

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

**DFR No : 270 of 2021 & IA No. 1187 OF 2021 &
IA No. 1188 OF 2021**

Dated: 8th November, 2021

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

In the matter of:

**M/s.Azure Power Thirty Four Private
Limited
Through its authorized signatory.
5th Floor, Southern Park,
D-II, Saket Place, Saket, New Delhi –
110017**

... Appellant(s)

Versus

**1. Maharashtra Electricity Regulatory
Commission.
Rep.by Registrars,
World Trade Centre, Centre No.1,
13th Floor, Cuffe Parade,
Mumbai 40000**

... Respondent No.1

**2. Maharashtra State Electricity Distribution
Company Limited
Represented through Chairman and
Managing Director
Hongkong Bank Building, M.G. Road,
Fort, Mumbai-400001**

... Respondent No.2

Counsel on record for the : Mr. Sanjay Sen, Sr. Adv.

Applicant/ Appellant (s)

**Mr. Sujit Ghosh
Ms. MannatWaraich,**

**Counsel on record for the
Respondent(s)** :

**Mr. Rahul Sinha
Mr. Samir Malik
Ms. Nikita Choukse for R-2**

ORDER

This matter has been taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.

We had heard the parties and had dictated this judgment in open court on 22.10.2021 when the second Respondent/MSEDCL was being represented by Mr. Rahul Sinha Advocate, he being led by Mr. Ravi Prakash, Advocate. The judgment was passed essentially on certain concessions made by Mr. Ravi Prakash, Advocate. After the proceedings were over, while the transcript of the judgment was being prepared the Registry noted and we were informed that Mr. Ravi Prakash, Advocate has not filed any *Vakalatnama*. It is against that backdrop that the matter has been listed “*For Directions*” today before us. Mr. Ravi Prakash, Advocate is not present but Mr. Rahul Sinha, counsel on record for MSEDCL/Respondent No.2, is present. He submits that the *vakalatnama* of Mr. Ravi Prakash was not filed though he was engaged to represent the case of MSEDCL with the consent and approval of the party (*MSEDCL*) and that all the submissions made by him on the said date were with the consent and upon instructions of MSEDCL. Mr. Rahul

Sinha, Advocate, thus, confirms the submissions and concessions made by Mr. Ravi Prakash, Advocate on 22.10.2021.

JUDGMENT (ORAL)

PER HON'BLE MR. RAVINDRA KUMAR VERMA, CHAIRPERSON (OFFICIATING)

1. This matter has been taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.

2. The learned senior counsel Mr. Sanjay Sen submitted that the issue is regarding the payment of GST as per change in law and the subject is fully covered by the judgment dated 20.09.2021 passed by this Tribunal in Appeal No. 215 of 2021 titled "*Tata Power Renewable Energy Limited Vs. Maharashtra Electricity Regulatory Commission &Anr.*", the relevant part of the judgment is as under:-

"2. The following clauses of the PPA are relevant for dealing with the dispute at hand:

"..9.1. Definitions In this Article 9, the following terms shall have the following meanings:

"Change in Law" shall refer to the occurrence of any of the following events after the last date of the bid submission, including (i) the enactment of any new law; or (ii) an amendment, modification or repeal of an existing law; or (iii)

the requirement to obtain a new consent, permit or license; or (iv) any modification to the prevailing conditions prescribed for obtaining an consent, permit or license not owing to any default of the Power Producer; or (v) any change in the rates of any Taxes, Duties and Cess which have a direct effect on the Project. However, Change in Law shall not include any change in taxes on corporate income or any change in any withholding tax on income or dividends.

9.2. Relief for Change in Law:

9.2.1 In the event a Change in Law results in any adverse financial loss/ gain to the Power Producer then, in order to ensure that the Power Producer is placed in the same financial position as it would have been had it not been for the occurrence of the Change in Law, the Power Producer/ Procurer shall be entitled to compensation by the other party, as the case may be, subject to the condition that the quantum and mechanism of compensation payment shall be determined and shall be effective from such date as may be decided by the MERC...”

3. The background facts as pleaded by the appellant in support of its claim before the State Commission were summarized succinctly in the impugned order and we borrow the same as under:

“ ...

3.1 On 9 April 2018, MSEDCL floated a tender to procure 1000 MW Solar Power on Long Term basis from new or existing Solar Projects through Competitive Bidding process (followed by reverse auction), to meet its Renewable Purchase Obligation (RPO).

3.2 A total of 8 bidders submitted their bids. TPREL was one such bidder who had participated in the said bidding process on 8 May 2018. After following the technical and financial qualification process, a final Tariff was discovered by the Reverse Auction process:

S. No.	Name of Bidder	Capacity (MW)	IPO Rate (Rs/Kwh)	E-RA result (Rs/Kwh)	Capacity allocated in MW	Intra/Inter Project
1	JLTM Energy Pvt. Ltd.	20	2.95	2.71	20	Intra State Project
2	Mahoba Solar (UP) Pvt. Ltd.	200	2.99	2.71	200	Intra State Project
3	Renew Solar Power Pvt. Ltd	250	2.99	2.72	250	Intra State Project
4	ACME Solar Holdings Ltd.	250	3	2.72	250	Intra State Project
5	Tata Power Renewable Energy Ltd.	150	3	2.72	150	Intra State Project
6	Azure Power India Pvt. Ltd	150	3	2.72	130	Intra State Project
7	Giriraj Renewable Pvt. Ltd.	250	2.99	2.72	0	Intra State Project
8	Shapoorji Pallonji Infrastructure Capital Company Ltd.	180	3	2.76	0	Intra State Project
	Total	1450			1000	

3.3 On 5 June 2018, a Letter of Award (LOA) was issued to TPREL. Subsequently, PPA was executed on 27 July 2018 between TPREL and MSEDCL, for supply of 150 MW of AC power from TPREL's Solar Energy based Power Plant to MSEDCL at Tariff of Rs. 2.72/unit.

3.4 In terms of the PPA, TPREL was required to construct, operate and maintain the Solar PV Project. Accordingly, on 21 September 2018, TPREL entered into the following contracts with Tata Power Solar Systems Limited (TPSSL):

- a. An Erection, Procurement and Construction Contract – EPC (Supply Contract) for Supply of Solar Power Generation System such as Solar Modules, Solar Inverter, Cables, 33 kV Switchgear System, Transformers, Auxiliary Power System, etc. amounting to Rs. 695.61 Crores for the entire Project (excluding GST). TPREL has submitted that the Cost of Module procurement was ~ Rs. 512 Crores.

At the time of the submission of the Bid, GST at the rate of 5% (i.e., 2.5% of CGST and 2.5% of SGST) was payable on such Supply Contracts, in terms of Ministry of Finance's Notification No. 1/2017-Central Tax (Rate) dated 28 June 2017.

- b. *For Civil Works for construction of Civil foundation, Construction of Transformer foundation, installation etc. (Service Contract), for a sum of Rs. 20.02 Crores for the entire Project (excluding GST).*

At the time of the submission of the Bid, GST at the rate of 18% was levied (i.e., 9% of CGST and 9% of SGST) on such service contracts, in terms of Ministry of Finance's Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017.

- 3.5 *Subsequently on 25 February 2019, the PPA was amended, whereby TPREL and MSEDCL agreed to change the location of the Solar PV Project from Village -Vairag, Tal. Barshi, Dist. Solapur, Maharashtra to Village Chhayyan-I, Tehsil Pokharan, Dist. Jaisalmer, in the State of Rajasthan.*

- 3.6 *Considering Ministry of Finance's Notification Nos. 1/2017-Central Tax (Rate) and 11/2017-Central Tax (Rate) dated 28 June 2017, TPREL at the time of the submission of the Bid, had considered GST at the rate of 5% (i.e. 2.5% of CGST and 2.5% of SGST) on Supply Contracts and 18% (i.e. 9% of CGST and 9% of SGST) on Contract for Civil Works (Service Contracts).*

- 3.7 *After the enactment of GST Act, there were various issues raised qua the applicable GST rates for Composite Contracts*

i.e. Contracts providing for supply and services for setting up of Solar Power Plants. In order to resolve these issues, the Ministry of Finance, on the recommendations of the Goods and Services Tax Council (GST Council), issued the following Notifications on 31 December 2018:

a. Notification bearing No. 27/2018-Central Tax (Rate) adding S. No. 38 to the list provided in Notification No. 11/2017 being:-

<i>(1)</i>	<i>(2)</i>	<i>(3)</i>	<i>(4)</i>	<i>(5)</i>
"38.	9954 or 9983 or 9987	Service by way of construction or engineering or installation or other technical services, provided in relation of setting up of following, - (a) Bio-gas plant (b) Solar power based devices (c) Solar power generating system (d) Wind mills, Wind Operated Electricity Generator (WOEG) (e) Waste to energy plants / devices (f) Ocean waves/tidal waves energy devices/plants Explanation:- This entry shall be read in conjunction with serial number 234 of Schedule I of the notification No. 1/2017- Central Tax (Rate), published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated 28th June, 2017 vide GSR number 673(E) dated 28th June, 2017.	9	".

b. Notification bearing No. 24/2018-Central Tax (Rate), which clarified that for composite contracts, 70% of the

taxable value would be treated as the supply component of the contract (to be taxed at 5% - CGST + SGST), and the remaining 30% would be considered as service component of the contract (to be taxed at 18% - CGST + SGST). The relevant part of the said Notification is reproduced below:

“Explanation: If the goods specified in this entry are supplied, by a supplier, along with supplies of other goods and services, one of which being a taxable service specified in the entry at S. No. 38 of the Table mentioned in the notification No. 11/2017-Central Tax (Rate), dated 28th June, 2017 [G.S.R. 690(E)], the value of supply of goods for the purposes of this entry shall be deemed as seventy per cent. of the gross consideration charged for all such supplies, and the remaining thirty per cent. of the gross consideration charged shall be deemed as value of the said taxable service.”;

3.8 As a result of these Notifications dated 31 December 2018, GST at the rate of 8.9% becomes payable on Supply and Service Contracts for setting up of Solar Power Plants instead of 5% on the taxable value of the Supply Contracts and 18% on the taxable value of the Service Contracts for setting up Solar Power Plants. As a result, TPREL’s Supply and Service Contracts with TPSSL for setting up of the Solar

Power Plant now attracts a composite tax of 8.9% (i.e. 5% on 70% of the consolidated taxable value of the Contracts and 18% on the remaining 30% of the consolidated taxable value of the Contracts). These Change in Law events have taken place much after TPREL submitted its Bid (i.e., on 8 May 2018). The said Notifications dated 31 December 2018, have adversely affected the cost of the Project envisaged by TPREL at the time of its Bid.

3.9 As the PPA is a long-term contract (i.e. for 25 years), it was contemplated that certain Change in Law events may occur which would have an impact on the economics of the project. Therefore, the PPA contemplates that the parties to the project are to be restituted to the same economic position, if such parties are adversely impacted by any Change in Law events. It is in this context, Article 9 (Change in Law provision) was incorporated in the PPA.

3.10 From the conjoint reading of Article 9.1 of the PPA (Change in Law provision) read with the definition of 'Law' and 'Government Instrumentality', the aforesaid Notification Nos. 24/2018 and 27/2018 dated 31 December 2018, changing the applicable GST rates on Supply and Service Contracts for setting up of Solar Power Plants, amount to Change in Law events, which have a direct impact on the power plant and increase in the resultant expenditure incurred by TPREL. Hence, in terms of the PPA, TPREL is required to be

compensated so that, it is restituted to the same economic position as if such Change in Law event had not taken place.

3.11 In light of the foregoing and as provided under the PPA, TPREL on 7 November 2019 issued a Change in Law Notice to MSEDCL highlighting the aforesaid Change in Law event and requesting it to compensate TPREL to the tune of Rs.24.62 Crores immediately along with the appropriate carrying cost, on account of such Change in Law event. MSEDCL has neither responded to the said Notice nor compensated TPREL as requested.

3.12 On 31 July 2020 (i.e. after filing of the initial Petition), TPSSL issued a letter to TPREL stating that, recently an internal audit was conducted for TPSSL where it was highlighted that GST of 8.9% is payable on base contract value which is to be computed after including the payment of applicable taxes (i.e. Safeguard Duty paid by TPSSL in the instant case). Further, TPSSL had also sought a legal opinion on the said issue. On 22 May 2020, TPSSL's legal advisor issued a legal opinion, stating that TPSSL is required to discharge its GST liability (in terms of the Notifications dated 31 December 2018) after including the amount of taxes paid/ payable on the base value of the goods and/ services. The amount of Safeguard Duty (SGD) paid by TPSSL would have to be added to the base value before computing the amount of GST (at the rate of 8.9%) payable by TPREL.

3.13 On 15 October 2020, the Amendment Application was filed by TPREL, seeking amendment of the present petition. TPREL through its amendment application has requested to include differential between 5% GST earlier considered on Safeguard duty and 8.9% GST which should have been considered as per 2018 GST amendment in Change in Law claims. Said application is registered as MA No. 55 of 2020.

3.14 Due to the Change in Law events brought about by the Notifications dated 31 December 2018 (i.e., much after the last date of bid submission), TPREL is required to:

- a. Compensate MSEDCL for reduction in GST for Civil Contracts, after considering for payment of any applicable taxes, cess etc. (Service Contract) from 18% to 8.9%; and
- c. Seek compensation from MSEDCL for increase in GST from 5% to 8.9% on the Supply Contracts after considering for payment of any applicable taxes, cess etc.

S.No	Particulars	Rate applicable after notification	Rate application prior to notification	Base Value on which Rate is applicable	GST after notification @ 8.9%	GST prior notification @ 5%	Differential Amt.

	a.	b.	c.	d.	$E=b*d$	$f.=c*d$	$g.=e-f$
1	Supply	8.90%	5%	665.57	59.24	33.28	25.96
2	Civil	8.90%	18%	14.74	1.31	2.65	-1.34
3	Safeguard	8.90%	5%	89.27	7.95	4.46	3.48
4	Total Separate	8.90%	5.25%	769.58	68.49	40.40	28.10

3.15 *In addition to the relief for Change in Law, TPREL is also entitled to Carrying Cost on the compensation for Change in Law, in view of the law laid down by the SC by its Judgment dated 25 February 2019 in Civil Appeal No. 5865 of 2018 titled as Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. v. Adani Power Limited & Ors.”*

4. *The prayers made by the appellant in the aforesaid case were stated thus:*
- (a) *Hold and declare that the change in rate of GST applicable to Supply and Service Contracts pursuant to the Notifications mentioned hereinabove, for setting up of TPREL’s solar power plants, amounts to Change in Law events under the PPA;*
- (b) *Hold and declare that the Petitioner (TPREL) is entitled to a sum of Rs.28.10 Crores along with the carrying cost towards restriction on account of the impact of such Change in Law events on the Petitioner’s Solar Power Plant;*

(c) Direct MSEDCL to make payment of the sum of Rs. 28.10 Crores along with the applicable carrying cost towards compensation for such Change in Law events to TPREL

5. The second respondent/MSEDCL contested the case, inter-alia, referring to certain advance rulings issued by the competent authority under GST Act on the request of certain other entities and argued that the compensation could not be claimed primarily because the appellant had been imprudent in its affairs.

6. The Commission examined the claim by subjecting to scrutiny the effect of applicable tax rates at the time of bid submission and the impact of change brought about by notifications issued in December, 2018. The Commission has accepted the case of the appellant that the notifications issued on 31.12.2018 are change in law event but denied the relief on the finding that the contracting practice adopted by it was neither economical nor prudent, such conclusion being predicated on the view that TPREL ought to have entered into three contracts (instead of two contracts) since that would not have led to increase in rate of GST payable post the notifications dated 31.12.2018.

7. The reasons for such conclusion as above, resulting in denial of relief, are set-out in the impugned order thus:

“20.1. As per analysis in earlier part of this Order, the Commission tabulated below the tax rate applicable to two contracts entered by TPREL for setting up of Solar power generating system:

S.No.	Contract Details	Applicable GST Rate	
		As on Bid Submission date (2017 GST Notification)	Post 2018 GST Notification
1	EPC Contract amounting to Rs. 695.61 Crores. [includes Module procurement Cost of ~ Rs. 512 Crores]	5%	8.9%
2	Civil Works Contract amounting Rs. 20.02 Crores	18%	8.9%

20.2. Thus, due to GST Notifications issued in 2018, tax rate for EPC contract of TPREL has been increased whereas tax rate for Civil Works contract has been reduced. Considering value of each contract, TPREL may have incurred net additional expenses due to increased tax rate post bid submission date.

20.3. The Commission notes that as per provisions of the PPA any adverse financial loss/ gain on account of Change in Law event needs to be compensated by other party. Thus, as in case of increased expenses, buyer has to compensate generator, similarly, in case of reduction in expenses or gain, generator shall pass on such gain to the buyer. However, at the same time. 20.3. The

Commission notes that as per provisions of the PPA any adverse financial loss/ gain on account of Change in Law event needs to be compensated by other party. Thus, as in case of increased expenses, buyer has to compensate generator, similarly, in case of reduction in expenses or gain, generator shall pass on such gain to the buyer. However, at the same time.

20.4. The Commission notes that total value of two contracts signed by TPREL for setting of Solar Power generating system is Rs. 716 Crore which includes cost of Rs. 512 crore towards supply of Solar modules. Thus, supply of solar modules only contributes 72% of total contracts value. If one considers other goods required for Solar Power plants, such contribution of goods would normally cross 85-90% of total contract value. Considering applicable GST notifications and prevailing difference of opinion on applicability of tax rate for Solar plant (evident from rulings of AAR), for saving expenses on taxes, TPREL as a prudent decision should have placed separate contract for only supply of goods which would attract GST tax rate of 5% and not 8.9% which is now applicable for composite contract. It is important to note that TPREL has placed two separate contracts which evidently seems to be placed to minimized GST implications as per then applicable laws. But, considering confusion prevailing at that point of time on applicability

of GST rate for EPC contract, if TPREL would have placed three separate contracts viz. pure supply of goods contracts, erecting & commissioning contract, and civil contracts, then such increased tax burden could have been avoided.

20.5. The Commission also notes MSEDCL's submission that other successful bidders (excluding Azure Power who has filed similar petition in Case No 147 of 2020) in the same bidding process have not approached with such request of compensation on account of GST notification issued in December 2018. This clearly established that present claim of increase in expenses due to 2018 GST notification is not relate with change in tax rate but it is linked with contracting practice of the successful bidder. The Commission notes that PPA requires the generator to perform its activities in prudent manner. PPA also provides definition of Prudent Practices which is reproduced below:

"Prudent Utility Practices shall mean those practices, method, techniques and standards, that are generally accepted for use in electric utility industries taking into account conditions in India, and commonly used in prudent electric utility engineering and operations to design, engineer, construct, test, operate and maintain equipment lawfully, safely, efficiently and economically

as applicable to power stations of the size, service and type of the Project, and that generally conform to the manufacturers' operation and maintenance guidelines."

Thus, as per Prudent Utility Practices, TPREL was expected and required to construct solar plant economically. By not entering into a most appropriate manner of contract for supply of goods, TPREL has lost opportunity of using legitimate lower tax rate of 5%. Therefore, contracting practice followed by TPREL cannot be considered as economical and hence not a prudent one. The additional expenses in this case are thus due to contracting practice adopted by the TPREL and not strictly due to change in tax rate (because tax rate for supply of goods for Solar power generating system remain unchanged i.e. 5%). As a corporate entity, TPREL is within the full knowledge of various provisions of the law and due diligence by them atleast to the extent of the provisions of the PPA would have reduced the unnecessary tax burden. As tax expenses was within the control of TPREL and was avoidable based on the provisions of the law, its adverse impact, if any, cannot be passed on to consumers of MSEDCL. Similarly, to balance the principles on both sides, any saving accrued to TPREL due to contracting practice

adopted by it, need not be passed on to the consumers of MSEDCL.

20.6. The Commission also notes TPREL's contention that placing of EPC contract for setting up of Solar power generating system is well accepted industrial practice. The Commission does not deny such submission of TPREL, but notes that in given circumstances, it would have been economical and prudent for TPREL to place goods supply contract directly with manufacturers of Solar modules and other allied equipments. And for services such as erection, testing and commissioning it could have place separate contract with its sister concerned i.e. Tata Power Solar System limited. Any adverse implication of such contracting practices adopted by TPREL cannot be allowed to be pass on to buyer under Change in Law provision of the PPA."

8. On the basis of above extracted observations, the compensation was denied and the case of the appellant dismissed by MERC.

9. It may be mentioned here that reliance on the advance ruling under Section 97 of GST Act was initially pleaded before the authority below but it (MERC) accepted the legal position that advance ruling cannot be treated as a judgment in rem and, therefore, not binding on TPREL. We must reject the argument

based on the advance ruling by quoting the following provision contained in GST Act:

“103 Applicability of Advance Ruling

(1) The advance ruling pronounced by the Authority or the Appellate Authority under this Chapter shall be binding only-

(a) on the applicant who had sought it in respect of any matter referred to in sub-section (2) of section 97 for advance ruling;

(b) on the concerned officer or the jurisdictional officer in respect of the applicant.

(2) The advance ruling referred to in sub-section (1) shall be binding unless the law, facts or circumstances supporting the original advance ruling have changed...

” (Emphasis supplied)

10. In terms of Section 103, the advance rulings given by the statutory authority are applicable only to the applicants seeking such advance ruling, which are provided after evaluating the facts and circumstances of their case. These advance rulings are judgments in personam and not in rem. Thus, they are not binding on the appellant.

11. To say the least, the approach of the Commission in denying relief to the appellant, in our opinion, is wholly misdirected. In the matter of Coastal Gujarat Power Limited vs Central Electricity Regulatory Commission & Ors. (Appeal no. 172 of 2017) decided by this tribunal by judgment dated 28.04.2021, we had, inter-alia, recorded our views on the subject as under:

“... 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.

...

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...”

(Emphasis supplied)

12. The moot question here is as to whether MERC could have applied the test of ‘prudent utility practice’ while examining the scope of Change in Law provision. The MERC has relied upon a clause in PPA on ‘prudent utility practice’ which reads as under:

“...3.1. Obligations of the Power Producer:

...

(vii) The Power Producer shall undertake at its own cost maintenance of the Interconnection Facilities, excluding the transmission line beyond the Sending Station as per the specifications and requirements of CTU /STU/ DISCOM, as notified to the Power Producer, in accordance with Prudent Utility Practices.

(viii) The Power Producer shall operate and maintain the Project in accordance with Prudent Utility Practices...”

13. Clearly, the Commission has failed to appreciate that the concept of ‘prudent utility practice’ has been used in the PPA in the context of operation and maintenance of the power plant or Article 3.1(vii) and (viii) of the PPA, it having no relevance to Change in Law provision. There is inconsistency in the approach in as much as even while holding in Para 20.4 that TPREL had entered into contract in terms of prevailing law to reduce the tax liability the MERC has found TPREL’s contracting imprudent since additional tax liability has arisen on account of change in law events, though conscious of the fact that Change in Law clauses are inserted in the PPA to compensate the parties on account of impact of unforeseen events. 19. MERC has glossed over the difference between ‘prudence check’ and ‘prudence utility practice’. The prudence check is conducted by the Commission to determine the computation of compensation such that imprudence

in expenditure such as for setting up the power plant is not passed on while determining the compensation of Change in Law. It does not extend to denying relief for Change in Law. Prudence check cannot be extended to arranging business affairs on the basis of law which will come in future. The impugned view would indeed make Change in Law provision otiose, since prudence would get tested in the context of law to come in future. This approach is impermissible in view of the decision in Coastal Gujarat Power Limited (supra).

14. The recourse to composite contract was a business decision of the appellant. It is not fair to deny relief for change in law, otherwise properly made out, only because another business model commends itself as better to the regulator. Suffice it to apply here the ruling of this tribunal in Karnataka Power Transmission Corporation Limited v. Karnataka Electricity Regulatory Commission &Ors. reported as 2007 ELR (APTEL) 223 wherein it was held that the Commissions cannot micro-manage the affairs and contracting of regulated entities.

15. The appellant could not have conceived in advance as to what changes in GST regime might be brought about by the legislature (or executive) in the period after submission of the bid and execution of the PPA. The reasons set out by the Commission are nothing but hindsight. There is no scrutiny or certainty as to whether the consideration payable for the supplies or services procured would have been similar, lower or higher to

the one paid under the composite contract, if the contracts were to be split into two, one for supplies and the other for services. The entire subject is in the realm of speculation. There is nothing shown that the authorities had inhibited or advised against award of such composite contracts at the time of bidding process or in the period thereafter in the run-up to the execution of the PPA and award of the subject contracts. There is no illegality attached to the award of composite contract as was the course adopted by the appellant.

16. If in terms of Article 9.2 of the PPA the Change in Law event has resulted in adverse financial loss to TPREL, on which issue the Commission has concluded in the affirmative, the relief must be granted such that TPREL 'is placed in the same financial position as it would have been had it not been for the occurrence of the Change in Law', the contractual provision being based on restitutionary principle. Further, in view of the settled law on the subject, TPREL is entitled to the compensation claim along with carrying cost. The issue of Carrying Cost for Change in Law compensation is no longer res integra. Hon'ble Supreme Court in UHBVNL & Anr. v. Adani Power Ltd. & Ors. (2019) 5 SCC 325 held that Carrying Cost is an integral part of the restitutionary principle and is inbuilt in Change in Law provisions of the PPA.

17. In above facts and circumstances, we do not uphold the decision, the denial of compensation on the perceived imprudence

for reasons stated above having been found to be unfair and unjust.

18. For the above reasons, we set aside and vacate the impugned order and remit the matter to the State Commission for passing a fresh order after determining the amount of compensation payable due to changes in the GST regime and the carrying cost in such respect.

19. The parties are directed to appear before the State Commission for further proceedings in above light on 04.10.2021. The Commission shall make all endeavor to pass a fresh order in accordance with law at an early date, preferably within two months of the date of first appearance fixed by us.

20. The appeal and the applications filed therewith stand disposed of in above terms.”

Our Consideration:

3. We have heard the learned senior counsel Mr. Sanjay Sen representing the Appellant and the learned counsel Mr. Ravi Prakash representing the second Respondent/MSEDCL.

4 The learned senior counsel Mr. Sanjay Sen submits that the issue raised in the present appeal and contentions advanced regarding the payment of GST are similar in the above referred appeal, the judgment

rendered in the above case squarely applies to this case also. The learned counsel Mr. Ravi Prakash representing second Respondent/MSEDCL submits that he agrees with the submissions of the learned senior counsel Mr. Sanjay Sen regarding the applicability of the judgment.

5. Having regard to the facts and circumstances of the case, as stated above, we hereby disposed of the instant Appeal, being DFR No. 270 of 2021 in terms of the judgment dated 20.09.2021 passed by this Tribunal in Appeal No. 215 of 2021 titled "*Tata Power Renewable Energy Limited Vs. Maharashtra Electricity Regulatory Commission & Anr.*" and for the reasons, as stated therein, the instant Appeal, being DFR No. 270 of 2021 filed by the Appellant is disposed of with the following directions:

- (a) The instant Appeal filed by the Appellant is allowed. The impugned Order dated 10.05.2021 passed by Maharashtra Electricity Regulatory Commission in Case No. 147 of 2020 is hereby set-aside.
- (b) The matter stands remitted back to the first Respondent (Maharashtra Electricity Regulatory Commission) for re-consideration and pass appropriate orders in accordance with law after affording reasonable opportunity of hearing to the Appellant and the second Respondent/MSEDCL and dispose of the matter as expeditiously as possible at any rate within the period of three months from the date of appearance of the parties before the first Respondent/State Regulatory Commission.

(c) The Appellant and Respondents herein are directed to appear before the first Respondent/State Regulatory Commission personally or through their counsel on 12.11.2021 at 11:00 a.m. without notice to collect necessary date of hearing.

6. The appeal and the applications filed therewith stand disposed of in above terms.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERENCING ON THIS 8thDAY OF NOVEMBER, 2021.**

(Justice R.K. Gauba)
Judicial Member

mk

(Ravindra Kumar Verma)
Officiating Chairperson