

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

**DFR NO. 470 OF 2020 & IA NO. 1864 OF 2020  
AND  
APPEAL NO. 246 OF 2022 & IA NO. 928 OF 2020**

Date : 04.11.2022

**Present: Hon'ble Mr. Justice R. K. Gauba, Officiating Chairperson  
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

**DFR NO. 470 OF 2020 & IA NO. 1864 OF 2020**

In the matter of:

**ESSAR POWER GUJARAT LIMITED**

(through Shruti Verma, Advisor)

Essar House 11, Keshavrao Khadye

Marg, Mahalaxmi,

Mumbai - 400034

.... Appellant(s)

***Versus***

**1. GUJARAT ELECTRICITY REGULATORY  
COMMISSION,**

Through the Secretary

6th Floor, GIFT ONE, Road 5C, Zone 5,

GIFT City, Gandhinagar

**2. GUJARAT URJA VIKAS NIGAM LIMITED  
(GUVNL)**

Through its Company Secretary

Sardar Patel Vidyut Bhavan, Race Course,

Vadodara - 390007

.... Respondent(s)

Counsel for the Appellant(s) : Mr. Sajan Poovayya, Sr. Adv.  
Ms. Raksha Agarwal  
Mr. Alok Shankar  
Mr. Kumarjeet Ray

Counsel for the Respondent(s) : Mrs. Suparna Srivastava  
Mr. Tushar Mathur  
Ms. Soumya Singh for R-1

Mrs. Swapna Seshadri  
Ms. Ashabari Thakur for R-2

**APPEAL NO. 246 OF 2022 & IA NO. 928 OF 2020**

**ESSAR POWER GUJARAT LIMITED,**  
44 KM Stone, Jamnagar-Okha Highway,  
P.O Box No.07, Dist. Devbhumi Dwarka  
Khambhaliya 361305, Gujarat

.... Appellant(s)

***Versus***

1. **GUJARAT ELECTRICITY REGULATORY  
COMMISSION,**  
Through the Secretary  
6th Floor, GIFT ONE, Road 5C, Zone 5,  
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.... Respondent(s)

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Mr. Tushar Mathur  
Ms. Soumya Singh for R-1  
Mrs. Swapna Seshadri  
Ms. Ashabari Thakur for R-2

**J U D G E M E N T** (*Oral*)

**PER HON'BLE MR. JUSTICE R. K. GAUBA, OFFICIATING CHAIRPERSON**

1. The common issue raised by these appeals concerns the fee payable by the Appellant, a generator, under the *Gujarat Electricity Regulatory Commission (Fees, Fines and Charges) Regulations, 2005* (for short, "Fee

Regulations”), on petitions for claims of compensation arising out of change in law provisions in the *Power Purchase Agreement* (“PPA”) with the beneficiaries.

**2.** The order under challenge in the first captioned appeal was passed by the first Respondent, *Gujarat Electricity Regulatory Commission* (“the State Commission”) on 09.10.2020 in Interlocutory Application (no. 09 of 2018) in petition registered as 1680/2017. The appeal was filed with a delay of 27 days and hence with an application (IA no. 1864/2020) for condonation. The learned counsel for the first Respondent fairly submitted that the request for condonation of delay is not opposed. We have allowed the application and entertained the appeal.

**3.** *Essar Power Limited* (“EPL”), the holding company of the Appellant *Essar Power Gujrat Limited* (“EPGL”) had participated in the process of bidding undertaken pursuant to *Request for Qualification* (“RFQ”) issued by the second Respondent *Gujarat Urja Vikas Nigam Limited* (“GUVNL”) for supply of power in bulk on long term basis. The Appellant emerged as a successful bidder for sale and supply of 1000 MW electricity from its proposed Unit-1 and Unit-2 of 1200 (2x600) MW phase-I Salaya Thermal Power project to be set up by it. The EPL and GUVNL entered into *Power Purchase Agreement* (“PPA”) on 26.02.2007 for supply of 1000 MW

electricity, the contract including a provision for change in law, the relevant part thereof being as under:

*“13. In this Article 13, the following terms shall have the following meanings:*

*13.1.1 “Change in Law” means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:*

*(i) The enactment, bringing into effect, adoption promulgation, amendment, modification or repeal, of any Law...”*

**4.** The bid tariff was adopted by the State Commission by order dated 20.12.2007, it having been found that the same was discovered through transparent process of bidding held in accordance with guidelines issued by the Central Government, in terms of Section 63 of the Electricity Act, 2003.

**5.** On 25.11.2008, GUVNL, EPL and EPGL entered into an Assignment Agreement in terms of which the PPA was assigned to EPGL (the Appellant).

**6.** The petition No. 1680 of 2017 which resulted in the order being passed on the issue of fee on 09.10.2020, impugned by the first captioned appeal, was presented by the Appellant on 30.08.2017 for approval to raise Supplementary Bills/Invoices on GUVNL for levy of Integrated Goods and Service Tax (“IGST”) on the assessable value of goods, Basic Custom Duty (BCD) on the goods imported, Integrated GST on the Sea Freight, Compensation Cess instead of Clean Energy Cess (CEC) as levy of

Compensation Cess also amounted to Change in Law under Article 13 of the PPA, the prayer clauses reading as under:

*“(A) Approve and allow the petitioner to raise Supplementary Bills/Invoices for levy of Integrated GST (IGST) on the Assessable value and BCD of the Goods imported, under Article 13 of the PPA;*

*(B) Approve and allow the Petitioner to raise Supplementary Bills/Invoices for the additional levy of IGST on import freight as per the provisions under GST law under Article 13 of the PPA;*

*(C) Approve and allow the Petitioner to raise Supplementary Bills/Invoices for levy of Compensation Cess instead of Clean Energy Cess (CEC);*

*(D) During pendency and final hearing of the present petition, in the interim, the Hon’ble Commission may direct GUVNL to keep making the payment of CEC as Compensation Cess and CVD as IGST provisionally, subject to outcome of present petition,*

*(E) Pass such other or further orders as may be deemed proper in the facts and circumstances of the case.”*

7. The petition which resulted in order dated 30.05.2022, impugned by the second captioned appeal, was presented by the Appellant in 2018, it not having been registered, presumably on account of objections as to furnishing of proper fee. By the said petition, the Appellant had sought approval from the State Commission to raise Supplementary Bills/Invoices on GUVNL for the change in the service tax rate from 12.24% at the time of bid to 15% by June 2017. Further, by enactment of IGST Act 2017, from 01.07.2017 the service tax has statedly been subsumed and the applicable taxes for the service rendered to EPGL have different rates ranging from 5% to 28% on different services like O&M Service and Coal Handling Services, the total

increase in the cost being described as more than 1% of the Letter of Credit Value which, per the appellant, amounts to Change in Law as per the PPA.

The reliefs sought by the said petition were stated as under:

*“(A) Approve and allow the Petitioner to raise Supplementary Bills/Invoices for levy of Tax on ‘Coal Handling’ Services and O&M Services under Integrated GST (IGST) Act 2017 under Article 13 of the PPA;*

*(B) Pending admission and final hearing of the present Petition, the Hon’ble Commission may direct Respondent to make/adjust payment towards the ‘change-in-law’ invoices/credit notes raised by the Petitioner for levy of Tax on ‘Coal Handling’ Services and ‘O&M’ Services; on the Respondent produced at Annexure-N above;*

*(C) Pass such other or further orders as may be deemed proper in the facts and circumstances of the case.”*

**8.** The fee regulations relevant for the present discussion read as under:

*“3. Fees on Applications and Petitions*

*i. Every application, petition and appeal made to the Commission shall be accompanied by such Fees as specified in the Schedule.*

<i>Sr.</i>	<i>Description</i>	<i>Fees</i>
<i>11</i>	<i>Determination of tariff under the provisions of clause (a) of sub-section (1) of Section 62 of Electricity Act, 2003, to be paid by the applicant</i>	
	<i>(a) Conventional fuel based (coal, oil, etc.) Plant.</i>	<i>Rs. 10,00,000 (Rs. Ten lakhs) for capacity upto 100 MW. Rs. 2,500 (Rs. Two thousand five hundred) for each additional MW capacity or part thereof</i>
<i>24.</i>	<i>Any other petition/Application 1. By utility/licensee/deemed licensee/person granted exemption from license 2. By Institution/ Organization / Company (Limited, Private</i>	<i>1. Rs. 10,000  2. Rs. 5,000</i>

Limited, Proprietorship	Partnership,	
3. Individual Consumer		3. Rs. 1,000
4. Self Pleading Individual Consumer		4. Rs. 500
5. Other matters not covered above		5. Rs. 10,000

”

9. It appears that the office of the Commission raised demand for payment of fee against the above-mentioned petitions with reference to entry at serial no. 11 in the schedule appended to the fee regulations, extracted as above. Such insistence was resisted by the Appellant and this led to two formal applications (IA nos. 09 of the 2018 and 10 of 2018) being filed. The said applications were considered by the Commission and orders thereupon were passed on 09.10.2020 and 30.05.2020.

10. The views expressed by Order dated 09.10.2020 are as under:

*“5.2. The Petition No. 1680 of 2017 has been filed under Section 86 (1) (f) of the Electricity Act, 2003 read with Article 17 of the PPA dated 26.02.2007 for approving Change in Law due to GST and other components, the Order for which has already been issued by the Commission on 23.12.2019 revisiting the bid-tariff on account of change in law. If one considers the plain reading of Section 62(1) (a) of the Electricity Act, 2003 and Sr. No.11 of the Schedule annexed to the GERC (Fees, Fines and Charges) Regulations, 2005 notified by the Commission, it only appears that the present Petition is not under this section. However, the wordings determination of tariff specified in this clause, which is associated with provisions of Section 61(1)(a) requires to be followed by the Commission in this case by a way of re-evaluation of tariff which is necessary prior to passing its impact on GUVNL and ultimately to the consumers. Accordingly, the commission is of the firm view that the present Petition falls under this clause because it is required to re-evaluate and re-determine the tariff considering the change in law effect as per the relevant clauses of the PPA.*

5.3 It is, therefore, decided to consider the petition fees as per Sr. No.11(a) of the Schedule annexed to GERC (Fees, Fines and Charges) Regulations, 2005 applicable for Conventional Fuel based (Coal, Oil, etc.) Plant, which is Rs. 32,50,000.”

**11.** The views adopted by the Commission in the order dated 30.05.2022 are captured, as under:

“11.22 The aforesaid provisions are silent with regard to determination of tariff or compensation methodology adopted by the Commission while granting the effect of ‘Change in Law’, if any, qualifying in terms of the PPA However, we note that whenever the ‘Change in Law’ is claimed by the Seller/Procurer, it is necessary to verify as to whether the effect of Change in Law has occurred or not. If it is observed that Change in Law has occurred then in that case it is required to be considered and applied on the part of the tariff component which is quoted by the Seller (in this case the Applicant/Petitioner) and give effect of same. The tariff quoted by the Seller consists of the components like capacity charge, energy charge, transportation charge and fuel handling charge etc. as bid submission components to be quoted at time of bidding. The tariff quoted by the Petitioner/Applicant at the time of bidding and comprising of bidding documents does not consist of the different assumptions, components, details, working etc. based on which the aforesaid components are determined and quoted by it. Say for example, the energy charge quoted by the bidder is Rs. 1.48 per unit without escalation which may be derived on basis of parameters like (1) GCV of Coal, (ii) Coal quantity required per unit/Specific Fuel consumption, (iii) Price of coal/other fuel, (iv) If some other fuel is utilised as primary fuel then in that case the quantum of such fuel, GCV, its price etc., (v) SHR, (vi) Auxiliary Consumption), (vii) Taxes, (viii) Other charges if any. In absence of above details, it is not possible to determine what were the original parameters or details considered by the Seller/Generators as part of energy charge and thereafter, in case of Change in Law, if any, that may occur then in that case it requires to be compared with the original cost and determine the impact of the Change in Law. As per the PPA, impact of Change in Law, if any, that may occur is required to be determined by the Commission with respect to change in cost or revenue and compare the amount so arrived for same with 1% of ‘Letter of Credit’ amount and thereafter it is permissible to pass on the impact of same to the Procurer i.e. GUVNL in this case. It therefore necessary to verify and determine and decide about the impact of Change in Law, if any, occurred with respect to different components which are part of the quoted tariff by the Applicant/Petitioner at the time of submitting bid in competitive bidding process. In absence of same, it is not possible to decide and determine the impact of Change in Law as well as compare with the original cost/revenue as well as the impact



*of Change in Law on cost/revenue of the Seller and to what extent does it qualify which may be passed on to the beneficiary i.e. licensee.”*

...

*“12. It is, therefore, decided to consider the Petition fees as per Sr. No.11 (a) of the Schedule annexed to GERC (Fees, Fines and Charges) Regulations, 2005 applicable for Conventional Fuel based (Coal, Oil, etc.) Plant, which is Rs. 32,50,000. The Petitioner has already paid the fees of Rs. 20,000/-. Thus, the differential fees to be paid is Rs. 32,30,000/-.”*

**12.** In our considered view, the State Commission has misconstrued and misapplied its own regulations. The entry at serial no. 11 in the schedule appended to the fee regulations expressly states it to be applicable to the petitions presented for determination of tariff under Section 62(1)(a) of the Electricity Act, 2003. The power project set up by the Appellant and PPA executed in relation thereto are not governed by section 62 of the Electricity Act, 2003. As noted earlier, the Appellant was selected through a competitive bidding process under Section 63 of the Electricity Act, 2003, the tariff applicable being the one discovered by the bid process found by the Commission to be transparent exercise and in accordance with the guidelines of the Central Commission.

**13.** The fee regulations are akin to fiscal statutes. It is trite that it is the form and not the substance which would determine the taxation thereunder. In this context, the following observations of Hon'ble Supreme Court in its

judgment reported as *Gujarat State Financial Corporation v. Natson Manufacturing Co. Pvt Ltd. and Others* (1979) 1 SCC 193, should suffice:

*“11. Section 31(1) enables the Corporation in the event of breach of agreement or default in payment of loan or advance or an instalment thereof to make an application not merely for sale of mortgaged property but even for transferring the management of the industrial concern to the Financial Corporation or merely injunct the industrial concern from transferring or removing its machinery or plant or equipment from the premises of the concern without the permission of the Board. An application for transfer of management of the industrial concern could, by no stretch of imagination, be said to be an application for repayment of the loan though Mr. Patel did say that the management can only be retained till such time as the Corporation reimburses itself. Further, if an application under Section 31(1) is merely for an injunction restraining the industrial concern from transferring or removing its machinery or plant or equipment without the permission of the Board, it could hardly, or even remotely, be said that such a relief substantively provides for repayment of the loan or it is a relief to prevent an anticipatory loss. Let it be recalled at this stage that if the Court-fees Act is a taxing statute its provisions have to be construed strictly in favour of the subject litigant (vide *State of Maharashtra v. Mishri Lal Tarachand Lodha*). In a taxing statute the strict legal position as disclosed by the form and not the substance of the transaction is determinative of its taxability [vide *Joint Commercial Tax Officer, Harbour Div. II, Madras v. Young Men’s Indian Association (Regd.)*, Madras]. If it is a fee, the enormity of the exaction will be more difficult to sustain. While we do not pronounce, we indicate the implication of the High Court’s untenable view.”*

*(Emphasis supplied)*

**14.** We do not agree with the logic and reasoning articulated by the State Commission to demand payment of fee in terms of entry 11 of the schedule to fee regulations. The impact on tariff is a consequence that may flow on account of invocation of change in law clause in the contract. That cannot give colour of Section 62 to the petitions in the form presented. Clearly, entry at serial no. 24 in the above-quoted schedule would be the appropriate rate of fee that only can be charged on petitions of such nature as at hand.

**15.** For the above reasons, the appeals are allowed. The impugned orders are set aside. The fee payable by the Appellants shall be regulated by the rates prescribed against entry at serial no. 24 in the schedule appended to the *Gujarat Electricity Regulatory Commission (Fees, Fines and Charges) Regulations, 2005*. The consequential orders will be passed by the State Commission.

**16.** The pending applications are rendered infructuous and stand disposed of accordingly.

PRONOUNCED IN OPEN COURT ON THIS 04<sup>th</sup> DAY OF NOVEMBER 2022

**(Sandesh Kumar Sharma)**

Technical Member

*tpd/mk*

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

Officiating Chairperson