APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 39 OF 2018

Dated : 15th December, 2022

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

IN THE MATTER OF :

M/s Ginni Global Limited,
Registered Office at 2nd Floor,
Shanti Chamber,
11/6B, Pusa Road,
New Delhi – 110005. .... **APPELLANT**

Versus

1. **Himachal Pradesh Electricity Regulatory Commission,**
Keonthal Commercial Complex,
Khalini,
Shimla – 171002.

2. **Himachal Pradesh State Electricity Distribution Board Limited**
Through its Executive Director (Pers),
Vidyut Bhawan,
Shimla – 171004.

3. **The Government of Himachal Pradesh**
Through its Secretary (MPP & Power)
Shimla – 171002.

4. **The Himachal Pradesh Energy Development Agency**
(Himurja)
SDA Complex, Kasumpti,
Shimla – 171009. .... **RESPONDENTS**

Counsel for the Appellant(s)	:	Mr. Hemant Singh Ms. Shikha Ohri Ms. Swagitika Sahoo Ms. Pratiksha Chaturvedi Mr. Omar Waziri Mr. Samyak Mishra Mr. Mohd. Aman Sheikh
Counsel for the Respondent(s)	:	Mr. Pradeep Misra Mr. Manoj Kumar Sharma for R-1 Mr. Anand K. Ganesan Ms. Swapna Seshadri Mr. Amal Nair Ms. Parichita Chowdhury Ms. Kritika Khanna for R-2

J U D G E M E N T

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

1. M/s Ginni Global Limited ("the Appellant" for short) has preferred this appeal against the order passed by the Himachal Pradesh Electricity Regulatory Commission ("Commission" for short) in Petition Nos. 70 of 2008 and 202 of 2009 dated 22.05.2010. The appellant had approached the Commission seeking revision of the generic tariff of Rs. 2.50 per unit, as notified by the Government of Himachal Pradesh on 06.05.2000, contending, among others, that the said tariff, applicable to small hydro power plants, did not factor in the Minimum Alternate Tax ("MAT" for short), which electricity generating companies, such as the Appellant, were liable

to pay to the Income Tax department; and the said tariff did not conform to the provisions of Section 61 of the Electricity Act, 2003 ("the Act" for short).

2. The Commission, after taking note of the appellant's submission, concluded that any change in MAT, from the one existing at the time of signing of the Power Purchase Agreement ("PPA" for short) in the first 10 years of the generation project, shall be payable as per the following formula:

"(Total amount on account of revised effective MAT) – (Total amount on account of MAT at the time of signing of PPA)."

3. The Commission further held that the adjustment, on account of a change in the MAT rate, shall be subject to the appellant furnishing, to the satisfaction of the Himachal Pradesh State Electricity Board, (ie the 2nd Respondent herein), documentary proof of actual payment of MAT made by them; and the 2nd Respondent shall calculate at the end of each financial year as per the prescribed formula.

4. Aggrieved thereby, the appellant filed Review Petition No. 135 of 2010 – 2721 – 24 which was disposed of by the Commission, by its order dated 23.11.2010, holding that the additional claim with respect to MAT could not be acceded to; and compensation, on account of MAT, shall be payable as per the formula given in its earlier order dated 22.05.2010. The Commission, while expressing its inability to agree with the appellant's

contention that the entire MAT - from its inception - should be allowed, and not the differential amount i.e., difference between the revised MAT rate and the MAT rate prevailing at the time of signing of the PPA, opined that the liability of the 2nd respondent to pay the additional MAT arises only after it had committed itself after signing the PPA; the appellant, on the other hand, was aware that MAT was payable by them even at the time of signing the PPA; the MAT payable by them, at that point of time, cannot be considered as a change in the goalpost; change of MAT, after signing the PPA, becomes the change in the goalpost for which the appellant was required to be compensated for which a formula had already been prescribed by the Commission in its earlier order dated 22.05.2010; and the compensation amount of MAT shall be as per the formula stipulated in the order dated 22.05.2010. After the Review Petition was disposed of, on 23.11.2010, the appellant preferred the present appeal against the original order dated 22.05.2010.

I. MINIMUM ALTERNATE TAX:

5. Before taking note of, and considering, the submissions put forth by Learned Counsel on either side, it is useful to refer to the relevant statutory provisions governing Minimum Alternate Tax ("MAT" for short). Section 115-JA was inserted in the Income Tax Act, by Finance Act No. 2 of 1996 with effect from 01.04.1997, prescribing the Minimum Alternate Tax payable

by certain categories of companies as their deemed income. Sub-section (1) of Section 115-JA stipulated that, notwithstanding anything contained in the Income-tax Act, where, in the case of an assessee being a company, the total income as computed under the Income-tax Act, in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 1997, was less than thirty percent of the book profit, the total income of such assessee, chargeable to tax for the relevant previous year, shall be an amount equal to 30% of such book profit. Under the explanation thereto "book profit", for the purpose of Section 115-JA, meant the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2), as increased by Clause (a) to (f) thereunder, and as reduced by clause (i) to (ix) thereunder. The said provision was, however, not made applicable to the profits derived by companies from their business of generation and distribution of electricity. It is by an amendment made on 12.05.2000, which came into force with effect from 01.04.2001, that Section 115-JB was inserted in the Income Tax Act prescribing levy of MAT at 7.5% of the book profit of certain Companies to which category the Appellant belonged.

6. Section 115-JB, as inserted in the Income Tax Act by Finance Act 10 of 2000 dated 12.05.2000 with effect from 01.04.2001, reads thus:

> *"115JB. Special provision for payment of tax by certain companies.—(1)*

> *Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2001, is less than seven and one-half percent of its book profit, the tax payable for the relevant previous year shall be deemed to be seven and one-half percent of such book profit."*

7. Consequent upon insertion of Section 115-JB, in case the total income of the companies, to which category the appellant belonged, was less than 7.5% of its book profit, they were liable to pay minimum alternate tax at 7.5% of such book profit.

II. TARIFF STIPULATED IN THE PPA:

8. On 06.5.2000, the Government of Himachal Pradesh issued a policy for promotion of small hydro projects which, among others, enabled the power produced by such projects either to be used by the developer for captive use within the State or outside the State or for its sale to the 2nd Respondent; if the developer opted to sell its power so produced to the 2nd Respondent, the tariff for such purchase was Rs. 2.50 per unit, which was firm and final. While the power producer had to pay royalty for the project site allotted, in the form of free power at the rate of 10% of the power produced for the first 15 years from the Commercial Operation Date ("COD" for short), and 12% for the balance useful life, payment of royalty for the first 15 years was exempt, in case the power so produced was sold to the 2nd Respondent.

9. On 27.03.2004, a joint petition was filed by the appellant and the 2nd Respondent before the Commission seeking its approval of the draft PPA. After the PPA was approved by the Commission on 27.04.2004, the PPA was executed between the appellant and the 2nd Respondent on 07.06.2004.

III. WAS MAT FACTORED IN THE TARIFF PRESCRIBED BY THE GOVT OF H.P. IN ITS POLICY DATED 06.05.2000?

10. Mrs. Shika Ohri, Learned Counsel for the appellant, would submit that it is only with the introduction of 115-JB, in the Income Tax Act, were electricity generating companies also brought within the ambit of **Minimum Alternate Tax** ("MAT"); Section 115-JB was inserted in the Income Tax Act on 12.05.2000 with effect from 01.04.2001; a few days prior to its introduction, the Himachal Pradesh State Government had issued a policy for promotion of small hydro projects on 06.05.2000; in terms of the said policy, the tariff was fixed at Rs.2.50 per kW/h; since MAT was extended to generating entities only thereafter, it is evident that the tariff was fixed at Rs. 2.50 kW/h without factoring into it, the MAT component; and, consequently, the appellant is entitled to be compensated for the entire MAT which they were statutorily required to pay, and had paid, to the Income Tax department.

11. We have no difficulty in agreeing with the submission of Mrs. Shikha Ohri, learned counsel for the appellant, that fixation of tariff at Rs.2.50 per

unit, by the Government of Himachal Pradesh in its policy dated 06.05.2000, was prior to 12.05.2000 when Section 115 JB was inserted and, consequently, the 7.5% MAT payable by companies, such as the appellant, could not have been factored in, by the Govt of Himachal Pradesh, while fixing the tariff rate, for the electricity supplied to the HPSEB by the Power Producers, at Rs.2.50 per unit in its policy dated 06.05.2000.

12. That, however, is of no consequence as the PPA was executed by the Appellant not before 12.05.2000 when MAT was extended to companies of the category of which the Appellant belonged, but on 07.06.2004 - by which date MAT was in force for more than three years. It is evident that the appellant had entered into the said PPA fully aware of its legal obligation to pay MAT in terms of Section 115 JB of the Income Tax Act.

IV. RELEVANT CLAUSES OF THE PPA:

13. The PPA dated 07.06.2004 defined "effective date" to mean the date of the agreement i.e., 07.06.2004. Clause 6.2 of the PPA, which stipulated the tariff for net saleable energy, reads as under:

> *"6.2 Tariff for net saleable energy*
>
> *The Board shall pay for the Net Saleable Energy delivered by the Company to the Board at the interconnection Point at a fixed rate of Rs. 2.50 (Rupees Two and paise fifty) per Killowatt hour. This rate is firm and fixed without indexation and escalation and shall not be changed due to any reason whatsoever."*

14. Clause 8.8 of the PPA, which related to levies, taxes, duties, cess etc, reads as under:

> *"Any statutory taxes, levy, duties, cess or any other kind of imposition(s) including tax on generation of electricity whatsoever imposed/charged by any government (Central/State) and/or any other local bodies/authorities on generation of electricity, after the Effective Date, shall be reimbursed by the Board to the Company on the quantum of Net Saleable Energy."*

15. In terms of Clause 8.8, the obligation of the second respondent was limited to reimbursing the Appellant, the increase in the rate of MAT, (a statutory tax imposed by the Central Govt under the Income-tax Act), after the effective date ie 07.06.2004

V. ARE THE CONDITIONS STIPULATED IN THE PPA INVIOLABLE?

a. Rival contentions under this head:

16. Mrs. Shikha Ohri, learned counsel for the appellant, submits that Clause 8.8 of the PPA dated 07.06.2004 is neither inviolable nor sacrosanct; the Commission is statutorily obligated, in terms of Clause (b), (d) and (h) of Section 61 and Sub-section (1) (a) of Section 62 of the Act, to determine the applicable tariff; the Commission erred in denying their claim in its entirety, merely on the ground that, when the appellant had entered into a Power Purchase Agreement ("PPA") on 07.06.2004, the MAT rate was 7.5%; in computing the amount to which the appellant was entitled to under this head, the Commission erred in reducing from the rate, at which MAT

was paid by the appellant to the Income-tax department, the 7.5% MAT rate prevalent on the date on which the PPA was entered into; the Commission was not justified in holding that the appellant was not entitled to this 7.5% MAT rate, on the ground that they had signed the PPA long after introduction of Section 115-JB; the power conferred on the Commission, under the aforesaid provisions required them to determine tariff in accordance with the principles prescribed for its determination; and the Commission is entitled to determine tariff notwithstanding the fact that the appellant had entered into such a PPA, for a fixed tariff of Rs.2.50 per kW/h, on 07.06.2004. Learned counsel would rely on ***Gujarat Urja Vikas Nivam Limited vs. Tarini Infrastructure Limited and Others [(2016) 8 SCC 743]*** in this regard.

17. On the other hand, Mr. Pradeep Misra, learned counsel for the Commission, would draw our attention to the list of dates, filed along with their written submissions, to submit that the appellant had entered into the PPA on 07.06.2004 with its eyes open and knowing fully well that electricity generating companies such as the appellant, were brought within the ambit of the MAT regime from 01.04.2001 onwards i.e., more than 3 (three) years prior to the date on which they had entered into the said PPA; and as the appellant had agreed for fixation of tariff at Rs. 2.50 per kW/h, conscious of the fact that their MAT liability under the Income Tax Act was 7.5%, the Commission was justified in denying their claim for being compensated for

the entire MAT paid by them, and in partly allowing the Appellant's claim for reimbursement of MAT after deducting therefrom the MAT rate of 7.5% prevailing prior to the date on which they had entered into the PPA on 07.06.2004.

18. Ms. Swapna Seshadri, learned counsel for the 2nd respondent, lays emphasis on the sanctity of the PPA to submit that the Commission cannot, under the guise of determining tariff, rewrite the Agreement entered into between the parties. She contends that reliance placed by the appellant on ***Tarini Infrastructure Limited*** was misplaced; the said judgment was, subsequently, distinguished by the Supreme Court in ***Gujarat Urja Vikas Nigam Limited vs. Solar Semiconductor Power Company (India) Private Limited and Another [(2017) 16 SCC 498],*** and in the judgement of this Tribunal in ***Punjab State Power Corporation Limited*** **vs.** ***Biomass Power Producers Association & others [Appeal No. 65 of 2016, dated 02.08.2016].***

b. Statutory provisions relating to determination of tariff:

19. Para-VII of the Act relates to Tariff, and Section 61 to Tariff Regulations. The said provision requires the Appropriate Commission, subject to the provisions of the Act, to specify the terms and conditions for the determination of tariff and, in doing so, to be guided by the principles enumerated in Clauses (a) to (i) thereunder which read thus:-

> *"(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;*
> *(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;*
>
> *(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*
>
> *(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;*
>
> *(e) the principles rewarding efficiency in performance;*
>
> *(f) multi-year tariff principles;*
>
> *(g) that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;]*
>
> *(h) the promotion of co-generation and generation of electricity from renewable sources of energy;*
>
> *(i) the National Electricity Policy and tariff policy:"*

20. As reliance is placed by Mrs. Shikha Ohri, learned counsel for the Appellant, on Section 62 (1) (a) also, besides Clause (b), (d) & (h) of Section 61, it is necessary to take note of what the said provision stipulates. Section 62 relates to the determination of tariff and, under Clause (1) (a) thereof, the Appropriate Commission shall determine the tariff in accordance with the provisions of the Electricity Act for supply of the Electricity by a Generating Company to a distribution licensee; and, in case of shortage of supply of Electricity, to fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity. While Section 62 of the Act deals with different kinds of tariffs/charges to be fixed,

Section 64 enumerates the manner in which tariff should be determined by the Commission. The word "tariff" has not been defined in the Act. Tariff means a schedule of standard/prices or charges provided to the category or categories for procurement by the licensee from the generating company, *(**Gujarat Urja Vikas Nigam Ltd. V/s Solar Semiconductor Power Company (India) Pvt. Limited & Another (2017-16-SCC-498).***

21. Section 86 relates to the functions of the State Commission and, under sub-section (1) (a) thereof, the State Commission shall determine the tariff for generating, supplying, transmission and wheeling of electricity, wholesale, bulk or retail as the case may be within the State. Under the proviso thereto, where open access has been permitted to a category of consumers under Section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers.

22. The function of the State Commission, under Section 86(1)(b), is to regulate electricity purchase and procurement process of distribution licensees, including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State. Determination of tariff is one of the primary functions of the Commission under Section 86(1)(b), which determination includes the regulatory power with regards purchase and procurement of electricity from generating companies by entering into PPA(s). This provision requires the Court

not to read inviolability in the terms of the PPA in so far as the tariff stipulated therein, as approved by the Commission, is concerned. ***(Gujarat Urja Vikas Nigam Limited Vs. Tarini Infrastructure Limited: (2016) 8 Supreme Court Cases 743).***

23. The power of tariff determination/fixation is statutory in character ***(A.P. TRANSCO v. Sai Renewable Power (P) Ltd., (2011) 11 SCC 34; Gujarat Urja Vikas Nigam Limited Vs. Tarini Infrastructure Limited: (2016) 8 Supreme Court Cases 743)***, and is subject to determination of the price of power in open access (Section 42) or in the case of open bidding (Section 63). ***(Gujarat Urja Vikas Nigam Limited Vs. Tarini Infrastructure Limited: (2016) 8 Supreme Court Cases 743).***

c. Agreements mutually entered into should, ordinarily, not be varied by an exercise of tariff determination to benefit one of the parties:

24. The choice of entering into a contract/PPA based on such tariff is with the power producer and the distribution licensee. While the State Commission, in exercise of its power under Section 62 of the Act, may redetermine the tariff, it cannot force either the generating company or the licensee to enter into a contract based on such tariff. nor can it vary the terms of the contract between the parties, or to the disadvantage of the consumers whose interest the Commission is bound to safeguard. ***(Gujarat Urja Vikas Nigam Ltd. V/s Solar Semiconductor Power Company (India) Pvt. Limited & Another (2017-16-SCC-498)*.** Sanctity of the PPA, entered into between the parties by mutual consent, cannot

be allowed to be breached by a decision of the State Commission to the advantage of one of the parties and to the disadvantage of the other. Terms of PPA are binding on both the parties equally. ***(Gujarat Urja Vikas Nigam Ltd. V/s Solar Semiconductor Power Company (India) Pvt. Limited & Another (2017-16-SCC-498).***

25. There is no scope for the Commission to vary the tariff agreed between the parties under the approved Power Purchase Agreement *(**Bangalore Electricity Supply Co. Ltd vs Konark Power Projects Ltd: (2016) 13 SCC 515**)*, and it ought not, in the exercise of its inherent jurisdiction, to substitute its views in the place of the stipulations in the PPA which is essentially a matter of contract between the parties. ***(Gujarat Urja Vikas Nigam Ltd. V/s Solar Semiconductor Power Company (India) Pvt. Limited & Another (2017-16-SCC-498)*.** As the tariff stipulated in the PPA is as a result of mutual agreement between the parties, the Commission should ordinarily, even though the PPA is neither inviolable nor sacrosanct, not substitute its views for that of the parties to the PPA or impose, to the disadvantage of one of the parties thereto, a tariff which is at variance with the one stipulated in the PPA.

d. Parties to the PPA are bound by the terms and conditions stipulated therein:

26. As noted hereinabove, Clause 6.2 of the PPA, while obligating the second respondent to pay for the Net Saleable Energy, delivered to them

by the Appellant, at a fixed rate of Rs. 2.50 per Killowatt hour, also emphasises that this rate of Rs. 2.50 per Killowatt hour is firm and fixed without indexation and escalation, and shall not be changed for any reason whatsoever. The obligation of the second respondent, under Clause 8.8 of the PPA, was confined to, reimbursing the Appellant, the increase in the rate of MAT, (a statutory tax imposed by the Central Govt under the Income-tax Act), after the effective date ie 07.06.2004. On a conjoint reading of Clauses 6.2 and 8.8 of the PPA, it is clear that, while the tariff rate of Rs.2.50 per unit is firm and fixed and cannot be changed for any reason, the Appellant is entitled to be reimbursed the change in the rate of MAT, introduced in the Income-tax Act, post 07.06.2004 alone. As the rate per unit of Rs.2.50 is fixed under the PPA, it does not permit reimbursement of the MAT rate of 7.5% prevailing prior to the date of execution of the PPA on 07.06.2004. Both the parties to the PPA (i.e. the Appellant and the Second Respondent) are bound by the terms and conditions stipulated therein as they have been entered into with mutual consent. ***(Gujarat Urja Vikas Nigam Ltd. V/s Solar Semiconductor Power Company (India) Pvt. Limited & Another (2017-16-SCC-498)*.**

VI. JUDGEMENTS RELIED UPON:

27. As reliance is placed by Mrs. Shikha Ohri, learned counsel for the Appellant, on ***Gujarat Urja Vikas Nigam Limited Vs. Tarini Infrastructure Limited, [(2016) 8 Supreme Court Cases 743]*** , let us examine whether

the said judgement supports her submission that the tariff stipulated in the PPA, (which is said to be referrable to a policy, of the Himachal Pradesh State Govt, framed just prior to the introduction of Section 115-JB in the Income-tax Act), should be varied and the Appellant should be compensated for the entire MAT paid by them to the Income-tax department.

28. The respondent, before the Supreme Court in ***Tarini Infrastructure Limited*****,** was the power producer which had installed two small Hydro Power Projects in the State of Gujarat. They had entered into a PPA with the Appellant agreeing to sell electricity from its generating stations, to the extent of the contracted quantity for a period of 35 years at Rs. 3.29 per KWH subject to escalation of 3% per annum till the date of commercial operation. Just before commissioning the generating station, the respondent sought an increase in the tariff to Rs. 4.70 per unit on the ground that though, under the concession agreement, power was to be evacuated at the nearest sub-station located at a distance of 4 Kms from its switch yard, it was later realized that the transmission line was required to be laid at a distance of 23 Kms instead of the originally envisaged 4 Kms. The increase in cost of around Rs. 10 crores, incurred in establishing the additional infrastructure, was not envisaged in the concession agreement entered into between the 1st and the 2nd Respondents earlier. The Application filed by the 1st Respondent was rejected by the Regulatory

Commission primarily on the ground that, once the tariff was determined and thereafter incorporated in the PPA, there was no scope for re-determination of the same at the unilateral request of the power producer.

29. Unlike in ***Tarini Infrastructure Limited & Others***, where the Supreme Court held that the Commission ought to have varied the tariff in the PPA in view of a change in the situation after the agreement was executed (ie shifting of the transmission line to a distance of 23 Kms instead of the originally envisaged 4 Kms, and the consequent provision of additional infrastructure costing around Rs. 10 crores, which was not envisaged in the concession agreement), the claim of the Appellant in the present case is for payment of the 7,5% MAT rate which was in force prior to when the PPA was executed on 07.06.2004, despite which the Appellant had agreed to supply electricity to the second respondent at Rs.2.50 per unit, which seems to be the rate stipulated by the Govt of Himachal Pradesh in its policy dated 6.05.2000. Not only did the Appellant agree to the tariff rate of Rs.2.50 per unit, they also agreed that this rate was firm and fixed without indexation and escalation, and shall not be changed for any reason whatsoever.(Clause 6.2 of the PPA). Reliance placed, on behalf of the Appellant, on ***Tarini Infrastructure Limited & Others*** is, therefore, of no avail.

30. The Judgment in ***Tarini Infrastructure*** was distinguished by the Supreme Court in its subsequent judgment in ***Gujarat Urja Vikas Nigam Ltd. V/s Solar Semiconductor Power Company (India) Pvt. Limited & Another (2017-16-SCC-498)*****.** The facts of the said case were that the appellant before the Supreme Court and the parent company of the 1st Respondent had executed a PPA for the sale and purchase of electricity. The said PPA stipulated that, in case of any delay in commissioning the Solar Power Project beyond 31.12.2011, the Appellant was liable to pay the tariff as determined by the Commission for solar projects effective on the date of commissioning of the solar power project or the tariff in the PPA, whichever was lower. There was a delay in commissioning the said solar power project. The first respondent approached the regulatory commission seeking extension of the control period. The Commission extended the control period in the exercise of its inherent power.

31. In this context, the Supreme Court held that, as the first respondent had commissioned its projects, beyond 31.12.2011, the Commission could not have exercised its inherent jurisdiction to vary the terms to extend the control period of the Tariff order, applicable to the 1st Respondent, beyond what was stipulated in the PPA entered into between the Appellant and the 1st Respondent.

32. While considering the earlier judgment in ***Tarini Infrastructure Ltd*****,** the Supreme court, in ***Solar Semiconductor Power Company (India) Pvt. Limited*****,** observed that, In the facts and circumstances of that case, the tariff rate of Rs 3.29 per kWh was subject to escalation, and subject to periodic review;. evacuation was changed from a distance of 4 km to 23 km from its switchyard; on account of the same, Respondent 1 therein had incurred an additional cost of about Rs 10 crores which was not envisaged in the Concession Agreement; and, in such facts and changed circumstances, the Supreme Court had thought it apposite to take a lenient view and allow the State Commission to redetermine the tariff rate.

33. The Supreme Court, in ***Solar Semiconductor Power Company (India) Pvt. Limited***, thereafter observed that when the tariff rate, as determined by the Tariff Order, was incorporated in the PPA, it was thereafter a matter of contract between the parties; Respondent No. 1 was bound by the terms and conditions of the PPA entered into between Respondent 1 and the appellant by mutual consent; and the State Commission was not right in exercising its inherent jurisdiction by extending the first control period beyond its due date and thereby substituting its view in the PPA, which was essentially a matter of contract between the parties.

34. Both the judgments of the Supreme Court in ***Tarini Infrastructure*** and ***Solar Semiconductor Power Company*** were considered by this Tribunal in ***Punjab State Power Corporation Limited*** **vs.** ***Biomass Power***

Producers Association (Appeal Nos. 65 and 284 of 2016, dated. 02.08.2022). This Tribunal opined that, as explained by the Supreme Court in ***Solar Semiconductor Power Company (India) limited*****,** the case of ***Tarini Infrastructure*** involved the question as to whether the tariff fixed under the PPA was sacrosanct and inviolable, beyond review and correction by the regulatory Commission; the power producer in that case had sought revision of tariff by the Commission primarily on the ground of longer distance, to which the power was to be evacuated, than the one envisaged in the concession agreement; and, in that context, the Court had ruled that the price of sale and purchase of electricity be regulated, and the tariff rate re-determined.

35. After extracting the relevant paragraphs of the judgments of the Supreme Court, both in ***Solar Semiconductor Power Company Limited*** and ***Gujarat Urja Vikas Nigam Ltd vs EMCO Ltd: (2016) 11 SCC 182***, this Tribunal observed that the terms of the contract (PPA) could not be varied as that would result in rendering the rights and obligations of the parties to be non-binding.

VII. CONCLUSION:

36. As noted herein above, the tariff rate of Rs. 2.50 per kW/h payable by the 2nd respondent, for the net saleable energy delivered by the appellant to them at the interconnection point, under Clause 6.2 of the PPA was firm and

fixed without indexation and escalation, and was not to be changed for any reason whatsoever. The only concession provided in the PPA, for a change in the said firm and fixed tariff rate of Rs.2.50 per unit, was as stipulated in Clause 8.8, in terms of which only statutory taxes imposed after the effective date were required to be reimbursed by the 2nd respondent to the appellant. As the effective date is defined, in Clause 2.2.30 of the PPA, to mean the date of signing the agreement which is 07.06.2004, it is only statutory taxes imposed after that date (i.e., 07.06.2004) which is required to be reimbursed by the 2nd respondent to the appellant. Even if the conditions stipulated in the PPA are not to be treated as inviolable or sacrosanct, and as not to bar the jurisdiction of the regulatory Commission to determine tariff, that does not mean that the regulatory commission can completely ignore the conditions stipulated in the PPA, as such an agreement has been entered into by the parties thereto on their own volition and free will, and is therefore binding inter-parties. Irrespective of the fact that the State of Himachal Pradesh framed its policy on 06.05.2000, prior to insertion of Section 115-JB on 12.05.2000, wherein it fixed the tariff rate at Rs. 2.50 per unit, the fact remains that MAT was extended, in terms of Section 115-JB of the Income Tax Act, also to electricity generating companies from 01.04.2001 onwards, more than three years prior to 07.06.2004 when the appellant entered into the PPA with the 2nd respondent. The appellant agreed to the conditions stipulated in Clause 6.2 of the PPA, knowing fully well that they

would have to pay MAT at 7.5% of their book profit, which was the MAT rate prevailing prior to the date of the PPA. It is not open to them, therefore, to now turn around and contend that, notwithstanding their having agreed to be paid tariff at Rs. 2.50 per unit, they are nonetheless entitled to be reimbursed the entire MAT paid by them to the Income Tax department, including the MAT rate of 7.5% prevailing prior to the date of the PPA.

37. In view of Clause 6.2 read with Clause 8.8 of the PPA, the regulatory Commission has, in our view, rightly directed the 2nd respondent to reimburse the MAT paid by the appellant to the Income-tax department, after deducting therefrom MAT at the earlier prevailing rate of 7.5%.

38. Viewed from any angle, we find no merit in this appeal necessitating our interference. The appeal fails and is, accordingly, dismissed.

39. Pronounced in the open court on this the **15th day of December, 2022**.

(Sandesh Kumar Sharma)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

tpd/ks