category. The relevant provision (section 63) reads as under:

> *63. Determination of tariff by bidding process.– Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.*

12. On 19.01.2005, the Ministry of Power ("MoP"), Government of India, issued the *"Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees"*, in terms of Section 63 of the Electricity Act, 2003, hereinafter referred to as "*the Competitive Bidding Guidelines*". These Competitive Guidelines were amended on 28.02.2006 and again on 18.08.2006.

13. In November, 2005, the Government of India, issued the Ultra Mega Power Project ("UMPP") Policy for development of UMPPs of about 4000 MW capacity tariff based competitive route. On 10.02.2006, the appellant CGPL was incorporated under the Companies Act, 1956, as a wholly owned Special Purpose Vehicle ("SPV") by Power Finance Corporation ("PFC") with a total authorized and paid-up capital of Rs. 5,00,000. On 31.03.2006, PFC issued the Request for Qualification ("RFQ") for selecting a successful bidder to build, own, operate and maintain Mundra

UMPP based on imported coal for supply of contracted power to the Procurers for 25 years. The PFC issued the Request for Proposal ("RFP"), on 22.06.2006, to all shortlisted bidders for *"Tariff Based Bidding Process for Procurement of Power on Long Term Basis from Power Station to be set up at Mundra, District Kutch, Gujarat based on imported coal".* By its email to the shortlisted bidders circulated on 23.10.2006, PFC furnished balance information as mentioned in the RFP, including various indicative costs qua declared price of land. Concededly, 30.11.2006 is the Cut-Off Date, in terms of Article 13 of the PPA, being seven days prior to the Bid Deadline Date i.e. 07.12.2006. On the said Bid Deadline Date, the qualified bidders submitted their bids and upon evaluation, the Tata Power Company Limited ("Tata Power") was declared as the successful bidder with an equivalent levelized tariff of Rs. 2.26367/ kWh. The Letter of Intent ("LoI") was issued to Tata Power on 28.12.2006.

14. In due course, Tata Power, being the successful bidder, acquired 100% equity of the appellant. On same date, it entered into various PPAs, for supply of up to 3800 MW of electricity from the Mundra UMPP, with the procurers which are referred to as "*Gujarat Procurer*" i.e. *Gujarat Urja Vikas Nigam Limited* ("GUVNL"); "*Maharashtra Procurer*" i.e. *Maharashtra State Electricity*

*Distribution Company Limited* (“MSEDCL”); “*Rajasthan Procurers*” i.e. *Ajmer Vidyut Vitaran Nigam Limited* (“AVVNL”); *Jaipur Vidyut Vitaran Nigam Limited* (“JVVNL”) and *Jodhpur Vidyut Vitaran Nigam New Limited* (“JdVVNL”); “*Punjab Procurer*” i.e. *Punjab State Power Corporation Limited* (“PSPCL”); and “*Haryana Procurers*” i.e. *Uttar Haryana Bijli Vitran Nigam Limited* (“UHBVNL”) and *Dakshin Haryana Bijli Vitran Nigam Limited* (“DHBVNL”). On 19.09.2007, the Central Electricity Regulatory Commission (“CERC”) passed an Order on Petition (no. 18/2007) under Section 63 of the Electricity Act of the appellant adopting the tariff discovered through the competitive bidding. Indisputably, the PPA contained clauses on *force majeure* and compensation for *change in law*.

15. On 05.05.2008, CGPL issued a letter to the Procurers under Article 3.1.2(iv) of the PPA dated 22.04.2007 preponing the Commercial Operation Date (“COD”) of each of the five Units. CGPL and the Procurers entered into a Supplemental PPA on 31.07.2008, to advance the Scheduled Commercial Operation Date (“SCOD”) of the Units. The four Units of Mundra UMPP were commissioned in due course one after the other – Unit-I on 07.03.2012; Unit-II on 30.07.2012; Unit-III on 27.10.2012; and Unit-IV on 21.01.2013. The fifth Unit (Unit-V) was commissioned on 22.03.2013. The Power Finance Corporation issued a letter on 19.03.2015 stating that

07.12.2006 was the Bid Deadline Date. Therefore, as per Article 13 of the PPA, 30.11.2006 was the Cut-Off Date (i.e., seven days prior to the Bid Deadline Date).

16. A number of "Change in Law" (*CIL*) Notices were issued by CGPL to the Procurers under Article 13.3.1 of the PPA dated 22.04.2007. On 11.07.2011, CGPL issued a letter to the Procurers under Article 13.3.1 of the PPA dated 22.04.2007 informing them (the Procurers) of CIL events during the Construction Period. On 26.02.2013, CGPL issued a CIL notice informing them that the CIL events intimated for the Construction Period were also affecting the Operation Period. Another CIL Notice was issued on 08.03.2013 informing them of the revision in Countervailing Duty on the import of Bituminous Coal. Still another CIL Notice was issued on 12.03.2013 informing them of the approximate impact of CIL on CGPL, it (CGPL) reserving its right to communicate any additional events and/or details in respect of its CIL claims and/or to lodge any additional claims under CIL. On 28.03.2013, another CIL Notice informed the Procurers about the Ministry of Finance's No. 12 of 2013-Customs dated 01.03.2013. CGPL issued CIL notices on 20.05.2014, 19.01.2016 and 13.06.2016 to the Procurers in terms of Article 13.3.1 of the PPA, intimating them of certain CIL events

viz. (i) Levy of Swachh Bharat Cess, at the rate of 0.5% in the value of taxable services rendered, in terms of Finance Act, 2015 read with Notification No. 21/2015-Service Tax dated 06.11.2015 and Notification No. 22/2015-Service Tax, issued by Ministry of Finance, Government of India; (ii) Levy of Krishi Kalyan Cess, at the rate of 0.5% on the value of taxable services rendered, in terms of Section 161 of the Finance Act, 2016 read with Notification No. 9/2016-Service Tax dated 01.03.2016, issued by Ministry of Finance, Government of India; (iii) Levy of Service Tax on Transportation of Goods by a vessel from a place outside India to the first custom station of Landing in India, in terms of Finance Act, 2016 read with Notification No. 9 of 2016 dated 01.06.2016 read with Notification No. 08/2015 dated 01.03.2015 read with Notification No 08/2014 dated 11.07.2014 and Notification No 26/2012 dated 20.06.2012, issued by the Government of India; (iv) Mandate of spending 2% of Net Profits of the Company towards CSR in terms of Section 135 and Schedule VII of the Companies Act, 2013 read with CSR Rules, 2014 notified by the Notification dated 27.02.2014 issued by Ministry of Corporate Affairs, Government of India.

17. Eventually, the appellant filed petitions before the CERC claiming reliefs for the CIL events. On 08.06.2015, Petition No. 157/MP/2015 was presented before CERC seeking adjustment in

tariff on account of the occurrence of CIL events during the Operation Period. On 11.08.2016, CGPL filed Petition No. 141/MP/2016 under Section 79(1)(f) of the Electricity Act read with Articles 13 and 17 of the PPA dated 22.04.2007, seeking increase in the Tariff (Non-Escalable Capacity Charges) as a result of increase in the Capital Cost of Mundra UMPP due to CIL events during the Construction Period. In due course, other petitions or applications came to be filed leading to the impugned orders being passed.

*THE 'CHANGE IN LAW' UNDER PPA*

18. The power project of the appellant and the Power Purchase Agreement (PPA) between the parties herein is governed by Section 63 of the Electricity Act, 2003 which has been quoted earlier.

19. The Competitive Bidding Guidelines issued by the Central Government (CBG), to the extent relevant here, read thus:

> "*Any change in law impacting cost or revenue from the business of selling electricity to the procurer with respect to the law applicable on the date which is 7 days before the last date for RFP bid submission shall be adjusted separately. In case of any dispute regarding the impact of any change in law, the decision of the Appropriate Commission shall apply.*"

20. As noted earlier, it is not in dispute that the Power Purchase Agreement (PPA) between the parties herein includes a clause (Article 13) that deals with "*Change in law*" (for short, "*CIL*") which reads thus:

> *"13 CHANGE IN LAW*
>
> *13.1 Definitions*
>
> *In this Article 13 the following terms shall have the following meanings:*
>
> *13.1.1 "Change in Law" means the occurrences 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 Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentally provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurers under the terms of this Agreement, or (iv) any change in the (a) Declared Price of Land for the Project or (b) the cost of implementation of the resettlement and rehabilitation package of the land for the Project mentioned in the RFP or (c) the cost of implementing Environmental Management Plan for the Power Station mentioned in the RFP or (d) the cost of implementing compensatory afforestation for the Coal Mine, indicated under the RFP and the PPA.*
>
> *But shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the*

*Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission.*

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

*13.1.2 'Competent Court' means*

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

*13.2 Application and Principles for computing impact of Change in Law:*

*While determining the consequences of Change in Law under this Article 13, the parties shall have due regard to the principle that the purpose of compensating the party affected by such Change in Law, is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 13, the affected party to the same economic position as if such Change in Law has not occurred.*

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

*For every cumulative increase/decrease of each Rupees Fifty crores (Rs 50 Crores) in the Capital Cost over the term of this Agreement, the increase/decrease in Non Escalable Capacity Charges shall be an amount equal to zero point two six seven (0.267%) of the Non Escalable Capacity Charges. Provided that the Seller provides to the Procurers documentary proof of such increase in Capital Cost for establishing the impact of such Change in Law. In case of Dispute, Article 17 shall apply.*

*It is clarified that the above mentioned compensation shall be payable to either party only with effect from the date on*

*which the total increase/decrease exceeds amount of Rs fifty (50) crores.*

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

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

*13.3 Notification of Change in Law:*

*13.3.1 If the Seller is affected by Change in Law in accordance with Article 13.2 and wishes to claim a Change in Law under this Article, it shall give notice to the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.*

*13.3.2 Notwithstanding Article 13.3.1, the Seller shall be obliged to serve a notice to all the procurers under this Article 13.3.2 if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the procurers contained herein shall be material. Provided that in case the Seller has not provided such notice, the procurers shall jointly have the right to issue such notice to the Seller.*

*13.3.2 Any notice service pursuant to this Article 13.3.2 shall provide, amongst other things, precise details of the Change in Law; and the effects on the Seller of the matters referred to in Article 13.2*

*13.4 Tariff Adjustment Payment on account of Change in Law:*

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

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

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

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

(emphasis supplied)

21. The expression `Law', 'Construction Period' and 'Operating Period' are defined in the PPA as under:

*"Construction Period: means the period from (and including) the date upon which the Construction Contractor is instructed or required to commence work under the Construction Contract up to (but not including) the Commercial Operation Date of the Unit in relation to a Unit and of all the Units in relation to the Power Station.*

*Law means, in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule or any interpretation of any of them by an Indian Government Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, notifications by an Indian Government Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the Appropriate Commission.*

*Operating Period: in relation to the Unit means the period from its COD and in relation to the Power Station the date*

*by which all the Units achieve COD, until the expiry or earlier termination of this Agreement in accordance with Article 2 of this Agreement."*

22. From the above, it can be culled out for purposes of the case at hand, that the expression CIL, means the occurrence of any of the following events, on or after 30.11.2006 ("Cut-Off date") which results in any change in cost of, or revenue from, the business of generating and selling electricity by CGPL to the Procurers under the terms of the PPA which include:

(i) Enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law; or

(ii) Change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality, provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation; or

(iii) Change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller.

23. The expression ‘Law’ is explained in Article 1.1 of PPA by an inclusive definition which covers statutes, notifications, ordinance, rules, regulations, codes etc.

24. The contract (PPA) expressly provides for restitution for CIL, by Article 13.2(b), for the Construction Period, as also for Operation Period, it being contingent for “Operation Period” on (i) determination of compensation for any increase / decrease in revenues / cost to the seller by CERC and (ii) such compensation to be payable where the impact of CIL is in excess of 1% Letter of Credit (LC) in aggregate for a contract year. It is not in dispute that in the case at hand the impact of the CIL events which are referred to has crossed the threshold limit (1% of LC).

25. The key words undoubtedly are that the event in nature of change in law must be such as “*results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement*”. This clearly means that mere enactment of any law or change would not amount to Change in Law as per Clause 13 unless there is a change in any cost of or revenue from the business of selling electricity by the Seller under the terms of the Agreement [*Sasan Power Limited v. Central Electricity Regulatory Commission* Appeal No. 161 of 2015 - 2017 ELR (APTEL) 0508 decided on 11.04.2017].

26. On 28.01.2016, Ministry of Power, Government of India, issued the Revised Tariff Policy clarifying that the issue of change in tax etc. is treated as CIL. The relevant part of said clarification reads as under:

> *"(4) After the award of bids, if there is any change in domestic duties, levies, cess and taxes imposed by Central Government, State Governments/Union Territories or by any Government instrumentality leading to corresponding changes in the cost, the same may be treated as "Change in Law" and may unless provided otherwise in the PPA, be allowed as pass through subject to approval of Appropriate Commission."*

27. The appellant relies on decision of Supreme Court reported as *Energy Watchdog* v. *CERC: (2017) 14 SCC 80,* to following effect:

> "*57. Both the letter dated 31-7-2013 and the revised Tariff Policy are statutory documents being issued under Section 3 of the Act and have the force of law. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in Clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred. Further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central Electricity Regulation Commission. This being the case, we are of the view that though change in Indonesian law would not qualify as a change in law under the guidelines read with the PPA, change in Indian law certainly would.*"
>
> (emphasis supplied)

28. This tribunal passed Judgment in Appeal No. 210 of 2017 titled as *Adani Power Limited* v. *CERC & Ors.* on 13.04.2018*, inter alia*, holding that carrying cost is payable on the CIL compensation of Seller, the said matter being also based on claim for compensation due to *change in law* events in light of the Standard Bidding Documents issued by the Ministry of Power, Government of India. This judgment was upheld by the Supreme Court by judgment passed on 25.02.2019 in *Uttar Haryana Bijli Vitaran Nigam Limited v. Adani Power Limited* (2019) 5 SCC 325, inter alia, holding that Article 13 of the PPA provides for payment of Carrying Costs. There is no quarrel with the proposition that the above quoted provision of the PPA on the impact of change in law requires determination by the Regulatory Commission of the quantum of compensation and the date from which it becomes effective, this also having been recognized in *Uttar Haryana Bijli Vitaran Nigam Limited v. Adani Power* (supra), the onus to establish the requisite facts concerning the change in existing law and its impact being that of the Seller (here, the appellant). It is apt to quote some parts from the said ruling:

"*9. It will be seen that Article 13.4.1 makes it clear that adjustment in monthly tariff payment on account of change in law shall be effected from the date of the change in law [see sub-clause (i) of clause 4.1], in case the change in law happens to be by way of adoption, promulgation, amendment, re-enactment or repeal of the law or change in law. As opposed to this, if the change in law is on account of a change in interpretation of law by a judgment of a Court or Tribunal or governmental instrumentality, the case would fall under sub-clause (ii) of clause 4.1, in which case, the monthly tariff payment shall be effected from the date of the said order/judgment of the competent authority/Tribunal or the governmental instrumentality. What is important to notice is that Article 13.4.1 is subject to Article 13.2 of the PPAs.*

*10. Article 13.2 is an in-built restitutionary principle which compensates the party affected by such change in law and which must restore, through monthly tariff payments, the affected party to the same economic position as if such change in law has not occurred. This would mean that by this clause a fiction is created, and the party has to be put in the same economic position as if such change in law has not occurred i.e. the party must be given the benefit of restitution as understood in civil law. Article 13.2, however, goes on to divide such restitution into two separate periods. The first period is the "construction period" in which increase/decrease of capital cost of the project in the tariff is to be governed by a certain formula. However, the seller has to provide to the procurer documentary proof of such increase/decrease in capital cost for establishing the impact of such change in law and in the case of dispute as to the same, a dispute resolution mechanism as per Article 17 of the PPA is to be resorted to. It is also made clear that compensation is only payable to either party only with effect from the date on which the total increase/decrease exceeds the amount stated therein.*

*13. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative*

*orders dated 6-4-2015 and 16-2-2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn. This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 4-5-2017 [Adani Power Ltd. v. Uttar Haryana Bijli Vitran Nigam Ltd., 2017 SCC OnLine CERC 66] that CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 1-4-2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal.*

29. On 14.09.2020, this tribunal passed its Judgment in Appeal No. 182 of 2019 titled as *Adani Power Maharashtra Limited (APML)* v. *MSEDCL & Ors.* on 14.09.2020*, inter alia*, holding as under:

*"7.14 From the aforesaid discussion, it emerges that this Tribunal has already held that the SHR submitted in the bid (when it is not a bid parameter as per the bidding guidelines) by a generating company is not to be used as the basis for computing the coal shortfall requirement and thereby for computation of change in law compensation to be awarded to the generating company. Such linking of change in law compensation to the SHR mentioned in the bid documents would not restitute the affected party to the same economic position as if the approved change in law event had not occurred. This issue is therefore decided in favour of the Appellant and the Respondent No. 2 is directed to allow*

*change in law compensation on the basis of the SHR specified in the MERC MYT Regulations, 2011 or the actual SHR achieved by the Appellant, whichever is lower. This would sufficiently protect the interests of the consumers against any plant inefficiency being passed on to the Discoms or the consumers.*

*….*

*8.6 From the judgments cited above, it is clear that this Tribunal as well as the CERC has consistently taken the view that the reference GCV for the purposes of change in law compensation shall be the actual GCV. We also note that the GCV specified in the tariff regulations is also the actual GCV on as received basis. MERC has not provided any reasoning or explanation as to why it considered the application of middle range of assured grade of linkage coal as the appropriate reference for computing the quantum of shortfall coal. It is a fact that there is no guidance in the PPAs or in the Bidding Guidelines as to the reference GCV that should be applied in case of change in law claims in Case 1 bid projects where SHR or GCV is not a bid parameter. However, the overarching principle for change in law compensation is that the generating company should not be left in a worse economic position. As stated above, in Wardha Power judgment (supra), this Tribunal has already rejected the reverse computation of coal price from the quoted energy charge in the bid since the coal price so calculated will not be equal to the actual price of coal and therefore, compensation for Change in Law computed on such price of coal will not restore the economic position of the Seller to the same level as if such Change in Law has not occurred. Therefore, the GCV as received shall be the appropriate basis to assess the quantum of shortfall in domestic coal and calculate the Change in law compensation accordingly."*

30. There can be no dispute as to the fact that Article 13 of the PPA enunciates that the purpose of compensating the party affected by CIL is "*to restore*", through monthly tariff payments, the affected party "*to the same economic position as if such CIL event has not*

*occurred*". Any change in Indian Law after the Cut-Off Date (i.e. 30.11.2006) which meets the qualifications under Article 13 and where the impact exceeds the contractual '*de minimis*' qualifies for such compensation. We agree that Article 13 enshrines the restitutive principle under the PPA which is bound to be borne in mind when compensation for increase or decrease is determined by CERC. Article 13.2 of the PPA concededly has an in-built mechanism to restitute (through monthly tariff payments) the party affected by CIL to the same economic position as if such CIL has not occurred.

31. The adjustment in Monthly Tariff Payment, to be claimed through a Supplementary Bill, for affording restitution on account of CIL event would indisputably be effective from (i) the date of CIL, where it is by adoption, promulgation, amendment, re-enactment or repeal of the Law; or (ii) in cases where CIL is on account of a change in interpretation of Law, from the date of order or judgment of the Competent Court or tribunal or Indian Governmental Instrumentality.

32. As settled by ruling in *Energy Watchdog* v. *CERC* (supra), a policy of the Government constitutes a "decision" having the force of law amounts to a CIL. Therefore, it is right for the appellant to contend that a change in such 'decision' by the Government is also

an actionable CIL. The respondents do not contest the argument that Indian Governmental Instrumentality within the meaning of CIL clause under the PPA includes the Government of India as indeed the Governments of States where the Procurers and the Project are located which here would include Governments of Gujarat, Maharashtra, Rajasthan, Punjab and Haryana, any ministry or department or board, agency or other regulatory or quasi-judicial body under the aegis of the Government of India or the above-said State Governments.

33. We endorse the submission that PPA gives express right to an affected party to claim compensation if the event qualifies as a CIL event in terms of Article 13 of the PPA. Once CIL is established, there can be no doubt, compensation in terms of restitutionary principles must follow. It is conceded that Article 13 of the PPA fleshes out Clause 4.7 of the CBG which envisages that any CIL impacting cost or revenue from the business of selling electricity shall be adjusted in tariff.

34. Generally speaking, change in tax or change in rate of taxes etc. is treated as CIL, as envisaged by the Revised Tariff Policy dated 28.01.2016 which was held to be a statutory document having the force of law in *Energy Watchdog* (supra). Similarly, it is fairly conceded as a settled proposition of law that the claim for Carrying

Cost is an integral part of admissible CIL compensation under the restitutionary principle and is in-built in Article 13 of the PPA [*UHBVNL & Anr.* v. *Adani Power Ltd.* (supra)]. In above view of the matter, there can be no quarrel with the proposition that the regulatory authority cannot introduce any extraneous words or qualifications to limit or whittle down the scope of Article 13 with respect to what constitutes CIL and how the relief has to be computed. Its role is limited to (i) determining whether a CIL event has occurred i.e. whether the qualifications provided under Article 13.1 are met; (ii) determining whether such a CIL event has an impact on the business of generation and sale of electricity; and (iii) if the answers to the first two questions be in the affirmative, to provide restitutive compensation (i.e. on actuals) to the affected party.

*THE 'CHANGES IN LAW' IN QUESTION*

35. It would be of advantage to bear in mind the chronology in which the fiscal legislation relevant for the disputes at hand evolved.

36. In 2003, the State of Gujarat had enacted the Gujarat Value Added Tax Act, 2003 ("Gujarat VAT Act"). It was amended in the year 2008 by the Gujarat Value Added Tax (Amendment) Act, 2008,

it having come into force on 01.04.2008.

37. The State of Gujarat notified, on 30.03.2011, the Gujarat Green Cess Act, 2011 ("Green Cess Act") providing for levy of cess on generation of electricity other than from renewable sources of energy. On 28.07.2011, In terms of powers conferred under the Green Cess Act, the State of Gujarat notified the Gujarat Green Cess Rules, 2011 ("Green Cess Rules"). A cess of 2 paisa per unit is to be levied in its terms on the electricity generated. It is stated that, pursuant thereto, CGPL paid an amount of Rs. 1,03,21,176/- towards Green Cess, for FY 2011-12 and 2012-13 (i.e. January, 2012 to April, 2012).

38. On 23.01.2013, however, Gujarat High court, by its Judgment dated 23.01.2013, declared the Green Cess Act and the Green Cess Rules as *ultra vires* the Constitution of India. In the wake of the above-mentioned Judgment dated 23.01.2013 of Gujarat High Court's, CGPL issued a letter on 15.04.2013 to the State of Gujarat, requesting for refund of the amount of Rs. 1,03,21,176/- paid by it towards Green Cess. The Judgment dated 23.01.2013 was challenged by the State of Gujarat before the Supreme Court of India by Civil Appeal No. 5153-5157/2013. By an Interim Order dated 03.07.2013, the Supreme Court directed the State of Gujarat to determine the cess and to raise the demands on CGPL. However,

the Court also directed that the demands raised shall not be enforced till final outcome of the pending Civil Appeals. The said Civil Appeal(s) are stated to be pending adjudication before the Supreme Court.

39. On 10.08.2004, Government of India introduced Education Cess at the rate of 2% by the Finance Act, 2004. Ministry of Finance by its circular bearing reference no. 345/2/2004-TRU(pt.) clarified that Education Cess is chargeable on all duties which are both levied and collected by the Department of Revenue.

40. The Government of India introduced, on 01.04.2007, Secondary and Higher Education Cess by the Finance Act, 2007, as a levy over and above Education Cess introduced by the Finance Act, 2004. The Department of Revenue, Ministry of Finance, issued a letter on 07.01.2014 clarifying that Education Cess and Secondary and Higher Educational Cess will not be applied to duties/ cesses which are merely collected by the Department of Revenue. The Principal Commissioner of Customs issued a letter to CGPL dated 19.06.2015 bearing reference no. F.No. VIII/48-241/Cess/Gr.1/MCH15-16, directing CGPL to deposit Educational Cess and Secondary and Higher Education Cess on Clean Energy Cess.

41. In June, 2006 Finance Act, 2006 came into effect. In terms

thereof, Works Contract was brought within the ambit of Service Tax. By the said Act, Service Tax at the rate of 12% was imposed on the service component/ element of the Works Contract after eliminating the supply component. On 22.05.2007, Ministry of Finance, by Notification No. 32/2007-Service Tax, introduced Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 ("Works Contract Rules"). In terms of the said Rules, an option was given to persons who were liable to pay Service Tax in relation to Works Contract to discharge their liability by paying an amount equivalent to 2% of the gross amount charged for the Works Contract instead of paying service tax at the rate of 12% on the service component. On 01.03.2008, Ministry of Finance, Government of India, issued Notification No, 7/2008 to amend Rule 3(1) of the Works Contract Rules. Thereby, the rate of Service Tax on Works Contract was increased from 2% to 4%.

42. The Ministry of Environment, Forest and Climate Change ("MoEF") had issued the Environmental Clearance in favour of CGPL on 02.03.2007, with certain conditions. Mandatory earmarking of certain sums towards fulfilment of Corporate Social Responsibility ("CSR") was not a condition in the said Environment Clearance. On 05.04.2007, the MoEF issued a Corrigendum, amending the Environment Clearance dated 02.03.2007. At that

stage as well, mandatory CSR was not a condition imposed on CGPL. On 26.04.2011, MoEF issued another Corrigendum whereby it amended its earlier Environmental Clearance letters dated 02.03.2007 and 05.04.2007. By the said Corrigendum, MoEF imposed the condition of mandatory CSR on CGPL.

43. On 11.08.2014, MoEF, Government of India, issued the Environment Sustainability and CSR related guidelines. The same, *inter alia*, provided:

> *"3. It is noticed that while there is clarity on the guidelines on EMP, as regards sustainability related issues, different formulations have been prescribed in the conditions in EC letters for the projects under different sectors listed out in Schedule to the EIA Notification, 2006. Thus, there is a need to issue guidelines on the subject.*
> *4. Section 135 of the Companies Act, 2013 deals with corporate social responsibility and Schedule-VII of the Act lists out the activities which may be included by companies in their CSR Policies. The activities relating to "ensuring environmental sustainability", are listed in this schedule. Further, Ministry of Corporate Affairs has also noted the Companies (Corporate Social Responsibility Policy) Rules, 2014.*
>
> *5. The concept of CSR as provided for in the Companies Act, 2013 and covered under the Companies (Corporate Social Responsibility Policy) Rules, 2014 comes into effect only in case of companies having operating projects and making net profit as also subject to other stipulations contained in the aforesaid Act and Rules. The environment clearance given to a project may involve a situation where the concerned company is yet to make any net profit and/ or is not covered under the purview of the aforesaid Act and Rules. Obviously, in such cases, the*

*provisions of aforesaid Act and Rules will not apply."*

44. On 29.08.2013, Parliament enacted the Companies Act, 2013. Section 135 of the Companies Act, *inter alia*, provides for compliance of CSR norms by the companies having a net-worth of Rs. 500 Crore or more, or turnover of Rs. 1000 Crore or more or a net profits of Rs. 5 Crore or more during any financial year. The CSR compliance has to be met out the average net profits made by the company in the preceding three financial years. The Ministry of Corporate Affairs, Government of India notified that the provisions of Section 135 and Schedule VII of the Companies Act, 2013 shall come into force on 01.04.2014. On the same date, the Ministry of Corporate Affairs, Government of India, also notified the Companies (Corporate Social Responsibility Policy) Rules, 2014 ("CSR Rules"), which also became effective from 01.04.2014.

45. On 14.05.2015, the Government of India enacted the Finance Act, 2015. Section 119 of the Finance Act, 2015 provided for levy of *Swachh Bharat Cess* at the rate of 2% as Service Tax on all or any of the taxable services. On 06.11.2015, the Ministry of Finance, Government of India issued Notification No. 21/2015-Service Tax notifying 15.11.2015 as the date from which the provisions of the Finance Act, 2015 pertaining to *Swachh Bharat Cess* (i.e. Chapter

VI of the Finance Act, 2015) would come into force. On same date, the Ministry of Finance, Government of India issued another Notification, being Notification No. 22/2015-Service Tax thereby restricting the levy of *Swachh Bharat Cess* to 0.5% only (as against the rate of 2% provided under the Finance Act, 2015). The said notifications were made effective from 15.11.2015.

46. The Government of India enacted the Finance Act, 2015, Section 161 of the Finance Act, 2016 provided for levy of *Krishi Kalyan Cess* at the rate of 0.5% as Service Tax on all or any of the taxable services.

*THE QUESTIONED DISALLOWANCES*

47. As noted earlier, both appeals relate to grievances of the appellant (Seller / generator) on ground of wrongful denial of compensation for the additional expenditure incurred due to CIL events arising from different fiscal legislation during the operation period, the difference (generally speaking) being that the first appeal (no. 172 of 2017) relates to FY 2012-15 while the second appeal (no. 154 of 2018) relates to FY 2015-17. Since some of the subjects overlap, they need to be considered accordingly such that there is no repetition and the same principle applies uniformly and

throughout.

48. We would take up the Change-in-law events subject wise.

*GUJARAT GREEN CESS (Appeal no. 172/2017)*

49. This issue is restricted to the period covered by the first captioned appeal.

50. The findings on the subject, which are assailed by the appellant, were returned by impugned order dated 17.03.2017 on following reasoning:

> *"VII. Levy of Green Cess*
>
> *46. We have considered the submissions of the petitioner and the respondents. A similar issue has been considered by the Commission in its order dated 6.2.2017 in Petition No. 156/MP/2014 wherein the Commission did not allow the Green Cess pending disposal of the appeal before the Hon'ble Supreme Court. Relevant portion of the said order is extracted as under:*
>
> > *"57. We have considered the submissions of the petitioner and the respondents. The Gujarat Energy Cess Act, 2011 and Gujarat Green Cess Rules have been set aside by the Hon`ble Gujarat High Court vide judgment dated 21.1.2013. The said judgment has been challenged before the Hon'ble Supreme Court in Civil Appeal No. 5135-5157 of 2013. The Hon'ble Supreme Court vide order dated 3.7.2013 has directed as under:*

*"During the pendency of the Appeals the operation of the impugned judgment of the High Court shall remain stayed.*

*It will be open to the appellants to determine the cess under the Gujarat Green Cess Act, 2011 and raise demand on the respondents. However, such demand shall not be enforced against the respondents until disposal of the Appeals. Moreover, determination of such cess shall be subject to the final decision in the Appeals."*

*The judgement of the Hon'ble Gujarat High Court setting aside the Gujarat Energy Cess Act, 2011 has been stayed by the Hon'ble Supreme Court and Government of Gujarat has been permitted to determine the cess in accordance with the said Act and raise the demand but Government of Gujarat has been restrained to enforce the demand until disposal of the appeal. The petitioner has prayed for determination of the issue whether the cess levied under the Gujarat Energy Act is covered under Change in Law or not. The respondents have submitted that the petitioner may approach the Commission after the Green Energy Act, 2011 is upheld by the Hon'ble Supreme Court. The respondents have reserved their rights to raise appropriate objections at relevant time. In our view, since the respondents have not filed their objections on merit, it will not be appropriate to determine the issue whether the Green Cess under the Gujarat Green Energy Act, 2011 is admissible under Change in Law or not. Accordingly, we grant liberty to the petitioner to file appropriate application before the Commission for consideration of its claim with regard to the green cess if the demand for green cess is allowed to be enforced by the Hon'ble Supreme Court pending disposal of the appeal or after disposal of the appeal if the Gujarat Green Cess Act, 2011 is upheld by the Hon'ble Supreme Court."*

*47. In the light of the above decision, the claim of the petitioner for relief under change in law on account of levy of green cess is not admissible at this stage. However, the petitioner is granted liberty to file appropriate application before the Commission for consideration of its claim with regard to the green cess if the demand for green cess is allowed to be enforced by the Hon'ble Supreme Court*

*pending disposal of the appeal or after disposal of the appeal if the Gujarat Green Cess Act, 2011 is upheld by the Hon'ble Supreme Court. …."*

(emphasis supplied)

51. The contentions of the appellant require to take into consideration the Gujarat Green Cess Act, Gujarat Green Cess Rules, Judgment dated 23.01.2013 of Gujarat High Court, the interim order passed by Supreme Court on 03.07.2013 in S.L.P. (C) No. 18493-18515/2013 and letter dated 15.04.2013 of the appellant to Chief Electrical Inspector.

52. The Gujarat Green Cess Act was notified on 30.03.2011 levying (by Section 3) Green Cess on generation of electricity. The Gujarat Green Cess Rules were notified on 28.07.2011 levying cess @ 2 paisa per unit on electricity generated. On the Cut-Off Date (i.e. 30.11.2006), there was no such existing levy of Green Cess on generation of electricity. Hence, the cost related to this levy could not conceivably be considered by the appellant at the time of bid submission.

53. There can be no quarrel with the proposition that in terms of Article 13.1.1(i) of the PPA, levy of Green Cess by enactment of the Green Cess Act and Green Cess Rules was indisputably a CIL event. By its Judgment dated 23.01.2013, the Gujarat High Court declared Green Cess Act *ultra vires* the Constitution of India and

directed that the Cess already paid, which burden has not been passed on to the consumers, shall be refunded with a simple interest @ 8% per annum after three months of the collection till the actual payment. It is in the wake of the said decision that the appellant had issued the letter on 15.04.2013 to the Government of Gujarat seeking refund of the amounts paid by it towards Green Cess. The order of Gujarat High Court is under challenge before Supreme Court in S.L.P (C) No. 18493-18515/2013 (*State of Gujarat and Ors.* v. *Reliance Industries Limited and Ors.*). On 03.07.2013, the Supreme Court, while declining the request for stay against the order of the High Court, permitted the Government of Gujarat to continue determining the amount of Cess payable by the generators and raising the demand on the respondents though not enforcing it till the final disposal of the SLPs.

54. It is the case for appellant (CGPL) that it had paid a sum of Rs. 1,03,21,176/- towards Green Cess to the Government of Gujarat during January to April 2012. Out of the said amount, Rs. 47,97,000/- was paid by CGPL during the Construction Period while the balance Rs. 55,24,176/- was paid during the Operation Period and claimed as CIL accordingly. The amount was paid before Green Cess Act was struck down as unconstitutional by the High Court, i.e. for and during the period the Green Cess Act was valid and

applicable to CGPL (during January 2012 to April 2012). In this view of the matter, subject to the continuance of the liability to pay under the law, the appellant does seem to be justified in contending that the event gave rise to a legitimate claim for compensation by the Procurers for the amounts paid by it towards Green Cess, subject to the final decision of the Supreme Court.

55. There is no dispute as to the fact that the amounts paid by CGPL have neither been refunded by the State of Gujarat nor compensated for by the Procurers and nor passed on to the consumers. This means that, resultantly, as on date the appellant (CGPL) is out of pocket (during the Operations Period) to the extent of Rs. 55,24,176/- since 2012 (almost nine years). The appellant claims that its entitlement to recover the said amount from the Procurers be accepted and given effect to. Alternatively, it is urged that, if CGPL is to claim this amount under CIL only if the Supreme Court upholds the validity of the Green Cess Act and Rules, then the Procurers be directed to pay the interest or Carrying Cost on the amounts already paid by CGPL, for the period March/ April 2012 till realization. The upshot of the contentions of the appellant is that it be held that the introduction of the Green Cess Act and Rules amounts to CIL in terms of Article 13 of the PPA for which CGPL needs to be compensated in full, the entitlement to such

compensation being subject to the outcome of the challenge to the legislation pending before the Supreme Court.

56. The respondents argue that the levy of Green Energy Cess cannot be held to be change in law in present situation wherein the said cess has been declared by the High Court of Gujarat to be *ultra vires* the Constitution of India with directions for refund and though the said order is under challenge, compulsory collection is not permitted. It is submitted that if the Supreme Court decides the matter in favour of the Government of Gujarat and upholds the Green Cess Act, the appellant can raise the issue for consideration on merits, the respondents reserving the right to raise appropriate objections at such stage, the claim presently being premature.

57. We reject the plea that the claim of the appellant is premature. Since it had already paid the new revenue to the State, its expectation to be compensated was immediate. We are in agreement with the appellant that, but for the decision of the High Court, so long as the Green Cess Act was operative, the liability on such account constituted a CIL event and the money paid on such account was bound to be compensated accordingly by directions for the burden being passed on to the Procurers which, in turn, may claim whatever relief they are entitled to under the tariff orders. There should have been no hesitation felt by the Commission in

ruling clearly on this subject. While we uphold the claim of the appellant in such regard, in principle, we do find some reasons exist why we must at the same time follow, for the present, the course of deferment for translating this into a concrete relief.

58. There is merit in the claim for compensation on account of CIL due to levy of Gujarat Green Cess, should the fiscal law be eventually upheld, and the judgment of High Court be vacated. Conversely, however, if the Supreme Court were to endorse the view taken by the High Court and the law is held bad and inoperative and the Government of Gujarat were called upon to refund the tax collected, the claim for compensation as CIL by the Procurer would be rendered meaningless. At best, in such scenario, the carrying cost suffered would need to be considered and taken care of, unless the decision of the Supreme Court comes with directions having a bearing even on such aspects. If the cess is not due, it cannot be collected or passed on. This stage is one where there can be no speculation as to what shape the judgment of Supreme Court will take. In our considered view, a practical approach has to be adopted, by deferring issuance of any directions on the subject at this intermediary stage.

59. For foregoing reasons, and in the circumstances, we hold that if the burden created and borne by the appellant on account of

enforcement of Green Cess Act, during the operation period, were to continue to be borne by the appellant even after decision is rendered by the Supreme Court on the pending challenge, the same shall be treated by the Commission as a CIL event and necessary order shall be passed by it to afford recompense to that extent along with corresponding carrying cost.

*SERVICE TAX ON WORKS CONTRACT (Appeal no. 172/2017)*

60. Again, the issue is limited to the first appeal. For dealing with this issue, it is necessary to bear in mind the Finance Act, 1994 read with Section 68(B) of Finance Act, 2006, Sections 126, 129 & 130 of the Finance Act, 2007, the Notification No. 32/2007-Service Tax dated 22.05.2007 and the Notification No. 7/2008-Service Tax dated 01.03.2008.

61. The findings on the subject returned by the Order dated 17.03.2017 may be quoted in extenso:

> "*VI. Increase in rate of Service Tax*
>
> *….*
>
> *43. We have considered the submissions of the petitioner and MSEDCL. <u>As on the cut-off date of 30.11.2006, there was no service tax on Works Contract</u>*

*Service. As per the bid documents, the petitioner was required to factor in all the taxes, cess, duties etc. in the bid. In the absence of service tax on Works Contract Service as on cut-off date, the petitioner could not be expected to factor the same while quoting the tariff. The service tax on works contract service was introduced through the Finance Act, 1994 and levied by the Ministry of Finance, Department of Revenue vide Notification No. 32/2007-Service Tax dated 22.5.2007 at the rate of 2% under Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 issued under Section 93 and 94 of the Finance Act, 1994. Subsequently, Government of India, Ministry of Finance, Department of Revenue (Tax Research Unit) vide Notification No. 7/2008-Service Tax dated 1.3.2008 increased service tax on works contract service from 2% to 4%. Government of India, Ministry of Finance through Finance Act, 2007 levied a Secondary and High Educational Cess at the rate of 1% on aggregate duty of service tax levied and collected by the Central Government. The petitioner has been paying service tax on work contract service at the rate of 4% and 1% of Secondary and Higher Education Cess to the tune of Rs.13 lakh and Rs. 39 lakh for the years 2012-13 and 2013-14 respectively since the effective date of the notifications. Therefore, the service tax on works contract service and levy of Secondary and Higher Education cess were introduced after the cut-off date through the Act of Parliament and the rates were being notified from time to time by Ministry of Finance (Department of Revenue) and Department of Revenue (Tax Research Unit) which are Indian Government Instrumentalities. Accordingly, the claim of the petitioner is allowed under Change in Law. The petitioner shall submit to the beneficiaries the auditor certificate based on the service tax paid on the service component of the works contract after obtaining all relevant documents from the contractor on annual basis."*

(emphasis supplied)

62. The grievance of the appellant stems from recall of above decision by observations on the subject in the Impugned Order

dated 31.10.2017 subsequently passed, reading thus:

"*11. The Commission in order dated 17.3.2017 had allowed Service Tax on Works Contract Service as under:*

*….*

*12. It is noticed from the above that the claim of the respondent, CGPL for Service tax on works contract service was allowed under 'change in law' as per Notifications dated 22.5.2007 and 1.3.2008 on the basis that service tax on Works Contract Service were introduced after the cut-off date. The Petitioner in this review petition has pointed out to an error in the said order and has submitted that the respondent CGPL had admitted in its rejoinder dated 14.10.2015 (to the reply filed by MSEDCL) that Service tax on work contract service was existing as on the cut-off date and that the Notifications dated 22.5.2007 and 1.3.2008 only gave an option to a person to discharge his service tax liability by paying an amount equivalent to 2% of gross amount charged for Works contract, instead of paying service tax. In other words, the grievance of the Petitioner is that the Commission, while observing that the Service Tax on Works Contract Service was introduced after the Cut-off date, had inadvertently not considered the submissions of the respondent, CGPL in its rejoinder dated 14.10.2015 had admitted that the said tax was existing as on the cutoff date. This according to the Petitioner is an error apparent on the face of the order dated 17.3.2017. There is force in the submissions of the Petitioner. It is observed that the Commission while allowing the said claim of the respondent, CGPL in order dated 17.3.2017 had not considered the submissions in its rejoinder dated 14.10.2015, wherein, the said respondent has admitted that the Service Tax on Works contract Service existed as on the cut-off date, though the option to pay at 2% of gross amount of the Works Contract was introduced after the cut-off date. The non-consideration of this submission of the respondent, is in our view, an error apparent on the face of the order dated 17.3.2017. Hence, the review petition is maintainable on this ground.*

*….*

*15. Based on the above discussions, there exists sufficient reasons to review the impugned order dated*

*17.3.2017 with regard to the decision to allow the Service Tax on Works Contract services under Change in Law as claimed by the respondent, CGPL. Considering the fact that the increase in Service tax has resulted due to exercise of an option by the Petitioner, we in line with the decision of the Commission dated 31.8.2017 in Petition No. 141/MP/2016, review the decision in para 43 of the order dated 17.3.2017 as under:*

> *"43. It is noticed that the Service tax of 12% was imposed on service component/ elements of Works Contract, thereby effectively considering 2% of service tax on Works Contract at the time of the bid. This has been considered by the Petitioner as on the cutoff date (30.11.2006). Thus, the notification dated 22.5.2007 of the Ministry of Finance giving options to the persons by paying an amount equal to 2% of the gross amount charged for the Works Contract, instead of paying service tax at the rate specified under the Finance Act, 1994 is not a new levy but an option given to the person to pay 2% of the gross instead of 12% of the service component. Thus, in our view, the exercise of option by the Petitioner, which is beneficial to the person liable to pay tax, cannot therefore be termed as a Change in law event falling within the scope of Article 13 of the PPA. Similarly, the increase of Service tax to 4% as per Notification dated 1.3.2008 is also an option to the person to discharge his tax liability. Since the increase in Service tax has resulted due to exercise of an option by the Petitioner, the impact of the same cannot be passed on to the Procurers. In this background, the claim of the Petitioner during the Operating period is not allowed."*

*Accordingly, the Respondent shall not be entitled for service tax on works contract under change in law. The impugned order dated 17.3.2017 shall stand modified to this extent."*

(emphasis supplied)

63. In terms of the Finance Act, 2006, a tax rate of 12% on service component of the Works Contract was levied. As on the Cut-Off

Date (i.e. 30.11.2006), while submitting its bid, Tata Power (the predecessor-in-interest of the appellant) was required to premise its bid on the basis of the then prevailing Service Tax @ 12% on the service component / element of the Works Contract. On 01.04.2007, in terms of Sections 126, 129 and 130 of the Finance Act, 2007, a Secondary and Higher Educational Cess was levied @ 1% on aggregate duty of Service Tax levied and collected by the Central Government.

64. On 22.05.2007 (six months after the cut-off date), the Works Contract Rules were notified giving an option to persons liable to pay Service Tax on Works Contract to discharge the liability by paying an amount equivalent to 2% of the gross amount charged for the Works Contract instead of paying service tax at the rate of 12% on the service component of the Works Contract.

65. The Notification dated 22.05.2007 reads as under:

> *"3(1) Notwithstanding anything contained in section 67 of the Act and rule 2A of the Service (Determination of Value) Rules, 2006, the person liable to pay service tax in relation to works contract service shall have the option to discharge his service tax liability on the work contract service provided or to be provided, instead of paying service tax at the rate specified in section 66 of Act, by paying an amount equivalent to two per cent. of the gross amount charged for the works contract.*"
>
> (emphasis supplied)

66. No doubt, the amended law gave an option and it may be

assumed that a person would exercise only such option as is beneficial. We are, however, not impressed with the argument of the respondents that if due to the exercise of the option, there was any benefit in reduction of service tax, the same should be passed on to the Procurers but if converse be the result (that is to say, if there has been an increase in the liability of service tax due to such exercise of option), the same cannot be passed on to the Procurers and ultimately the beneficiaries. This argument is flawed and not merely because it leads to inequitable consequences. If there is decrease, the benefit must go to the Procurers and if there is increase in liability, the adjustment in tariff must follow. That is the letter and spirit of the contractual terms and law binding the parties.

67. It is argued that the operation and maintenance of the plant is the responsibility of the appellant and if the appellant seeks to employ services of other agencies, the same cannot increase the liability of the Procurers; this was a commercial decision and choice of the appellant; and that if the appellant had not employed services of outside agencies, there would have been no impact of the alleged changes of tax rates.

68. We find no substance in the above submissions. The work contractors are engaged by the appellant within its discretion and there is no inhibition in PPA in such regard. In fact, it is pointed out

by the appellant, and rightly so, that Article 7 of the Model PPA which was a part of the RFQ documents had envisaged that the generator (Seller) alone shall be liable to operate and maintain the power station at its own cost but, in the final PPA that was executed between the parties, the clause to such effect was removed, this clearly indicative of the common understanding of the parties that the generator (CGPL) would not be solely responsible for O&M, the definition of 'Project Documents' read with 'O&M contracts' contemplating that a third-party O&M contractor might be appointed by it (CGPL).

69. It is wrong to argue that because the appellant stands in the capacity of the Principal in relation to the work contractors engaged by it, it is responsible for the action (or inaction) on their part in such matters as have financial implication for the Procurers because the option exercised by the contractor is not a change in law but part of the commercial and business decision and has to be dealt *inter se* the former two. We reject this plea against claim under consideration here for the simple reason the doctrine of agency cannot be invoked in this context. It is not shown that in matters of State revenue, the choices made by the contractors could have been controlled by the appellant.

70. Reliance in above context by the respondents on the rulings

of *Power Grid Corporation of India Limited v. Central Electricity Regulatory Commission and Ors* [2015 ELR (APTEL) 1270] and *Maharashtra State Power Generating Company Limited v. Maharashtra Electricity Regulatory Commission and Ors* [2012 ELR (APTEL) 1342] is misplaced. In former case, the issue was the cost saddled on the beneficiaries due to "*delay … on account of the contractor*". In the latter case, "*the cost of … non-performance*" on the part of the Contractor attributable to the Generating Company "*in relation to the technical parameters mandated by the Regulations*" was the bone of contention. There is no relevance of the said rulings to the subject at hand.

71. Pertinently, the option under the law governing the subject at hand was to be exercised not by the appellant but by the contractor engaged (for executing any Works Contract for the Project) by it (CGPL). The option given to the work contractor of paying Service Tax at the rate of 2% of the gross value of the Works Contract was introduced to provide for a simplified and hassle-free method of tax assessments, and for administrative convenience. On 01.03.2008 by Notification No. 7/2008, Rule 3(1) of the Works Contract Rules were amended to enhance the rate of Service Tax on Works Contract from 2% to 4% w.e.f 01.03.2008.

72. The appellant refers primarily to three events viz. (i) the option

given to the work-contractor to pay Service Tax on Works Contract either at the rate of 12% on the service component or 2% of gross amount charged for the Works Contract (by Notification No. 32/2007-Service Tax dated 22.05.2007); (ii) increase in rate of Service Tax on Works Contract from 2% to 4% on account of amendment to Rule 3(1) of the Works Contract Rules (by way of Notification dated 01.03.2008); and (iii) levy of Secondary and Higher Education Cess at the rate of 1% on the aggregate duty of Service Tax levied and collected by the Central Government (by Section 130 of the Finance Act, 2007). The claim for impact to be offset based on Article 13.1.1(2) of the PPA is premised on the submissions that these constitute CIL since (i) the notifications/ amendments have been issued by the Ministry of Finance, Government of India, an Indian Governmental Instrumentality in terms of Article 1.1 of the PPA; (ii) such events having occurred after the Cut-Off Date; and (iii) they have an impact on CGPL's cost of generation and sale of electricity.

73. We find substance in the argument that having correctly appreciated the effect and import of the events, *albeit* wrongly noting that Service tax did not exist prior to the cut-off date, the Commission fell into error at review stage by accepting the argument that since Service Tax on Works Contract existed (@

12%) before the Cut-Off Date, the impact of increase in rate having occurred due to exercise of option renders the claim of CIL inadmissible. This was too simplistic an approach missing out the crucial fact that the Seller was being penalised for an act of volition exercised by another entity over which it had no control in the matter.

74. We are of the considered opinion that CERC has failed to appreciate that at the time of bidding for UMPPs various works contracts are not finalized but are contemplated to be finalized, *inter alia*, within fourteen months period thereafter [Article 3.1.2 of PPA]. To work out the bid numbers, each participant in the bid process is expected to factor in the applicable tax rates prevalent as on the Cut-Off Date which are beneficial to the person. Any change in such rates after the Cut-Off Date are covered by Article 13. It is not contested that Service Tax @ 12% on service component of a Works Contract considered by CGPL in its Bid amounts to approximately 2% of total contract value (including materials and services). Hence, the enhancement of the rate to 4% of total contract value (including levy of Secondary & Higher Education Cess @ 1%) constitutes a CIL event deserving restitution. We agree with the submission that in terms of Article 3.1.2 of the PPA, various Works Contracts (such as EPC & BTG contracts) were

contemplated to be finalized either within twelve months from the Effective Date (i.e. 22.04.2007) or fourteen months from the date of issuance of Letter of Intent (i.e. 28.12.2006), each date being well after the Cut-Off Date (i.e. 30.11.2006). The CIL provision, for the purpose of Works Contract, is to be interpreted in light of Article 3.1.2 of the PPA.

75. What is crucial and must be the decisive factor, however, is the fact that the option of paying an amount equivalent to 2% of the gross amount charged for the Works Contract instead of 12% on the Service Component was granted to the Contractor(s) employed by CGPL for executing the Works Contract. This was not within the choice, domain or discretion of the appellant. It cannot be penalised or faulted by denying it the offset of adverse effect of such CIL, due to the exercise of option by the contractor to pay Service Tax on Works Contract at the then prevalent rate of 2% and thereafter at the increased rate of 4% on the gross or total value of the contract.

76. It is the argument of the respondents that the claim of the appellant that it has been additionally burdened to the extent that there was an increase to 4% is misconceived. It is contrarily argued that by exercise of the option, there was discharge of the service tax liability at 12% and, therefore, the benefit of 12% has to be passed on to the Procurers. It is submitted that the benefit of 12% is likely

to be higher than the expenditure of 2% and 4% because otherwise the person would not exercise the option of paying the tax at 2% or 4% as opposed to 12%. These arguments are based on unfounded assumptions. The Commission has not gathered the requisite information nor done the necessary mathematical exercise to find out the net effect of the changes brought about as a result of change in law, levy and method of calculation.

77. The reversal by impugned order dated 31.10.2017, thus, must be vacated and the dispensation on the subject upon correct view taken initially by original order dated 17.03.2017 being restored. We order accordingly. The Commission shall be obliged to undertake the exercise of ascertaining the net effect of the change effected by the option exercised after CIL event and the subsequent change in rate of the tax and allow adjustment accordingly to recompense the party which has suffered the impact.

*EDUCATION CESS AND SECONDARY & HIGHER EDUCATION CESS ON CLEAN ENERGY CESS (Appeal no. 172/2017)*

78. The arguments on the captioned subject are based on Sections 126 and 129 to 130 of Finance Act, 2007; Section 82 read with Tenth Schedule of Finance Act, 2010; Ministry of Finance,

Department of Revenue, Circular dated 10.08.2004 bearing reference no. 345/2/2004-TRU(pt.); Letter dated 07.01.2014 issued by Department of Revenue, Ministry of Finance; and Letter dated 19.06.2015 bearing reference no. F.No. VIII/48-241/Cess/Gr.1/MCH15-16.

79. The impugned order dated 17.03.2017 took the following view on the captioned subject:

> *"20. … Therefore, levy of clean energy cess on coal is admissible as a change in law event under Article 13 of the PPA. Further, we find force in the submissions of the petitioner that it is liable to be compensated for the additional expenditure incurred due to levy of clean energy cess, since it was not payable at the time of bid deadline. Accordingly, the petitioner is entitled to recover the additional generating cost on account of clean energy cess from the Procurers as per applicable rate of clean energy cess in proportion to the coal consumed for generation and supply of electricity to the procurers. The respondents are directed to compensate the petitioner for the cost incurred at different points of time in accordance with the applicable rates of the Clean Energy Cess at that point of time. MSEDCL has submitted that the clean energy cess imposed by the Government of India is Rs. 50/- per ton of imported coal and not Rupees 51.50 per ton of imported coal. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to procurers. It is clarified that the petitioner shall be entitled to recover clean energy cess on coal in proportion to the actual coal consumed in accordance with the parameters as decided by the Commission in Para 82 (d) of the order dated 6.12.2015 in Petition No. 159/MP/2012 corresponding to the scheduled generation for supply of electricity to the procurers. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of clean energy cess on*

*coal. The petitioner and the procurers are directed to carry out reconciliation on account of these claims annually."*

(emphasis supplied)

80. The appellant is aggrieved and submits that its claim has not been properly understood or addressed. It is the averment that though by the Impugned Order, the CERC has held that levy of Clean Energy Cess is a CIL event but it has failed to return proper findings regarding the rate at which the appellant (CGPL) is entitled to recover the amounts paid under Clean Energy Cess.

81. The claim of the appellant is premised on the following which qualify as restitutable CIL:

(a) Clean Energy Cess is a statutory levy introduced by Section 82 of the Finance Act 2010 and levied at the rate of Rs. 100 on purchase of Coal, Lignite and Peat in terms of Tenth Schedule to Finance Act, 2010;

(b) Ministry of Finance, Department of Revenue (Tax Research Unit) by its Notification No. 354/72/2010-TRU dated 24.06.2010 reduced the rate of Clean Energy Cess from Rs. 100 to Rs. 50 per ton. As per the said Notification, Clean Energy Cess is being levied as a duty of excise and, therefore, it is also made applicable to imported coal by virtue of Section 3(1) of the Customs Tariff Act, 1975 in the form of additional duty on

customs. Consequently, CGPL was liable to pay Education Cess @ 2% and Secondary & Higher Secondary Cess @ 1% on the amount of Clean Energy Cess payable by it;

(c) On 10.08.2004, Ministry of Finance, Department of Revenue, issued a circular stipulating that Educational Cess is chargeable on all the duties which are both levied and collected by the Department of Revenue;

(d) On 07.01.2014, the Department of Revenue, Ministry of Finance, has clarified that Educational Cess and Secondary and Higher Educational Cess will not be applied to duties or cesses which are merely collected by the Department of Revenue but are not administered by them. As such, Educational Cess and Secondary and Higher Educational Cess is payable on the duties or cesses which are being administered and collected by the Department of Revenue;

(e) CGPL had received a letter dated 19.06.2015 issued by the Office of the Principal Commissioner of Customs, (reference no. F.No. VIII/48-241/Cess/ Gr.1/MCH/15-16) directing CGPL to deposit the Educational Cess and Secondary and Higher Educational Cess on Clean Energy Cess;

(f) CGPL has paid Clean Energy Cess at the rate of Rs. 51.50 / Ton (including Educational Cess of 2% and Secondary and Higher

Education Cess of 1%).

82. On basis of the above facts, the appellant claims that it is entitled to compensation for Clean Energy Cess at the rate of Rs. 51.50 / ton (including Educational Cess of 2% and Secondary and Higher Education Cess of 1%).

83. It is submitted by the respondents that in the case of the generating station of the appellant, the claim is related to imported coal and the matter has to be considered in light of applicability of exemption, if any, from higher education and education cess on the clean energy cess imported coal. It is submitted that some of the Procurers have been paying the clean energy cess as per the invoices raised by the appellant which is inclusive of higher education and education cess and in case it is held that higher education and education cess is not applicable, the appellant would be liable to refund of the amount by adjusting all such amounts collected against the bills.

84. It appears that MSEDCL has been resisting the payment of requisite amount under this head on the contention that the appellant CGPL has not furnished the necessary documentary evidence in support also adding that if the documents are provided by CGPL, then subject to a prudence check, payments shall be made by MSEDCL. The position taken is not proper. From the

record, we do not have the least doubt that all the necessary documents as mandated by the CERC while making its claim for Clean Energy Cess were made available, the other Procurers not having put in any such contest. There is no reason why MSEDCL should be allowed to avoid the responsibility on this score.

85. The respondents have not shown any material as could indicate possibility of exemption from such cess. Since there is no doubt that such levy has been imposed after the cut-off date, by virtue of change in law, the impact of entire actual additional burden has to be off-set by compensation under Article 13 of the PPA. We modify the impugned order accordingly.

*SWACHH BHARAT & KRISHI KALYAN CESSES - SERVICES AVAILED (Appeal no. 154/2018)*

86. The levy called *Swachh Bharat Cess* was introduced and enforced in terms of Section 119 (2) and (3) of the Finance Act, 2015 which, to the extent relevant, may be extracted as under:

> *" (2). There shall be levied and collected in accordance with the provisions of this Chapter, a cess to be called the Swachh Bharat Cess, as service tax on all or any of the taxable services at the rate of two per cent, on the value of such services for the purposes of financing and promoting Swachh Bharat initiatives or for any other purpose relating thereto.*

*(3). The Swachh Bharat Cess leviable under sub-Section (2) shall be in addition to any cess or service tax leviable o such taxable services under Chapter V of the Finance Act, 1994, or under any other law for the time being in force."*

87. Similarly, *Krishi Kalyan Cess* was levied by authority given by Parliament by Section 161 of Finance Act, 2016 reading, to the extent relevant, thus:

*"(2). There shall be levied and collected in accordance with the provisions of this Chapter, a cess to be called the Krishi Kalyan Cess, as service tax on all or any of the taxable services at the rate of 0.5 per cent, on the value of such services for the purposes of financing and promoting initiatives to improve agriculture or for any other purpose relating thereto.*

*(3). The Krishi Kalyan Cess leviable under sub-Section (2) shall be in addition to any cess or service tax leviable o such taxable services under Chapter V of the Finance Act, 1994, or under any other law for the time being in force."*

88. The order relevant to the captioned subject was rendered by CERC on 21.02.2018. The Commission articulated its views thus:

*"B. Swachh Bharat Cess*

*….*

*33. We have considered the submissions of the Petitioner and Respondents. Swachh Bharat Cess has been imposed by an Act of Parliament on the taxable services at the rate of 0.5%. Section 119 (2) and (3) of the Finance Act, 2015 …*

*Therefore, Swachh Bharat Cess @ 2% is a service tax leviable on taxable service and has been introduced through the Act of Parliament and hence is covered under change in law. The Commission has already allowed Swachh Bharat*

*Cess as change in law events vide order dated 1.2.2017 in Petition No. 8/MP/2014, order dated 6.2.2017 in Petition No. 156/MP/2014 and order dated 7.4.2017 in Petition No. 112/MP/2015. The Commission had directed the Petitioner to submit the taxable service on which Swachh Bharat Cess has been levied. The Petitioner has given list of 24 taxable services as extracted in Para 32 of this order. We have examined the taxable service and find that only 4 services at Sr. No. 1, 18, 21 and 23 are directly related to the input cost for generation and sale of power by the Petitioner to the procurer. Accordingly, Swachh Bharat Cess at the rate of 0.5% is allowed on the following services:-*

*(a) Transportation of goods by a vessel from a place outside India to the first customs landing station in India- Ocean Freight on coal received at Mundra.*

*(b) Port Service- Fixed Port Handling charges and Permission Charges on usage of intake channel.*

*(c) Technical Testing & Analysis Agency- Coal analysis charges and coal stock yard sampling & analysis and Drinking Water sampling and analysis.*

*(d) Transport of goods by road- Hiring utility vehicle for material transportation and transportation charges on LDO, various equipment sent for repairing.*

*The Petitioner shall submit the Audited Certificate as regard to actual payment of Swachh Bharat Cess to the Procurers while claiming the same under Change in Law.*

*C. Krishi Kalyan Cess*

*….*

*39. We have considered the submissions of the Petitioner and Respondents. Krishi Kalyan Cess has been imposed by an Act of Parliament on the taxable services at the rate of 0.5%. Section 161 (2) and (3) of the Finance Act, 2016 …*

*Therefore, Krishi Kalyan Cess @ 0.5% is a service tax on taxable service and has been introduced through an Act of Parliament and is therefore covered under change in law. The Commission has already allowed Krishi Kalyan Cess as change in law events vide order dated 1.2.2017 in Petition No. 8/MP/2014, order dated 6.2.2017 in Petition No.*

*156/MP/2014 and order dated 7.4.2017 in Petition No. 112/MP/2015. The Commission had directed the Petitioner to submit the taxable service on which Krishi Kalyan Cess has been levied. The Petitioner has given list of 24 taxable services as extracted in Para 32 of this order. We have examined the taxable service and find that only 4 services at Sr. No. 1, 18, 21 and 23 are directly related to the input cost for generation and sale of power by the Petitioner to the procurer. Accordingly, Krishi Kalyan Cess at the rate of 0.5% is allowed on the following services:-*

*(a) Transportation of goods by a vessel from a place outside India to the first customs landing station in India- Ocean Freight on coal received at Mundra.*

*(b) Port Service- Fixed Port Handling charges and Permission Charges on usage of intake channel.*

*(c) Technical Testing & Analysis Agency- Coal analysis charges and coal stock yard sampling & analysis and Drinking Water sampling and analysis.*

*(d) Transport of goods by road- Hiring utility vehicle for material transportation and transportation charges on LDO, various equipment sent for repairing.*

*The Petitioner shall submit the Audited Certificate as regard to actual payment of Krishi Kalyan Cess to the Procurers while claiming the same under Change in Law. ..."*

(emphasis supplied)

89. It is vivid from above that the CERC has restricted the recompense on account of levy of *Swachh Bharat Cess* and *Krishi Kalyan Cess* in favour of the appellant as CIL events on four out of the twenty-four taxable services claimed to have been availed by it (CGPL), they being (i) Transportation of goods by a vessel from a place outside India to the first customs landing station in India; (ii) Port services; (iii) Technical Testing & Analysis Agency; and (iv)

Transport of goods by road. The claim on the remaining twenty taxable services availed by CGPL for generation and sale of electricity has been disallowed holding that the impact of *Swachh Bharat Cess* and *Krishi Kalyan Cess* can be allowed only on services which have a "*direct*" impact on the cost of generation of electricity. The twenty sub-heads of this claim which have been disallowed for CIL relief are: (i) Air Travel Agent – Services on Air Ticket booking; (ii) Banking and other financial services; (iii) Business – Auxiliary services (AC maintenance, AMC of Civil Works Plant area, etc); (iv) Business Support Service (Housekeeping and O&M services); (v) Cost Accountant; (vi) Courier Services; (vii) Credit Rating Agency; (viii) Dredging Services; (ix) Erection, Commissioning or installation; (x) General Insurance; (xi) Legal Consultancy Services; (xii) Government Services; (xiii) Management Consultancy – Director; (xiv) Management Consultant (Expert services for U50 overhaul, CEP & Booster, EDS analysis, TRA fees); (xv) Manpower Recruitment Agency or Supply; (xvi) Medical Services; (xvii) Rent-a-cab operator; (xviii) Renting of immovable property; (xix) Telecommunication services; and (xx) Transport of passengers by Air (standby charge for air ambulance provider for Mundra UMPP employees).

90. The respondents defend the impugned decision arguing that

the Commission has duly allowed the claim of change in law in respect of the levy of *Swatch Bharat Cess* and *Krishi Kalyan Cess* in respect of such services as are linked to the business of generation and sale of electricity, such relief being not admissible in respect of other services since under Articles 13.1.1 and Article 13.2(b) read with Clause 4.7 of the Guidelines any change in law impact is confined to change in revenues and costs from the business of selling electricity by the Seller to the Procurers. Reference is made to the judgment dated 19.04.2017 of this tribunal in Appeal No. 161 of 2015 in *Sasan Power Limited v. Central Electricity Regulatory Commission and Others*. The respondents submit that there may be various activities carried out by the appellant as a commercial decision but which are neither necessary nor concerned with the business of selling electricity. It is argued that the appellant had failed to demonstrate as to how the other services claimed have an impact on the cost of or revenue from the business of selling electricity by it to the Procurers. At the same time, it is stated that the services claimed by CGPL, except in relation to transportation of goods (coal), are not related to the business of selling electricity. The submission also is that there has to be some benefit to the procurers or necessity for such services. The respondents further aver that the operation and maintenance of the

power plant is the responsibility of Appellant and the fact that the appellant chose to employ services of other agencies cannot increase the liability of the Procurers.

91. It is not disputed that the appellant (CGPL) is a project specific *Special Purpose Vehicle* (SPV) set up solely for the purpose of generating and supplying electricity exclusively to the Procurers in accordance with the PPA. It engages in no other business undertaking. All services availed by CGPL are undoubtedly used for its sole objective of generating electricity for supply to the Procurers under the PPA. The increased cost towards *Krishi Kalyan Cess* and *Swachh Bharat Cess* affects the cost of the business of the appellant for generation and sale of electricity. The twenty services left out by CERC also are connected to the commercial activities of the appellant adding to its cost of production and supply. In this view, there was no justification for disallowance of the claim for additional financial burden on other services covered under *Swachh Bharat Cess* and *Krishi Kalyan Cess* contrary to Article 13 of the PPA.

92. We agree with the submission that CERC erred to introduce an extraneous qualification or filter which is not borne out from the PPA. The qualifying factor under Article 13 of the PPA is whether or not a CIL event has an impact on the cost of, or revenue from, the business of generation and sale of electricity by the seller (CGPL).

In this view, the test applied by CERC that taxable service should have a "*direct relation to the input cost of generation*" is extraneous to the provisions of the PPA and must be rejected. It is trite that explicit terms of a contract (PPA) bind and it is not open for the adjudicating forums to substitute their own view on the presumed understanding of the commercial terms by the parties [*Nabha Power Limited* v. *PSPCL & Anr.* (2018) 11 SCC 508]. Once it is established that levy of a tax on services availed by CGPL has an impact on the cost of or revenue from business of generation and sale of electricity - whether directly or indirectly - compensation must follow.

93. We are not impressed with the plea of the respondents that the qualifying requirement under Article 13 is that the Change in Law event must have an impact on the cost of, or revenue from, the activity of generation of electricity. This argument is based on selective reading of the text of the clause. The contract (PPA), by Article 13, refers to the "*business of selling electricity*". The compensation envisaged here cannot be restricted to the activity of "*generating electricity*". The expression "*business*" has a very wide connotation. It is defined as *an activity carried on continuously and systematically by a person by the application of his labour or skill with a view to earning an income* [see Mitra's Legal & Commercial Dictionary (Sixth Edition)]. Entire gamut of activities connected to

the generation, wheeling etc of electricity will have to be treated as covered by the expression "*business of supply of electricity*".

94. The expression "Supply of electricity" has to be interpreted to mean all activities that are required to be undertaken by a generating company for the purpose of generation and supply of electricity to the Procurers. Levy of any taxes or duties or cess on the said services tantamount to a tax implication on the supply of electricity by CGPL to the Procurers. Accordingly, it ought to have been allowed as a CIL event in terms of Article 13 of the PPA.

95. For foregoing reasons, we allow relief for CIL qua *Swachh Bharat Cess* and *Krishi Kalyan Cess* on all the twenty-four taxable services availed by CGPL during FY 2014-15 to FY 2016-17.

*COAL-BASED LEVIES – LIMITING TO NORMATIVES (Appeal nos. 172/2017 & 154/2018)*

96. This issue plagues periods covered by both appeals. It will be proper to first note as to how the CERC has considered it by different orders that are impugned here.

97. The captioned subject was considered and dealt with by the Commission by the impugned order dated 17.03.2017 (for FY 2012-15) as under:

*"20. ….Therefore, levy of clean energy cess on coal is admissible as a change in law event under Article 13 of the PPA. Further, we find force in the submissions of the petitioner that it is liable to be compensated for the additional expenditure incurred due to levy of clean energy cess, since it was not payable at the time of bid deadline. Accordingly, the petitioner is entitled to recover the additional generating cost on account of clean energy cess from the Procurers as per applicable rate of clean energy cess in proportion to the coal consumed for generation and supply of electricity to the procurers. The respondents are directed to compensate the petitioner for the cost incurred at different points of time in accordance with the applicable rates of the Clean Energy Cess at that point of time. MSEDCL has submitted that the clean energy cess imposed by the Government of India is Rs. 50/- per ton of imported coal and not Rupees 51.50 per ton of imported coal. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to procurers. It is clarified that the petitioner shall be entitled to recover clean energy cess on coal in proportion to the actual coal consumed in accordance with the parameters as decided by the Commission in Para 82 (d) of the order dated 6.12.2015 in Petition No. 159/MP/2012 corresponding to the scheduled generation for supply of electricity to the procurers. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of clean energy cess on coal. The petitioner. and the procurers are directed to carry out reconciliation on account of these claims annually.*

*…..*

*27. The Petitioner is directed to furnish along with its monthly bill, the proof of payment of duty and computations duly certified by the auditor to the procurers. The Petitioner shall be entitled to recover custom duty and CVD on imported coal in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to the Procurers. If actual generation is less than the scheduled generation, the coal consumed in accordance with the parameters as decided by the Commission in Para 82 (d) of the order dated 6.12.2016 in Petition No.159/MP/2012 for actual generation shall be considered*

*for the purpose of computation of impact of custom duty and CVD on coal. The Petitioner and the procurers are directed to carry out reconciliation on account of these claims annually.*

*….*

*55…..*

*(b) The increase in clean energy cess, customs duty, excise duty on coal, Central Sales tax and service tax shall be computed based on actual payment subject to ceiling of coal consumed corresponding to scheduled generation and shall be payable by the beneficiaries pro-rata based on their respective share in the scheduled generation. In case of reduction of clean energy cess, custom duty, sale tax and excise duty on coal, the Petitioner shall compensate the procurers on the basis of above principle."*

(emphasis supplied)

98. The impugned Order dated 31.10.2017 brought about some correction recording as under:

*"17. Accordingly, the Petitioner has pointed out that the order dated 6.12.2015 mentioned in the above para is 6.12.2016 and not 6.12.2015. It has also submitted that the reference to para 82(d) is also erroneous and that the reference should be to all bid parameters as considered in Para 84 of the order dated 6.12.2016.*

*18. We have examined the matter. It is observed that certain clerical errors as pointed above by the Petitioner had crept in the order dated 17.3.2017 and the same is required to be corrected by this order. Accordingly, the review on this ground is allowed and the para 20 of the order dated 17.3.2017 stands corrected as under:*

***"**(a) The order dated 6.12.2015 is corrected as '6.12.2016'.*

*(b) The sentence, "the parameters as decided by the Commission in Para 82(d) of the of the order dated 6.12.2016 in Petition No. 159/MP/2012" is corrected as "the parameters as decided by the Commission in Para*

*84 of the of the order dated 6.12.2016 in Petition No. 159/MP/2012.."*

*19. The respondent, CGPL has submitted that the issue of computation of impact of change in law with respect to levies is pending adjudication before the Hon'ble Appellate Tribunal for Electricity (Tribunal) and therefore this Commission ought not to consider it in the present Review Petition. It is noticed that the respondent CGPL has filed Appeal No. 172/2017 before the Tribunal challenging the order dated 17.3.2017 on change in law events which have not been allowed by the Commission in the said order. Moreover, the issue of Service Tax on Works Contract Service is not a matter pending before the Tribunal. Even otherwise, the pendency of the appeal filed by the respondent, CGPL do not bar the consideration of the issues raised in the review Petition filed by the Petitioner, GUVNL. Accordingly, the submissions of the respondent are rejected."*

(emphasis supplied)

99. By order dated 21.02.2018, CERC rejected the claim of appellant on captioned subject, for the period of FY 2015-17, setting out reasons as under:

*"….*

*27. It is clarified that the Petitioner shall be entitled to recover on account of service tax on transportation of goods by a vessel from a place outside India to the first Customs Station of landing in India required in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to the Procurers. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of service tax on transportation of goods by a vessel from a place outside India to the first Customs Station of landing in India. The Petitioner and Procurers are directed to carry out reconciliation on account of these claims annually.*

*….*

*50. …..*

*(b) The increase in Service Tax on transportation of goods by a vessel from a place outside India to the first custom station of landing in India shall be computed based on actual payment subject to ceiling of coal consumed corresponding to scheduled generation and shall be payable by the beneficiaries pro-rata based on their respective share in the scheduled generation. In case of reduction of Service Tax on transportation of goods by a vessel from a place outside India, the Petitioner shall compensate the procurers on the basis of above principle. If actual generation is less than scheduled generation then compensation payable shall be computed based on actual payment subject to ceiling of coal consumed corresponding to actual generation. ...”*

(emphasis supplied)

100. It is submitted by the appellant that during the pendency of the present appeals challenging the above quoted order, the Procurers of Punjab, Haryana, Gujarat and Rajasthan filed an Application (I.A. No.71/2018 in Petition No. 121/MP/2017) before CERC, seeking a clarification of the impugned order that quantum of coal in relation to compensation for CIL incidences related to coal ought to be calculated as per normative bid parameters and not actuals. By its Order dated 03.09.2019 (quoted hereinafter), the CERC allowed the Clarification Application filed by the said set of Procurers (of Punjab, Haryana, Gujarat and Rajasthan) to modify the Impugned Order by holding that quantum of coal in relation to compensation for CIL incidences related to coal ought to be calculated as per normative

bid parameters as held by the CERC in the Impugned Order dated 17.03.2017 read with Review Order dated 31.10.2017. The Order dated 03.09.2019, to the extent relevant here, may be extracted as under:

> *"17. The Commission in its order dated 17.3.2017 in Petition Nos. 157/MP/2015 read with order dated 31.10.2017 in Petition No. 22/RP/2017 allowed CGPL to recover claims of change in law in proportion to the actual coal consumed in accordance with the parameters as decided by the Commission in Para 84 of the order dated 6.12.2016 in Petition No. 159/MP/2012 corresponding to scheduled generation. However, in the order dated 21.2.2018 in the Petition No. 121/MP/2017 the Commission allowed CGPL to recover claims of change in law in proportion to the actual coal consumed corresponding to the scheduled generation. We note that the latter order (dated 21.2.2018 in Petition No. 121/MP/2017) is silent as regards the parameters while the earlier order (dated 17.3.2017 in Petition Nos. 157/MP/2015 read with order dated 31.10.2017 in Petition No. 22/RP/2017) states that the actual coal consumed (corresponding to scheduled generation) has to be as per parameters decided by the Commission in another order of CGPL dated 159/MP/2012 dated 6.12.2016. Thus, there appears to be an aberration in the methodology decided by the Commission for computing the impact of Change in Law with respect to the quantum of coal.*
>
> *18. We find a force in the submissions of the Applicants and are of the view that there is need for clarification as regards the parameters based on which the calculations for change in law claims have to be done.*
>
> *19. The Applicants have relied upon various orders of this Commission to submit that the Commission has allowed the quantum of coal based on the normative parameters only in case of other generators as well. On other hand, CGPL has relied upon certain other orders of this Commission and judgment of APTEL to submit that the compensation for Change in Law is to be computed on the actual consumption and not on normative parameters. We have perused the*

*orders/ judgments relied upon by the parties. In some recent orders, the Commission has relied upon parameters as laid down in the Tariff Regulations of the Commission. On the other hand, the Commission had specified parameters for computation of quantum of coal for the Change in Law events for CGPL in its earlier order dated 17.3.2017 in Petition No. 157/MP/2015 read with order dated 31.10.2017 in Petition No. 22/RP/2017. In our view, the parameters specified in the earlier order dated 17.3.2017 in Petition No. 157/MP/2015 read with order dated 31.10.2017 in Petition No. 22/RP/2017 needs to be adopted with respect to Change in Law claims allowed in order dated 21.2.2018 in Petition No. 121/MP/2017, petitions being of similar vintage.*

*20. CGPL has submitted that the issue of computation of impact of Change in Law as decided by the Commission in order dated 17.3.2017 read with order dated 31.10.2017 in Petition Nos. 157/MP/2015 and 22/RP/2017 respectively has been challenged before the APTEL in Appeal No. 172 of 2017, which is pending for adjudication.*

*21. Therefore, the decision in the said appeal on the aspect of computation methodology will squarely apply to the present case. Till such time APTEL delivers judgement, the methodology prescribed by the Commission vide orders dated 17.3.2017 read with order dated 31.10.2017 in Petition Nos. 157/MP/2015 and 22/RP/2017 respectively will also apply in the present case.*

*22. In view of the above, we clarify that the Petitioner shall be entitled to recover the compensation on account of Service Tax including Swachh Bharat Cess and Krishi Kalyan Cess on quantum of coal as per actual subject to ceiling based on parameters as decided by the Commission in Para 84 of the order dated 6.12.2016 in Petition No. 159/MP/2012 corresponding to the scheduled generation for supply of electricity to the Procurers. If actual generation is less than the scheduled generation, the coal consumed for actual generation based on normative parameters or actual quantum of coal consumed, whichever is lower, shall be considered for the purpose of computation of impact of change in law events."*

(emphasis supplied)

101. The appellant relies upon, and rightly so, Article 13 of the PPA and the judgments of Supreme Court in *Energy Watchdog* v. *CERC & Ors.* [(2017) 14 SCC 80] and *UHBVNL & Anr.* v. *Adani Power Limited* [(2019) 5 SCC 325] in terms of which the disallowance of compensation on account of the CIL event is erroneous and in teeth of settled principles.

102. The appellant also refers to the following observations of this tribunal in Judgment dated 12.09.2014 in *Wardha Power Company Ltd. V. Reliance Infrastructure Ltd.* (Appeal no. 288 of 2013):

> *"26. The price bid given by the Seller for fixed and variable charges both escalable and non-escalable is based on the Appellant's perception of risks and estimates of expenditure at the time of submitting the bid. The energy charge as quoted in the bid may not match with the actual energy charge corresponding to the actual landed price of fuel. The seller in its bid has also not quoted the price of coal. Therefore, it is not correct to co-relate the compensation on account of Change in Law due to change in cess/excise duty on coal, to the coal price computed from the quoted energy charges in the Financial bid and the heat rate and Gross Calorific value of Coal given in the bidding documents by the bidder for the purpose of establishing the coal requirement. The coal price so calculated will not be equal to the actual price of coal and therefore, compensation for Change in Law computed on such price of coal will not restore the economic position of the Seller to the same level as if such Change in Law has not occurred.*
>
> *27. For example, if the price of coal calculated on the same base as used in the bid is more than the prevalent price of coal, then using the base price of coal for computing the compensation for Change in Law will result in over compensation to the Seller. Similarly, if the coal price calculated on the same base as used in bid is less than the*

*actual price of coal, it will result in under compensation to the Seller. In both these cases, the affected party will not be restored to the same economic position as if such Change in Law has not occurred, as intended in the PPA."*

(emphasis supplied)

103. The above ruling was based on conclusion that compensation for CIL on the basis of normative bid parameters does not restitute the affected party to the same economic position as if the CIL had not occurred and, therefore, the compensation for CIL has to be on actuals.

104. The aforesaid principle has been followed and reiterated in the recent Judgment dated 14.09.2020 in the matter of *Adani Power Maharshtra Ltd. V. MSEDCL* (Appeal no. 182 of 2019) thus:

*"7.4 The Appellant has pointed out that the MERC has already held in its order dated 07.03.2018 in Case No.123 of 2017 that auxiliary consumption has to be considered as lower of actual or MYT norms for the purpose of change in law compensation. We are of the view that the Commission should have followed the same approach for SHR also in the instant case. We find no reason for the MERC to apply two different principles for Auxiliary Consumption and SHR, when both are operational parameters and the Commission was dealing with the same PPA in both cases.*

*7.5 The Appellant has also relied upon this Tribunal's judgment in Wardha Power Industries Ltd. vs. Reliance Infrastructure Ltd. (Appeal No. 288 of 2013). In that case, the Tribunal came to the following conclusions:*

*…..*

*In Wardha case, this Tribunal came to the conclusion that it was not correct to consider the SHR and GCV of coal given in the bid documents to establish the coal requirement and*

*then determine the Change in Law compensation since the same may result in over-compensation or under-compensation to the seller/generating company. The Appellant has pointed out that Wardha Power's bid was also under Case 1 and the PPA provisions are same as that of APML's PPAs with MSEDCL and based on a similar format of the RfP as floated by MSEDCL for procurement of power in the instant case. We are not in agreement with MSEDCL's contention that the Wardha Power Judgment is distinguishable on facts. The principle decided in Wardha case squarely applies to the instant case also since in that case too, this Tribunal was considering the relief for Change in Law under a similar Case-1 bid PPA. MSEDCL has attempted to distinguish this decision on the ground that the said decision proceeds on the basis that seller in its bid had not quoted price of coal and the price of coal had been computed by backward calculation. However, such intention is not correct since the Tribunal specifically ruled that it would not be proper to use the SHR or GCV given in the bid to establish the coal requirement and it is exactly that the same issue which arises in the instant case.*

*7.6 We have also seen that the judgment of this Tribunal in Wardha Power was relied upon by the CERC in its order in GMR Warora Energy Limited v. MSEDCL (Petition No. 88/MP/2018) wherein the current Respondent No. 2 was a party. The CERC came to the following conclusion:*

*…..*

*7.8 The CERC's findings in GMR Warora case (88/MP/2018) has already been accepted by this Tribunal in Sasan Power case. Moreover, this Tribunal has reiterated the principle that change in law compensation for shortfall in supply of domestic coal has to be determined by reference to the operating parameters specified in the relevant tariff regulations…..*

*….*

*7.14 From the aforesaid discussion, it emerges that this Tribunal has already held that the SHR submitted in the bid (when it is not a bid parameter as per the bidding guidelines) by a generating company is not to be used as the basis for computing the coal shortfall requirement and thereby for*

*computation of change in law compensation to be awarded to the generating company. Such linking of change in law compensation to the SHR mentioned in the bid documents would not restitute the affected party to the same economic position as if the approved change in law event had not occurred. This issue is therefore decided in favour of the Appellant and the Respondent No. 2 is directed to allow change in law compensation on the basis of the SHR specified in the MERC MYT Regulations, 2011 or the actual SHR achieved by the Appellant, whichever is lower. This would sufficiently protect the interests of the consumers against any plant inefficiency being passed on to the Discoms or the consumers…..*

*….*

*8.6 From the judgments cited above, it is clear that this Tribunal as well as the CERC has consistently taken the view that the reference GCV for the purposes of change in law compensation shall be the actual GCV. We also note that the GCV specified in the tariff regulations is also the actual GCV on as received basis. MERC has not provided any reasoning or explanation as to why it considered the application of middle range of assured grade of linkage coal as the appropriate reference for computing the quantum of shortfall coal. It is a fact that there is no guidance in the PPAs or in the Bidding Guidelines as to the reference GCV that should be applied in case of change in law claims in Case 1 bid projects where SHR or GCV is not a bid parameter. However, the overarching principle for change in law compensation is that the generating company should not be left in a worse economic position. As stated above, in Wardha Power judgment (supra), this Tribunal has already rejected the reverse computation of coal price from the quoted energy charge in the bid since the coal price so calculated will not be equal to the actual price of coal and therefore, compensation for Change in Law computed on such price of coal will not restore the economic position of the Seller to the same level as if such Change in Law has not occurred. Therefore, the GCV as received shall be the appropriate basis to assess the quantum of shortfall in domestic coal and calculate the Change in law compensation accordingly."*

(emphasis supplied)

105. In effect, the CERC has held that to compute impact of CIL qua Clean Energy Cess, Change in Basic Customs Duty and Countervailing Duty (i.e. coal based levies), the quantum of coal consumed by CGPL (for generating electricity) must be based on normative parameters. This finding, we agree, negates Article 13 and as also is violative of the principles laid down in *Energy Watchdog* v. *CERC & Ors.* (supra) and *UHBVNL & Anr.* v. *Adani Power Limited* (supra).

106. As ruled in *UHBVNL & Anr. v. Adani Power Ltd.* (supra), the PPA, by Article 13, envisages restitution of the affected party on actuals to the same economic position as if such CIL events had not occurred. The principle contemplated under Article 13.2 of the PPA is to grant relief to mitigate the actual loss suffered by the affected party. Neither the PPA nor the bid documents contemplate discretion to vest in the Commission to limit relief to normative parameters. There was no justification for the CERC to reduce the relief for CIL, especially when the differential amount (i.e. amount spent by CGPL vis-à-vis the amount calculated after computing the quantum of coal in terms of the normative parameters) had already been incurred by CGPL and had been duly audited. If the relief for CIL to be granted is computed on the basis of normative parameters (and not on actual impact), the appellant CGPL would stand

penalised by lower relief, for no fault on its part.

107. The approach of CERC linking the computation of quantum of coal to its Order dated 06.12.2016 is erroneous. The said Order dated 06.12.2016 was passed by it (CERC) in the Compensatory Tariff remand proceedings, wherein the scope of relief to be granted to the appellant (CGPL) was confined to *Force Majeure* (under Article 12). In contrast, the relief of restitution on the basis of actuals is permitted in case of CIL (under Article 13). The CERC could not have arbitrarily reduced the quantum of relief to be granted to the affected party being aware of the ruling in *Energy Watchdog* (supra).

*108.* It is well conceded by the appellant that additional expenses incurred by a Seller due to a CIL event are allowed only after a prudence check. This (prudence check) does not automatically imply that the costs incurred by a Seller are not to be allowed as per actuals. If the costs incurred by the Seller have been prudently incurred, the same must be allowed on actuals. No facts showing imprudence in such additional expenditure have been found by CERC. In this view, the rejection of the claim of the appellant for compensation on actual consumption of coal is without any justification.

109. In view of the settled law on the subject, it is held that CERC has fallen in grave error by declining to undertake the computation

of coal for determining the CIL compensation based on actual coal consumed by CGPL. Such compensation cannot be restricted to normative bid parameters as held by CERC. The Commission must bring about suitable correction and is directed to do so accordingly.

*GUJARAT VAT ON FUEL OIL – LIMITING TO NORMATIVES (Appeal no. 172/2017)*

110. This issue, confined to the period of first appeal, has a flavour similar to the issue discussed just above.

111. By the impugned order dated 17.03.2017, the CERC had considered and decided on the captioned issue as under:

> *"38. We have considered the submissions of the petitioner and MSEDCL. The Commission vide order dated 30.3.2015 in Petition No. 6/MP/2013 did not allow the increase in VAT. Relevant portion of the said order is extracted as under:*
>
> > *"49. We have considered the submissions made by the petitioner and the respondents. Government of India, Ministry of Finance Notification dated 17.3.2012 notifying the change in excise duty, Notification dated 30.5.2008 notifying the change in rate of Central Sales Tax and Madhya Pradesh VAT (Amendment) Act, 2010 notifying the changes in VAT rates are not covered under "Change in Law". The quoted tariff according to provisions of Para 2.7.1.4.3 of the RFP shall be an inclusive one including statutory taxes, duties and levies. Therefore, the petitioner was expected to take into account all cost including capital cost and operating cost, statutory taxes, duties levies while quoting tariff in*

*the bid. Therefore, the "Change in Law" in this respect is not admissible."*

*39. In the light of the decision as quoted above, the claim of the petitioner for reimbursement of the impact on account of revision in Gujarat VAT rate under change in law is not admissible and is accordingly disallowed. The decision of the Commission disallowing claim of the Petitioner for reimbursement of VAT has been challenged by Sasan Power Ltd. in the Appellate Tribunal for Electricity in Appeal No. 161 of 2015. Our decision in Para 38 above shall be subject to the final outcome of the appeal on this point."*

(emphasis supplied)

112. After decision had been rendered by this tribunal in Appeal no, 161 of 2015, the above order came up for reconsideration (in I.A. No. 26/2017) and the CERC passed order on 29.01.2018 as under:

*"….*

*6. We have considered the submissions of the Applicant and MSEDCL. The Applicant had approached the Commission under Article 13 of the PPA dated 22.4.2007 for compensation on account of the additional expenditure incurred due to Change in Law events during the operating period which included increase in Gujarat VAT. The Commission, after considering the submissions of the parties, vide order dated 17.3.2017 in Petition No. 157/MP/2015 rejected the Applicant`s claim as under….*

*…..*

*7. Subsequently, the Appellate Tribunal vide its judgment dated 19.4.2017 in Appeal No. 161 of 2015 (Sasan Power Limited Vs. CERC & others) has held that change in rate of VAT is allowed as Change in Law in terms of the provisions of the PPA. Relevant portion of the said judgment is extracted as under….*

*….*

*8. The PPAs in case of Sasan Power Ltd. and CGPL are based on the Standard Bidding Documents for UMPP*

*notified by the Ministry of Power, Govt. of India under Section 63 of the Act. Once the VAT is allowed under Change in Law in case of Sasan Power Ltd., the same cannot be denied in case of the Applicant. It is further pertinent to mention that the Commission had also in its order dated 7.4.2017 in Petition No.112/MP/2015 [GMR Kamalanga Energy Limited Vs. Bihar State (Holding) Company Limited and others] and order dated 1.2.2017 in Petition No. 8/MP/2014 [Emco Energy Limited/GMR Warora Energy Limited Vs. Maharashtra State Electricity Distribution Limited and others] allowed change in the rate of VAT under Change in Law. Therefore, change in rate of Gujarat VAT is allowable under Change in Law in terms of the PPA.*

*9. The Petitioner has submitted that at the time of bidding, Gujarat VAT payable on fuel oil, plant, machinery and spares was 4% or 12.50% depending on the category in which the consumables fall into under the Gujarat Value Added Tax. However, Government of Gujarat in the year 2008 amended the Gujarat Value Added Tax Act, 2003 and increased the rate of value added tax on fuel oil, plant and machinery and spares to 5% or 15% respectively. Since, increase in the rate of VAT is pursuant to the amendments of Gujarat Value Added Tax (Amendment) Act, 2008 by the Government of Gujarat, the same (difference between the new and old rates) qualifies as Change in Law event. The Applicant is directed to furnish the proof of actual payment of Gujarat VAT duly certified by the Statutory Auditor to the Procurers while claiming the compensation under Change in Law. It is clarified that the Applicant shall be entitled to recover actual Gujarat VAT (differential) paid in case of consumables and spares of plant and machineries which are used for generation and supply of power to the Procurers during operation period. In case of fuel oil, the relief shall be admissible proportionate to the scheduled generation or actual generation, whichever is lower at bid parameter or actual, whichever is lower, for supply of electricity to the Procurers."*

(emphasis supplied)

113. Thus, even while granting relief of compensation on account

of levy of Gujarat VAT, following the ruling of this tribunal in case of *Sasan*, CERC declined the full relief to the appellant, restricting it to normative bid parameters and not as per actuals, just like in case of coal based levies discussed above.

114. It needs to be recapitulated that the CERC had disallowed increase in rate of Gujarat VAT as an incidence of CIL to the appellant (CGPL), holding it to be subject to the final outcome of Appeal No. 161 of 2015 (*Sasan Power Limited* v. *CERC & Ors.*) then pending before this tribunal. On 19.04.2017, decision was rendered in the said appeal the claim of appellant having been allowed as change in rate of VAT was construed as an incidence of CIL. It was pursuant to the said judgment that the appellant filed application before CERC (I.A. No. 26/2017 in Petition No. 157/MP/2015) seeking modification of the Impugned Order dated 17.03.2017 to the extent that change in rate of Gujarat VAT be allowed as a CIL event. By its Order dated 29.01.2018 on said application, the CERC allowed Gujarat VAT as a CIL event but has proceeded to limit recovery of Gujarat VAT levied on fuel oil to normative bid parameters. It is pointed out by the appellant, and rightly so, that no such normative bid parameters exist as might cover the subject.

115. A procedural objection is taken by the respondents that this part of impugned order was not challenged in appeal. This is

demonstrated to be factually incorrect and so unfair submission. On 28.03.2018 the appellant had filed an application (IA No. 344/2018) placing on record the Order dated 29.01.2018 of CERC seeking liberty to make submissions on the issue of Gujarat VAT. The said request was allowed with the consent of the parties and for the reasons stated in the Application**.**

116. Unlike coal related costs (primary fuel related costs) recovered under the Energy Charges component of Tariff, fuel oil (i.e. secondary fuel) relates to the costs recovered under the Capacity Charges component of Tariff as O&M expenditure. There are no normative bid parameters for fuel oil i.e. LDO or HFO. The direction of CERC that in case of fuel oil, CGPL is entitled to recover Gujarat VAT in proportion to its scheduled generation or actual generation, as per normative bid parameter or actuals, whichever is lower, is clearly erroneous.

117. Relief for Gujarat VAT on fuel oil cannot be linked to bid assumed parameters as there are no bid assumed parameters for secondary fuel. Secondary fuel cost (i.e. cost of fuel oil) is recovered through Capacity Charges and not Energy Charges. It is not correct to argue that there has to be some ceiling for coal computation to ensure that generators operate efficiently or, putting it conversely, that allowing computation of coal on actual parameters will result in

passing on of the inefficiencies to the Procurers. The position of law on the subject was settled by this tribunal by judgment dated 12.09.2014 in the matter of *Wardha Power Company Limited* v. *Reliance Infrastructure Limited & Ors.* (Appeal no. 288 of 2013) and reiterated in judgment dated 14.09.2020 in *Adani Power Maharashtra Limited* v. *MSEDCL & Ors.* (Appeal no. 182 of 2019), holding that linking computation of coal to bid assumed parameters is incorrect since these numbers are based on the perception of the generator as to the risks and estimates of expenditure at the time of bid submissions and it will not be reflective of actual energy charge corresponding to actual landed price of fuel and consequently not restitute the seller to the same level as if the Change in law has not occurred.

118. It is pointed out that by its Order dated 31.08.2017 on the petition (no. 141/MP/2016) of the appellant (CGPL) for CIL during the Construction Period, the CERC has allowed Gujarat VAT as an incidence of CIL without linking it to actual or scheduled generation. There is no justification as to why a contrary approach was adopted for similar relief vis-à-vis operation period as well. We, thus, hold that for the Operation Period, Gujarat VAT on fuel oil has to be allowed as recoverable as per actuals.

119. It would be appropriate to deal with the captioned issue in context of second appeal ahead of the issue arising out of obligations imposed by environmental authorities having a similar flavour of *corporate responsibility* for larger public good so as to attempt clear the mist of confusion that seems to have prevailed due to overlap.

120. The Companies Act, 2013, by Section 135, mandates thus:

> *135. Corporate Social Responsibility— (1) Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.*
> *(2) The Board's report under sub-section (3) of section 134 shall disclose the composition of the Corporate Social Responsibility Committee.*
> *(3) The Corporate Social Responsibility Committee shall,—*
> *(a) formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII;*
> *(b) recommend the amount of expenditure to be incurred on the activities referred to in clause (a);*
> *(c) monitor the Corporate Social Responsibility Policy of the company from time to time.*
> *(4) The Board of every company referred to in sub-section (1) shall,—*
> *(a) after taking into account the recommendations made by the Corporate Social Responsibility Committee, approve the Corporate Social Responsibility Policy for the*

*company and disclose contents of such Policy in its report and also place it on the company's website, if any, in such manner as may be prescribed; and*

*(b) ensure that the activities as are included in Corporate Social Responsibility Policy of the company are undertaken by the company.*

*(5) The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy:*

*Provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities:*

*Provided further that if the company fails to spend such amount, the Board shall, in its report made under clause (o) of sub-section (3) of section 134, specify the reasons for not spending the amount.*

*Explanation.— For the purposes of this section —average net profits shall be calculated in accordance with the provisions of section 198."*

(emphasis supplied)

121. The claim for compensation of additional financial burden on ground of CIL with reference to captioned subject has been disallowed by CERC by order dated 21.02.2018 which, to the extent germane, reads thus:

*"D. Mandate of Corporate Social Responsibility*

*….*

*42. The respondents have submitted that every law cannot be considered as change in law under Article 13 of the PPA. Article 13 covers only those laws which results in any change in cost of or revenue from the business of selling electricity by the sellers to the procurers. In support of its*

*contention, the respondents have relied upon the judgment of the Appellate Tribunal dated 19.4.2017 in Appeal No 161 of 2015. The respondents have submitted that expenses incurred towards CSR activities are an application of profit and therefore, it has no relation whatsoever with the revenue or cost of the business of selling electricity and cannot be considered as change in law event under Article 13 of the PPA.*

*43. The Petitioner in its rejoinder has submitted that as per prudent accounting principles, any CSR expenditure incurred is expense (before arriving at net profits) in the books of accounts of the company. It is cost of the business and is charged to the profit and loss accounts of the company. Therefore, expenditure towards CSR activities affects the cost of business of selling electricity and is a change in law event under Article 13 of the PPA.*

*44. We have considered the submissions of the Petitioner and the respondents. Section*

*135 of the Companies Act, 2013 provides as under:*

*…*

*As per the above provision, any company with a net worth of Rupees five hundred crore or more or turnover of Rupees one thousand crore or more or net profit of Rupees five crore or more is required to constitute a Social Corporate Responsibility Committee of the Board consisting of three directors to formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII. As per sub-section (5) of Section 135 of the Companies Act, 2013, the Board of the Company shall ensure that the Company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy.*

*45. As per the above provision, the company is required to spend, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years in pursuance of its Corporate Social Responsibility Policy. The obligation under Section 135 of the Companies Act, 2013 is on the net profit*

*of the company. This obligation does not effect in any manner, the cost or revenue from the business of selling electricity.*

*46. A similar issue has been considered by the Commission in its order dated 17.2.2017 in Petition No. 16/MP/2016 where in the Commission has not considered expenditure incurred towards CSR on environment clearance under change in law. The relevant portion of the said order is extracted as under:*

> *"27….Thus corporate social responsibility also includes expenditure on ensuring environmental sustainability, ecological balance and conservation of natural resources and maintaining quality of soil, air and water. MoEF has prescribed that the CSR cost should be Rs. 5 per Tonne of Coal produced which should be adjusted as per annual inflation. As per sub-section (5) of section 135 of the Companies Act, 2013, the Board of the Company shall ensure that the Company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy. Therefore, the Corporate Social Responsibility Committee of the Petitioner`s company should consider and include the expenditure on account of condition (xxiii) of the environmental clearance in the Corporate Social Responsibility Policy of the company and meet the expenditure out of the net profits of the company. In our view, this expenditure cannot be allowed under Change in Law as the environment clearance has specifically classified as CSR cost for which provisions have been made in the Companies Act, 2013 to be met out of the net profit of the company."*

*In our view, the expenses towards CSR activities are in the nature of the fulfilment of statutory duty by the Petitioner out of the profit of the company as per the provisions of the Companies Act, 2013. If such expenses are passed on to the consumers, it would defeat the provisions of the Companies Act, 2013 as the expenditure would be met by the consumers and not by the Company out of its profit. Therefore, the claim of the Petitioner for relief under change in law on account of imposition of Mandate of Corporate Social Responsibility is not admissible and accordingly*

*disallowed."*

(emphasis supplied)

122. As is plain from the above, the claim of CSR expenditure on principles relating to CIL has been disallowed by CERC on the grounds that:

(a) The CSR obligation does not affect the cost or revenue from the business of generation and sale of electricity; and

(b) Expenses to be incurred towards CSR activities are paid out of the profits in fulfilment of a statutory duty and if such expenditure is passed on to the consumers, it would defeat the objective of the company sharing this from its profits.

123. It is argued by the appellant that CERC has failed to appreciate that, on the Cut-Off Date (i.e., 30.11.2006), there was no requirement for the appellant (CGPL) to mandatorily spend 2% of its net profit towards CSR activities. Therefore, its parent company (Tata Power) did not factor in this cash-flow related to CSR at the time of submitting its Bid. The Companies Act, 2013 was enacted (on 28.08.2013) after the cut-off Date. The relevant rules (CSR Rules) were notified on 27.02.2014. Section 135 and Schedule VII of the Companies Act were brought into force on 01.04.2014. It is

thereafter that the appellant has come under the statutory obligation to mandatorily spend a minimum of 2% of the average net profits of the company made during the three immediately preceding financial years, towards CSR.

124. As per Article 13.1.1(i) of the PPA read with the definition of Law, promulgation of a new statute or rule falls within the meaning of CIL. As noted above, the requirement of spending 2% of net profit towards CSR related activities was mandated after the Cut-Off Date, by way of promulgation of the Companies Act and CSR Rules.

125. It is the submission of the appellant that CSR expenditure incurred by a company is recognized as an expense, before arriving at net profits. CSR (which is booked as an expense) is a cost to the company and is charged to the Profit and Loss account of the company. Profit Before Tax ("PBT") is calculated after charging CSR as an expenditure to the P&L Account, whereas MAT and Income Tax are both charged to the P&L account after PBT. It is pleaded that unlike MAT and Income Tax, CSR is a cost used to arrive at the profits. Thus, it is claimed that CSR impacts the cost of generation for the appellant and sale of electricity to the Procurers.

126. The appellant argues that CSR is booked as an expense in its books of accounts and is a cost incurred by it which necessarily impacts the cost of, and revenue from, its business of generation

and sale of electricity. The argument is that it is to be treated as a CIL event impacting the cost of, or revenue from, its business of generation and sale of electricity, and consequently the Seller is required to be compensated by restitution to the same economic position as if such CIL had not occurred.

127. The argument based on accounting methods does not impress us. The accounting standards are intended primarily to provide information to the stakeholders and from that point of view it is to show the net available surplus and, in present scenario, for the generator to ascertain the costs related to generation and sale of electricity They are not relevant for determination as to whether Change in Law provision is concerned with the net profit of the corporate entity. A parallel can be drawn with liability under law on Income Tax. In *Sasan Power Limited v. Central Electricity Regulatory Commission* 2017 ELR (APTEL) 0508 it was observed as under:

> *"31. Relying on the above paragraph, it is contended that taxes on income are expenses and, therefore, any change in the tax rate results in the change in the revenue from the business of electricity and is covered under "Change in law". The CERC has rejected this contention on the ground that provisions of AS-22 are for the purpose of management of tax portfolio of a business enterprise and the methodology for accounting of tax expenses in the balance sheet of the enterprise and these provisions do not create additional liabilities on other entities who contribute towards the income of the business enterprise like the procurers. This*

*view is correct. In J.K. Industries, the Supreme Court was considering the question "Whether Accounting Standards-22 entitled 'accounting for taxes on income" insofar as it relates to deferred taxation is inconsistent with and ultra vires the provisions of the Companies Act, 1956, the Income Tax Act, 1961 and the Constitution of India." While dismissing the challenge to the constitutional validity of the Accounting Standards-22, the Supreme Court examined the meaning and purpose of Accounting Standards and inter alia held that in its origin Accounting Standards is a policy statement which establishes rates relating to recognition, measurement and disclosures thereby ensuring that all enterprises that follow them are comparable and that their financial statements are true, fair and transparent. The Supreme Court observed that accounting income is normally used as a relevant measure by most stakeholders……..*"

(emphasis supplied)

128. We are of the considered opinion that CSR under Section 135 of the Companies Act is the responsibility of the Company to be met out of the profits (2% of net profits). It has nothing to do with the cost or revenue from the business of selling electricity, it being a social obligation to be discharged from net revenue and cannot be passed on to others. Reliance is rightly placed on decisions of this tribunal in *Tata Power Company Limited (Transmission)* v. *Maharashtra Electricity Regulatory Commission* 2013 SCC Online APTEL 139; *Noida Power Company Limited* v. *Uttar Pradesh Electricity Regulatory Commission* 2016 SCC Online APTEL 61; *Gujarat Energy Transmission Corporation Limited* v. *Gujarat Electricity Regulatory Commission and Ors.* – Judgment dated 21.07.2016 in

129. In *Noida Power Company Limited v. Uttar Pradesh Electricity Regulatory Commission* (supra), it was held as under:

> *"30. On the Issue No. 11 i.e. Whether in the facts and circumstances of the case, the State Commission was right in disallowing the expenses claimed on account of the Corporate Social Responsibility (CSR) Obligation to be met by the Appellant under the provisions of the Companies Act, 2013, a mandate of law, our analysis is as follows:*
>
> *…*
>
> *c. The Appellant contended that the CSR expenses is being incurred by mandate of law which came subsequent to the notification of the Distribution Tariff Regulations, 2006 and are therefore incurred on account of change in law*
>
> *d. As per the Respondent, the Appellant is statutorily bound to incur CSR expenses on the activities as defined in provisions of the newly enacted Companies Act, 2013.*
>
> *e. It is very much clear from the relevant extract from Companies Act 2013 that the company should spend, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years in pursuance of its Corporate Social Responsibility Policy.*
>
> *f. We are of the considered opinion that <u>if such expenses are passed on to the consumers in the ARR, it would defeat the very purpose. in fact, such expenses are for the social development which should not be passed on to the consumers</u>.*"
>
> (emphasis supplied)

130. In *Tata Power Company Limited (Transmission) v. Maharashtra Electricity Regulatory Commission* (supra), it was ruled thus:

> "*63. In reply to above submissions, the learned Counsel for the State Commission submits the following:*

*(a) The expenses towards community welfare/Corporate Social Responsibility (CSR) cannot be passed on to the consumers, since it is the social obligation of the corporate entity and the same cannot be passed on to the consumers. The Appellant is free to undertake such activities by funding the same from its returns, based on how it desires to utilize its profits/returns from the business.*

*…...*

*(e) The Companies Bill, 2011 has not been enacted yet. Moreover, even the provision in the Companies Bill, 2011 provides for spending at least 2% of the 'net profit' of the company, which makes it clear that the same has to come out of the net profits/returns of the company, and are intended to reflect the organization's seriousness to contribute to the welfare of the community as a whole, and the Appellant cannot expect that such contribution should be recovered from the consumers.*

*……..*

*(g) If the Appellant shows increased expenses on account of Corporate Social Responsibility, such expenses have to be met by the Corporate itself. A utility ought not to be permitted to discharge its Corporate Social Responsibility at the cost of the consumer.*

*(h) If the Appellant's contention was to be accepted then the consumers of the Appellant would be paying for the discharge of the Appellant's social responsibility. It is for the Appellant to shoulder the burden of its Corporate Social Responsibility and ought not to be permitted to shift the burden to the consumer.*

*...*

*64. We have carefully considered the said submissions on the issue.*

*65. At the outset, it shall be mentioned that the Community Social Responsibility is the responsibility of the Company. The contention of the Appellant that the State Commission had approved these expenses in the ARR petition and that therefore, it cannot change during true up exercise is not tenable*

*…*

*67. Ongoing through the impugned order on this point as well as the submissions made by the learned Counsel for the State Commission, it is clear that the conclusion on this point arrived at by the State Commission is valid and the reasons for such conclusions are justified.*"

(emphasis supplied)

131. In *Gujarat Energy Transmission Corporation Limited v. Gujarat Electricity Regulatory Commission and Ors* (supra), the issue was dealt with as under:

*"31.2 In our opinion, Corporate Social Responsibility expenses were meant for the welfare of the general public by providing education, health camps and other social activities, charities etc. The above expenses were meant for the welfare of the public at large. Hence, these expenses cannot be included in the ARR to pass on to the consumers of the licensee. The State Commission also deducted from the earlier years A&G expenses after prudence check. The amount of Rs. 1.18 crores incurred towards charity and contribution cannot be included in the ARR to pass on to the end consumers.*"

(emphasis supplied)

132. We follow the above decisions which must govern the present case as well notwithstanding the difference that unlike the projects in said previous cases the project of the appellant is governed by Section 63 of Electricity Act. What must be the clinching factor is the mandate of the provision contained in Section 135 of Companies Act whereunder the CSR obligation has to be met from out of the profits of the corporate entity. The profits in relation to a generator

are computed after taking into account the revenue earned as against the costs incurred in production of electricity. What may be passed on to the consumers to compensate the generator under restitutionary principle embedded in CIL clause is the impact on "*cost of or revenue from the business of selling electricity*" and not what is to be paid under the law out of profits earned. Since CSR is mandated as the responsibility of the corporate entity to be met out of its net profits it cannot be allowed as *pass through*. The law has placed the responsibility on the Company and not on its consumers.

133. We, thus, uphold the view taken by the Commission in the impugned orders. The challenge by the appeal at hand is repelled.

*MoEF MANDATED CONDITIONS TO ENVIRONMENTAL CLEARANCE (Appeal no. 172/2017)*

134. The claim for compensation for the expenditure additionally suffered by the appellant after cut-off date on account of conditions added to *Environmental Clearance* ("EC") granted by the Ministry of Environment and Forests (MoEF) of the Government of India (GOI) in exercise of powers vested in it by the Environment (Protection) Act, 1986 is the subject matter of claim for compensation which has been denied.

135. For appreciating the contentions urged by the appellant, it is necessary to bear in mind (a) MoEF's Environmental Clearance ("EC") dated 02.03.2007*;* (b) MoEF's EC dated 05.04.2007*;* (c) MoEF's Corrigendum dated 26.04.2011*;* (d) PFC's e-mail dated 23.10.2006; and (e) MoEF's Office Memorandum dated 11.08.2014**.**

136. The Environmental Clearance (EC) was originally granted by MoEF in favour of the appellant on 02.03.2007 partly modified on 05.04.2007. The appellant points out that there was no mandate, as on the Cut-Off Date (i.e. 30.11.2006), by MoEF requiring the appellant (CGPL) to earmark and incur additional costs towards certain works relating to environment protection. By Corrigendum dated 26.04.2011, the MoEF amended the earlier EC dated 02.03.2007 and 05.04.2007, making it mandatory for CGPL to earmark a sum of Rs. 72 Crores as one-time capital expenditure (capex) besides recurring expenditure of Rs. 14.40 Crores per annum on the subject during the Operation Period.

137. As is evident from Recital B of the PPA read with the definition of 'Initial Consents', Part 1 of Schedule 2 and Clause 1.4(iii) of the RFP*,* it was an obligation of the Procurers to obtain EC before the Cut-Off Date. The EC for Mundra UMPP was received on 02.03.2007, i.e. after the Cut-off Date and made available to the Bidders on 22.04.2007. It is pointed out that, in a subsequent matter

involving CIL claim, in Petition No. 77/MP/2016 titled as *CGPL* v. *GUVNL & Ors.*, by Order dated 17.09.2017, the CERC held that it was the Procurers responsibility to obtain the initial consents, including the requisite ECs for Mundra UMPP. This conclusion, the appellant pleads, has attained finality because the order was not challenged.

138. The plea of the appellant before CERC was that all conditions imposed by MoEF (under EC dated 02.03.2007 read with amendment dated 05.04.2007 and the Corrigendum dated 26.04.2011) constitute a CIL event in terms of Article 13 of the PPA. In terms of Article 13.1.1(i) of the PPA read with the definition of 'Law', any notification or sub-ordinate legislation issued by an Indian Governmental Instrumentality enforced after the cut-off Date (i.e. 30.11.2006) and having force of Law, falls within the scope of CIL. There is no dispute as to the fact that the Corrigendum dated 26.04.2011 was issued by the MoEF in exercise of the powers vested in it under the law and was binding on the appellant.

139. By Order dated 17.03.2017, the CERC rejected the claim of the appellant on the captioned subject thus:

> *"51. We have considered the submissions of the petitioner and the respondents. A similar issue has been considered by the Commission in its order dated 17.2.2017 in Petition No. 16/MP/2016 where in the Commission has*

*not considered conditions specified in EC under change in law. The relevant portion of the said order is extracted as under:*

> *"27. The petitioner was required under law to obtain EC for operating the project and comply with the conditions specified therein which is also recognized in Article 5.5 of the PPA which provides that it is the responsibility of the petitioner for maintaining/reviewing the initial consents and for fulfilling all obligations specified therein. Schedule 2 of the PPA defines initial consents to include necessary environmental and forest clearance for the power station. Since There was no EC obtained prior to the cut-off date relevant to the bid date, any condition imposed by the environmental authority for the grant of EC would not qualify as a change in law...Section 135 of the Companies Act, 2013 provides as under:*

*…*

*As per the above provision, any company with a net worth of Rupees five hundred crore or more or turnover of Rupees one thousand crore or more or net profit of Rupees five crore or more is required to constitute a Social Corporate Responsibility Committee of the Board consisting of three directors to formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII….*

*Thus corporate social responsibility also includes expenditure on ensuring environmental sustainability, ecological balance and conservation of natural resources and maintaining quality of soil, air and water. MoEF has prescribed that the CSR cost should be Rs. 5 per Tonne of Coal produced which should be adjusted as per annual inflation. As per sub-section (5) of section 135 of the Companies Act, 2013, the Board of the Company shall ensure that the Company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy. Therefore, the Corporate Social Responsibility Committee of the Petitioner`s company should consider and*

*include the expenditure on account of condition (xxiii) of the environmental clearance in the Corporate Social Responsibility Policy of the company and meet the expenditure out of the net profits of the company. In our view, this expenditure cannot be allowed under Change in Law as the environment clearance has specifically classified as CSR cost for which provisions have been made in the Companies Act, 2013 to be met out of the net profit of the company."*

*52. In the light of the above decision, the claim of the petitioner for relief under change in law on account of imposition of new conditions by the MoEF is not admissible and is accordingly disallowed."*

(emphasis supplied)

140. The respondents contend that in order to succeed in claim of CIL, the seller (appellant) must meet the qualifying requirement under Article 13 which is that the CIL event must have an impact on the cost of / revenue from the activity of generation of electricity. It is submitted that the obligation under EC here is not related to the business of generation and sale of electricity, there having been no implication on the cost or revenue on account of the mandate by MoEF. The respondents defend the impugned order stating that burden is similar to Income Tax and other cesses which are levied on profit. Reliance is placed on decisions of this tribunal in *NPCL* v. *UPERC*, 2016 SCC OnLine APTEL 61; *TPCL (Transmission)* v. *MERC,* 2013 SCC OnLine APTEL 139 and *GETCO* v. *GERC (*Appeal No. 108 of 2013) laying down the principle that CSR is an

obligation of the corporate entity (being its social responsibility) and cannot be passed onto the consumers since it would defeat the purpose of mandating CSR obligation in the first place. Admittedly, the issues involved in the cases cited had arisen from claim for compensation with refence to Section 135 of Companies Act. Concededly, unlike the case at hand, wherein the power project was established under Section 63 of Electricity Act (where the tariff was discovered by bid process), the aforesaid decisions were rendered in relation to power projects governed by "*cost-plus*" principle of Section 62. The argument of the respondents is that if Section 62 projects are not entitled to claim CSR expenditure as a pass through in tariff, then such costs should not be allowed as a pass through under Section 63 Projects, it being improper to pass on the same to the consumers at large.

141. It is the submission of the respondents that the aforesaid liability has arisen due to the appellant (CGPL) seeking increase in capacity from 4000 MW to 4150 MW, the Procurers having not benefitted by this increase in capacity, their entitlement under the PPA being limited to 4000 MW. It is pleaded that there was no EC on the Cut-Off Date and it was issued only after the Cut-Off Date, there has been no change in consent as contemplated under Article 13.1.1. The respondents also aver that, while submitting its bid, Tata

Power ought to have considered that an EC will be required and, thus, should have factored in the implication of the EC, it not being the responsibility of the Procurers.

142. *Per contra*, it is pointed out by the appellant that the additional burden imposed by MoEF is not linked to the capacity expansion sought by CGPL. It is seen that the additional condition relating to environmental protection (as provided in para 3 of Corrigendum dated 26.04.2011) has no nexus with the increase in generation capacity of Mundra UMPP, the former amendments (in para 3) being the result of change in policy of MoEF after 2010. On facts, the respondents are unable to refute the submission that such conditions as at hand relating to environment protection have been imposed by MoEF in various Environmental Clearances issued by it after 2010, even if there is no increase in gross or net generation capacity of a power plant.

143. The appellant explains that originally it was intended to install Steam Driven Boiler Feed Pumps but the design was changed to Motor Driven Boiler Feed Pumps to enable CGPL to generate electricity in a more efficient and sustainable manner, thereby resulting in lower cost of generation. In order to account for the additional auxiliary consumption due to installation and use of Motor Driven Boiler Feed Pumps, while maintaining net generation

capacity at the contracted level of 3800 MW, CGPL increased its gross generation capacity from 4000 MW to 4150 MW. The appellant urges acceptance of its claim for compensation for additional expenditure due to this obligation as one related to the entire Project Cost that includes cost of generating the capacity contracted by the Procurers and not only on the cost of increased capacity (i.e. 150 MW).

144. There is no merit in the argument that since there was no EC on the Cut-Off Date, there is no 'change in consent' as required under Article 13.1.1. Change means altering or modifying. Issuance of a consent with terms and conditions as well as costs that didn't exist as on the Cut-Off Date amounts to a 'change' in consent since it modifies the earlier position where no consent terms existed. The generator could not have foreseen any amendment or change in the law or binding directives of the executive branch in exercise of statutory authority existing on the Cut-Off Date during the stipulated long term (25 years) of the PPA. It is rightly pointed out that it was the obligation of the Procurers (respondents) to obtain EC before the Cut-Off Date as is evident from Recital B of the PPA read with the definition of 'Initial Consents', Part 1 of Schedule 2 and Clause 1.4(iii) of the RFP. For defaults in timely action on their part, the Seller cannot be made to suffer, the CIL event being subsequent.

145. In our considered view, the CERC has fallen into error by treating the additional expenditure incurred by the appellant for adding to the infrastructure in terms of mandatory works undertaken in compliance with modified conditions of EC issued by the MoEF as an expenditure in nature of *Corporate Social Responsibility* (CSR) under Section 135 of the Companies Act. The statutory provision contained in Section 135 of the Companies Act, 2013 has been quoted by us earlier. The use of the expression CSR in the discourse seems to have misguided the approach. As was confirmed by the learned counsel for both sides at the hearing that in the communications issued by MoEF on the subject of EC (or its modification) there is no reference, not even a remote one, to the statutory requirement of Section 135 of the Companies Act. In view of this distinguishing feature, the rulings cited by the respondents are rendered inapplicable.

146. There may be a similarity in the *nature* of works or initiatives which can be undertaken under CSR envisaged by Section 135 of Companies Act, on one hand, and technological improvements for environmental protection enforced by the executive branch (MoEF) in exercise of the authority under environment protection law, on the other. But, the former cannot be equated with the latter since the objects and reasons of, and authorisation for, each is distinct.

Moreover, in terms of Section 135 of the Companies Act, the programme to be covered under CSR allocation by a Company (not every Company but only such corporate entities as meet the criteria of minimum net worth or net profits) is a matter left to its choice. Unlike that, the environmental protection measures are mandated for the larger public good and not dependant on factors such as turnover, income, etc., there being no discretion or choice in selection of focal area.

147. It seems that the authorities that be in the executive branch (MoEF) have, of late, realized the need to rid the discourse of the confusion stemming from use of the expression *Corporate Social Responsibility* (CSR) opting instead to describe more appropriately the measures mandated by Environmental Clearances (ECs) as pertaining to *Corporate Environmental Responsibility* (CER). As was brought out at the hearing by counsel for the appellant, the Impact Assessment Division of MoEF by Office Memorandum (F.No. 22-65/2017-IA.III) dated 01.05.2018 (revised on 30.09.2020) on the subject of "*Corporate Environment Responsibility*" promulgated as under:

> "T*he Environment Impact Assessment (EIA) Notification, 2006, issued under the Environment (Protection), 1986, as amended from time to time, prescribes the process for granting prior environment clearance (EC) in respect of certain development projects/activities listed out in the*

*Schedule to the notification.*

*2. Sustainable development has many important facets/components like social, economic, environmental, etc. All these components are closely inter-related and mutually re-enforcing. Therefore, the general structure of EIA document, under Appendix-III to the notification, prescribes inter-alia public consultation, social impact assessment and R&R action plan besides environment management plan (EMP).*

*3. Section 135 of the Companies Act, 2013 deals with Corporate Social Responsibility (CSR) and Schedule-VII of the Act lists out the activities which may be included by companies and their CSR policies. The concept of CSR as provided for in the Companies Act, 2013 and covered under the Companies (Corporate Social Responsibility Policy) Rules, 2014 comes into effect only in case of companies having operating projects and making net profit as also subject to other stipulations contained in the aforesaid Act and Rules. The environment clearance given to a project may involve a situation where the concerned company is yet to make any profit and\or is not covered under the purview of the aforesaid Act and Rules. In such cases, the provisions of aforesaid act and Rules will not apply.*

*4. In the past, it has been observed that different Expert Appraisal Committees / State Expert Appraisal Committees (EACs/SEACs) have been prescribing different formulation of the Corporate Environment Responsibility (CER) and no common principles are followed. Several suggestions have also been received in this regard which inter-alia states that Greenfield projects and Brownfield projects should be treated differently; no CER should be prescribed whereas there is no increase in the air pollution load, R&R, etc., besides streamlining percentage of CER.*

*5. The ministry has carried out a detailed stakeholder consultation which inter-alia included meeting with Ministry of Petroleum & Natural Gas, Ministry of Power, Chairmen EACs, FICCI, ASSOCHAM, Gujarat Chamber of Commerce and industry amongst others.*

*6. In order to help transparency and uniformity while recommending CER by Expert Appraisal Committee (EAC) / State level Expert Appraisal Committee (SEAC) / District level Expert Appraisal Committee (DEAC), the following guidelines are issued:*

*(I) The cost of CER is to be in addition to the cost envisaged for the implementation of the EIA/EMP which includes the measures for the pollution control, environmental protection and conservation, R&R, wildlife and forest conservation/protection measures including the NPV and Compensatory Aforestation, required, if any, and any other activities, to be derived as part of the EIA process.*

*(II) The fund allocation for the CER shall be deliberated in the EAC or SEAC or DEAC, as the case may be, with a due diligence subject to maximum percentage as prescribed below for different cases:*

*…*

*(III) The activities proposed under CER shall be worked out based on the issues raised during the public hearing, social need assessment, R&R plan, EMP, etc.*

*(IV) The proposed activities shall be restricted to the affected area around the project.*

*(V) Some of the activities which can be carried out in CER, are infrastructure creation for drinking water supply, sanitation, health, education, skill development, roads, cross drains, electrification including solar power, solid waste management facilities, scientific support and awareness to local farmers to increase the yield of crop and fodder, rainwater harvesting, soil moisture conservation works, avenue plantation, plantation in community areas, etc.*

*(VI) The entire activities proposed under the CER shall be treated as project and shall be monitored. The monitoring report shall be submitted to the regional office as a part of half-yearly compliance report, and to the District Collector.*

*It should be posted on the website of the project proponent.*

*(VII) The District Collector may add or delete the activities as per the requirement of the District.*

*(VIII) The EAC can vary the above percentage of CER subject to proper diligence, quantification and justification. The EAC based on appraisal, should clearly suggest activities to be carried out under the CER.*

*(IX) This CER is not applicable in name change, transfer and amendment involving no additional project investment. In case of amendment EC involving additional expenditure, CER will be applicable only on the additional expenditure as per column-IV of the table given in para 6(II) above.*

*7. This issues in supersession of all earlier Oms and guidelines issued in this regard.*

*8. This issues with the approval of competent authority."*

148. From the above-quoted OM of MoEF, it can be culled out that:

(a) The concept of CSR as provided for in Section 135 of the Companies Act, 2013 and covered under the Companies (CSR Policy) Rules, 2014 comes into effect only in cases of companies having operating projects and making net profits as also subject to other stipulations contained in the said Act and Rules;

(b) The EC given to a project may involve a situation where the concerned company is yet to make any profit or is not covered under the purview of the said Act and Rules. In such cases, the provisions of the said Act and Rules will not apply;

(c) In the past, different Expert Appraisal Committees / State Expert Appraisal Committees had been prescribing different formulation of Corporate Responsibility and no common principles were followed (i.e. CER imposed in the EC conditions was not standardized and imposed in an *ad-hoc* manner);

(d) There is an informed decision taken to draw the distinction between CSR under Companies Act and CER as part of EIA under Environment (Protection) Act;

(e) Unlike CSR which is determined and debited against profits of the Compant (subject to minimum turnover etc), CER is part of the project cost, the cap being fixed as per projected capital (or additional) investment..

149. In order not to fall into same confusion or error as was suffered at the stage of scrutiny before CERC, and to properly distinguish the EC mandate of MoEF for environmental protection from CSR under Section 135 of the Companies Act, we would borrow the expression used in OM dated 01.05.2018 and prefer to refer to the expenditure in the former nature as one incurred mandatorily pursuant to *Corporate Environmental Responsibility* or, in short, *CER*.

150. More than semantics, however, it is pertinent to note that the mandate by MoEF in EC (whether called CSR or CER) is not linked

to the net profits (unlike under the Companies Act). Such obligation must be met irrespective of whether or not the generating company is making any profits. This obligation, noticeably, is also applicable during the construction period of the power plant, where there may not be any revenue received much less profits earned. This obligation is, therefore, a cost or expense added to the business of generation and sale of electricity in the particular context of the appellant - a one project company. Hence, we agree, the comparison with Income Tax or other cesses which are levied on profits or income is misplaced and erroneous. We have already rejected the plea that the qualifying requirement under Article 13 is that the Change in Law event must have an impact on the cost of, or revenue from, the activity of generation of electricity since that clause (Article 13) of the PPA deals with the "*business of selling electricity*" and not restricted to the literal activity of "*generating electricity*".

151. The judgments relied upon by the respondents (Procurers) in context of CSR under Companies Act cannot apply here also because they were rendered in the context of Section 62 projects where the determination of tariff by the regulatory commission is on parameters different from those applicable to projects established by bidding route under Section 63 of the Electricity Act. Sections 62

and 63 PPAs differ fundamentally. Under Section 62, each head of cost is provided for by the regulatory authority. Under Section 63, the PPA and CBG are the controlling documents and determine what costs can be passed on to the Procurers in addition to the bid-out tariff. In the latter case, the entity participating in the bid process must quote the price at which it would be inclined to supply electricity to be generated by it through the proposed project over a long period. Naturally, the investor would work out the price to be quoted in the bid taking into account all factors relevant for computation of cost of generation and supply of electricity including not only the capital expenditure (capex), fuel cost, operational and maintenance costs, recurring expenditure on human and other resources, operational losses, erosion in value of money or inflation, etc. but also the impact of change in law that adds to the cost of production or supply like increased taxation, approvals, modifications, infusion of improved technology mandated in view of concerns such as environment etc. It is with this view that the guidelines formulated by the Central Government in exercise of power vested in it by virtue, *inter alia*, of Section 63 of Electricity Act create a right, and a legitimate expectation, in favour of the parties for readjustment of the price discovered and adopted by bid process to be suitably adjusted in the event of CIL situation so as to accommodate the

impact (increase or decrease, as the case may be) on the equitable principle of restitution, it getting incorporated in the contract (PPA) in the form and shape of Article 13. As noted earlier, the obligation created by modification of EC by MoEF was not in the nature of CSR under Companies Act (which would be out of profits) but CER for environmental protection and in the nature of Capex, a factor that has a direct bearing and impact on bid price quoted and accepted (or adopted) prior to such expenditure being conceived or mandated.

152. What must clinch the issue in favour of the appellant is an explanatory statement given by the competent authorities. On 11.08.2014, the MoEF in GOI issued an Office Memorandum clarifying that CSR obligations under EC is not linked to net profit and is separate from the CSR obligation under the Companies Act. It may be quoted, to the extent necessary, verbatim:

> "*4. Section 135 of the Companies Act, 2013 deals with corporate social responsibility and Schedule-VII of the Act lists out the activities which may be included by companies in their CSR Policies. The activities relating to "ensuring environmental sustainability", are listed in this schedule. Further, Ministry of Corporate Affairs has also noticed the Companies (Corporate Social Responsibility Policy) Rules, 2014*
>
> *5. The concept of CSR as provided for in the Companies Act, 2013 and covered under the Companies (Corporate Social Responsibility Policy) Rules, 2014 comes into effect only in case of companies having operating*

*projects and making net profit as also subject to other stipulations contained in the aforesaid Act and Rules. The environment clearance given to a project may involve a situation where the concerned company is yet to make any net profit and / or is not covered under the purview of the aforesaid Act and Rules. Obviously, in such cases, the provisions of aforesaid Act and Rules will not apply."*

(emphasis supplied)

153. It is rightly submitted by the appellant that the Procurers, having failed to obtain the necessary EC before the Cut-Off Date (i.e. 30.11.2006), cannot seek to benefit from their own default by alleging that imposition of Additional Conditions by MoEF is not a CIL. Had the Procurers obtained the EC and made it available to all the Bidders, all Bidders including Tata Power would have taken into account the costs involved for complying with the EC at the time of quoting its tariff. It is a settled position of law that a person cannot take benefit of its own wrong. Reliance is placed on *Union of India v. Major General Madan Lal Yadav* 1996 (4) SCC 127 and *Ashok Kapil v. Sana Ullah & ors. 1996 (6) SCC 342*. Since procuring the EC was not its responsibility, CGPL cannot be held liable for any additional costs that have resulted from the EC and on account of any change to the EC and which qualify to be treated as a CIL.

154. The practice of mandating CSR expenditure while granting ECs was introduced by MoEF in 2010, some years after the Cut-Off date. All RFQ qualified bidders were advised by the Bid Coordinator

i.e. PFC (an Indian Governmental Instrumentality) to consider/ earmark certain amounts towards land cost and R&R cost by its email dated 23.10.2006 (before the Cut-Off Date) in their Bids. There was no occasion then for the RFQ qualified bidders to be informed to consider earmarking amounts towards CSR expenses during the Construction or Operation Periods. Such financial burden (expenditure relating to mandatory CSR) stemming from obligations imposed by MoEF later, thus, could not have been foreseen by any participant (including the promoter of appellant's project) to be taken into account in computations while submitting its Bid for Mundra UMPP.

155. The underlying assumption of argument to the contrary raised by the Procurers is that generating companies are expected to know or foresee any amendment or change in the existing law (i.e. law existing on the Cut-Off Date), which may take place over the long term of the PPA (25 years). That such assumption is misplaced and impermissible is clear merely from the fact that the PPA gives express right to an affected party to claim compensation if the event qualifies as a CIL event in terms of Article 13 of the PPA deserving restitution. But for the agreed need for such possibility to be covered, there was no occasion to include Article 13 in the PPA.

156. In the Impugned Order dated 17.03.2017, the CERC has

linked the expenditure mandated through EC by MoEF to the CSR mandated under the Companies Act, 2013. As discussed earlier, the expenditure mandated by MoEF is over and above the CSR mandated under the Companies Act, the former being directly linked to the Project cost. In sharp contrast, the CSR under the Companies Act is linked to the net profits of the company [*see* OM dated 11.08.2014 (supra)].

157. We, thus, unhesitatingly hold that the additional expenditure incurred by the appellant in terms of the modified EC added to the capital expenditure for the project, there being no nexus with CSR under Section 135 of the Companies Act, the obligation having arisen due to CIL event within the meaning of Article 13 of the PPA, the appellant (seller) is entitled to commensurate compensation. We order accordingly.

*SERVICE TAX ON TRANSPORTATION OF IMPORTED GOODS (Appeal no. 154/2018)*

158. The findings returned by CERC on this issue claimed as CIL event by the appellant are set out in the impugned Order dated 21.02.2018 as under:

*"23. We have considered the submissions of the parties. The Petitioner has submitted that Mundra UMPP was awarded as an imported coal based project where the coal is shipped from outside India. As on cut-off date, i.e 30.11.2006, no service tax was payable on transportation of goods by a vessel from a place outside India to the custom station landing in India. Subsequently, Government of India, Ministry of Finance vide Finance Act, 2012 through Section 66 D (p) (ii) exempted transportation of goods by an aircraft or a vessel from a place outside India to the first customs station of landing in India from payment of service tax. Relevant portion of the Finance Act, 2012 is extracted as under:*

*"66B. Charge of service tax on and after Finance Act, 2012: There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent on the value of all services, other than those specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.*

*****

*66D. Negative list of services: The negative list shall comprise of the following services, namely:*

*(a) to (o) ******

*(p) Service by way of transportation of goods-*

*(ii) by an aircraft or a vessel from a place outside India to the fist customs station of landing in India.*

*24. Subsequently, Ministry of Finance, Government of India vide its Notification No. 25/2012 dated 20.6.2012 exempted the services by way of transportation of goods by an aircraft from a place outside India upto the customs station of clearance in India from the service tax in excess of 50% of the taxable value. Ministry of Finance, Department of Revenue vide its Notification No. 9/2016 dated 1.3.2016 by amending the said notification and the negative list therein, exempted the transportation of goods by an aircraft from payment of Service Tax. Relevant portion of the said Notification is extracted as under:*

*"53…..Services by way of transportation of goods by an aircraft from a place outside India upto the customs station of clearance in India."*

*From the above amendment, it appears that transportation of goods by an aircraft is exempted from the service tax. However, service tax on transportation of goods by vessel is applicable. The Government of India vide its Notification No. 26/2012 dated 20.6.2012 exempted the taxable services by way of transportation of goods by a vessel in excess of 50% of the taxable value. Subsequently, vide Notification No. 8/2014 dated 11.7.2014, the Government of India exempted the taxable services by way of transportation of goods in a vessel in excess of 50% to 40% of the taxable value. Further, vide Notification No. 8/2015 dated 1.3.2015, the Government of India exempted the taxable services by way of transportation of goods in a vessel in excess of 30% of the taxable value. The Government of India, vide Notification No. 9/2016 introduced Service Tax on Transportation of imported goods with effect from 1.6.2016 and the applicable rate of service tax as on 1.6.2016 was 15% inclusive of Swachh Bharat Cess and Krishi Kalyan Cess i.e. (14% of Service Tax + 0.5 % each of Swachh Bharat Cess and Krishi Kalyan Cess). Since, the service tax on transportation of good in a vessel is chargeable only to the extent of 30%, the applicable rate of service tax on transportation of goods from a vessel would come to 4.5% i.e. 30% of the rate of 15% inclusive of corresponding Swachh Bharat Cess and Krishi Kalyan Cess. i.e. Service tax at the rate of 4.20% and Swachh Bharat Cess and Krishi Kalyan Cess at the rate of 0.15% each. As per the said Notification Nos. 26/2012, 8/2014 and 8/2015, the said rate of Service Tax is applicable only subject to this condition that the CENVAT credits on inputs, capital goods and input services, used for providing the taxable service, has not been availed by the petitioner under the provisions of the CENVAT Credit Rules, 2004.*

*25. In view of the above, said notifications levying the service tax on goods transported by a vessel from a place outside India to the custom station of clearance on India qualifies as change in law under Article 13.1.1(i) of the PPA. Accordingly, the same is admissible.*

*….*

*50.*

*….*

*(b) The increase in Service Tax on transportation of goods by a vessel from a place outside India to the first custom station of landing in India shall be computed based on actual payment subject to ceiling of coal consumed corresponding to scheduled generation and shall be payable by the beneficiaries pro-rata based on their respective share in the scheduled generation. In case of reduction of Service Tax on transportation of goods by a vessel from a place outside India, the Petitioner shall compensate the procurers on the basis of above principle. If actual generation is less than scheduled generation then compensation payable shall be computed based on actual payment subject to ceiling of coal consumed corresponding to actual generation…."*

(emphasis supplied)

159. The CERC correctly appreciated that as on the Cut-Off Date (i.e. 30.11.2006) there was no Service Tax on Transportation of Imported Goods and, thus, reached appropriate conclusion that levy of Service Tax on Transportation of Imported Goods after the Cut Off Date amounts to a CIL event for which compensation in favour of appellant is in order. But, it (CERC) fell into error by directing that for any reduction in the rate of Service Tax on Works Contract, CGPL shall be required to compensate the Procurers. Any reduction in the rate of Service Tax on Transportation of Imported Goods in future would only result in reduced compensation to the Seller (CGPL) rather than it (CGPL) being required to compensate the Procurers. The appellant is right in also pointing out that Service Tax

on Transportation of Imported Goods has since been subsumed in Goods & Services Tax (GST) - with effect from 01.07.2017. Therefore, there would be no question of any reduction in the rate of Service Tax on Transportation of Imported Goods.

160. We, thus, direct that the order of CERC on the captioned subject shall be read, construed and enforced with clarification/correction in terms of above observations recorded by us.

*CARRYING COST (Appeal nos. 172/2017 and 154/2018)*

161. This issue is common to both appeals.

162. Placing reliance on the restitutionary principle in-built in Article 13 of the PPA and the judgment of Supreme Court in *Uttar Haryana Bijli Vitran Nigam Ltd. & Anr.* v. *Adani Power Ltd. & Ors. (2019) 5 SCC 325* upholding the judgment of this tribunal in *Adani Power Limited* v. *CERC & Ors.: 2018 ELR (APTEL) 0556*, the appellant presses its claim of carrying cost stating that the same has been unjustly denied by CERC.

163. The impugned order dated 17.03.2017 pertaining to period of fist appeal deals with the issue as under:

*"(C) Carrying cost*

*53. The petitioner has pleaded in the prayer clause of the petition that the procurers should be permitted to raise the Supplementary Bills for the sum of Rs. 25,96,00,000 along with the carrying cost in terms of Article 13.4.2 of the PPA. In our view, there is no provision in the PPA to allow carrying cost on the amount covered under change in law till its determination by the Commission. The issue has been decided in order dated 16.2.2017 in Review Petition No. 1/RP/2016 in Petition No. 402/MP/2015. Accordingly, the claim of the petitioner is rejected."*

(emphasis supplied)

164. The claim of the appellant for period covered by second appeal has been repelled by CERC by order dated 21.02.2018 as under:

*"Carrying Cost*

*47. The Petitioner has submitted that the intent of having change in law clause under the PPA is to restore the affected party to the same economic position as if change in law event has not taken place. The Petitioner has prayed for recovery of compensation for both past period and future period along with the carrying cost. GUVNL has submitted that the Petitioner is not entitled to any carrying cost as the same has been rejected by the Commission vide order dated 17.3.2017 in Petition No. 157/MP/2015. Similar submissions have been made by the other procurers, namely PSPCL and the Discoms of Haryana (UHBVNL and DHBVNL). In our view, there is no provision in the PPA to allow carrying cost on the amount covered under change in law till its determination by the Commission. The issue has been decided in order dated 16.2.2017 in Review Petition No. 1/RP/2016 in Petition No. 402/MP/2015. Accordingly, the claim of the Petitioner is rejected."*

(emphasis supplied)

165. The issue of Carrying Cost is no longer *res integra*. This tribunal had allowed Carrying Cost on CIL compensation by decision in *Adani Power Limited (supra)* in context of similar Article 13 of PPA. The view was upheld by Supreme Court in *Haryana Bijli Vitran Nigam Ltd. & Anr.* v. *Adani Power Ltd. & Ors.* [(2019) 5 SCC 325], the take-aways from said decision being:

(a) Article 13.2 of the PPA is an in-built restitutionary principle which compensates the party affected by CIL and which must restore, through monthly tariff payments, the affected party to the same economic position as is if such CIL has not occurred;

(b) Article 13.2 of the PPA creates a fiction pursuant to which the affected party must be given the benefit of restitution as understood in civil law;

(c) In terms of Article 13.4.1 of the PPA, adjustment in monthly tariff payment on account of CIL has to, *inter alia*, be effected from the date of CIL, in case the CIL is on account of adoption, promulgation, amendment, re-enactment or repeal of any law;

(d) Upon a reading of Article 13 as a whole, it is clear that, subject to restitutionary principles contained in Article 13.2, adjustment in monthly tariff has to be from the date when CIL

event takes place; and

(e) Article 13 of the PPA provides for payment of Carrying Cost.

166. We have not the least doubt that the afore-mentioned settled principles are squarely applicable to the claim for carrying cost at hand. The PPA executed between CGPL and its Procurers is identical to the PPA which was subject matter of the case cited above each, in turn, being based on the Model PPA commended by the Ministry of Power along with the Standard Bid Documents issued under the CBG.

167. The claim of the appellant for Carrying Cost is borne out from the restitutionary principle that is in-built in Article 13.2 of the PPA, being particularly covered by Article 13.4.1(i). Therefore, adjustment in monthly tariff payment becomes effective from the date of imposition or levy of the CIL events. The restitutionary principle under Article 13.2 will kick in for the reason that it is only after the notification or imposition or levy of the CIL events that the consequent additional expenditure is being allowed as a CIL event under Article 13.

168. While resisting the appeals on this subject, the respondents contend that the benefit will inure only from the date the appellant approached the CERC and not earlier since there has been

inordinate delay. This submission is neither correct nor fair. The effect of CIL is suffered from the date of such event. There is sufficient documentary proof adduced to show that the appellant had been informing the Procurers about Change in Law events since 11.07.2011, initially respecting the impact during construction period and thereafter for the operation period, the latter (Procurers) having responded by some letters exchanged during 2011 to 2015, holding meetings to discuss the subject amongst themselves, auditor having been appointed at their instance, the report of auditor having been shared on 21.11.2014, another Procurers' Meet on 30.03.2015 having failed to bring about agreement, it being insisted by some (Punjab and Haryana Procurers) for the matter to be taken to the Commission, lack of consensus being eventually communicated by letter dated 15.04.2015 (by GUVNL) asking the CGPL to take appropriate action under the PPA. The petition was filed before CERC on 08.06.2015.

169. Reliance is placed by the appellant on ruling in *UHBVNL* v. *Adani Power Limited & Ors.* (2019) 5 SCC 325 to the effect that the adjustment in monthly tariff payment on account of Change in Law shall be reckoned and made effective from the date of CIL in case the CIL happens by way of adoption, promulgation, notification, amendment, re-enactment or repeal of law. Clearly, if the relief for

CIL is to be effected from the date on which the CIL has occurred, Carrying Cost has to be paid from the date on which the affected party became out of pocket due to the impact of CIL. This is also the letter and spirit of Article 13 of PPA.

170. Thus, we accept the contention of the appellant and direct that the carrying cost in respect of the additional expenditure allowed on account of nexus with CIL events shall also be allowed for the period(s) from which the Seller (appellant) incurred such additional expenditure, be it by payment to State under taxation laws or otherwise borne for infrastructural developments mandated by law. Needless to add, the CERC will have to pass necessary orders in such regard.

*THE FINAL ORDER*

171. We have, thus, accepted, in principle, the claim of the appellant for compensation in relation to the payments made under Gujarat Green Cess Act, the constitutional validity of which legislation is pending before the Supreme Court of India. We have held that if the burden created and borne by the appellant on account of enforcement of the said law, during the operation period, were to continue to be borne by the appellant even after decision is rendered by the Supreme Court on the pending challenge, the same shall be treated by the Commission as a CIL event and necessary

order shall be passed by it to afford recompense to that extent along with corresponding carrying cost.

172. We have rejected the claim for compensation of the appellant for the expenditure incurred additionally under Section 135 of the Companies Act in order to fulfil its *Corporate Social Responsibility*.

173. Subject to the above, all other claims of the appellant in these appeals have been accepted as giving rise to legitimate ground justifying compensation under *Change in Law* clauses of the PPAs with the Procurers.

174. The impugned orders of the Commission stand modified accordingly. In view of above noted observations and directions, subject-wise, the Central Electricity Regulatory Commission is directed to pass the necessary consequential orders within four weeks of this judgment and ensure that the benefit, to the extent allowed, inures without delay to the appellant.

175. The two appeals are disposed of in above terms.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS 27th DAY OF APRIL, 2021.**

**(Justice R.K. Gauba)**
Judicial Member

**(Ravindra Kumar Verma)**
Technical Member