

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 25 of 2020 & MA No. 55 of 2020

Case of Tata Power Renewable Energy Limited seeking compensation due to increase in costs on account of change in rate of Goods & Services Tax amounting to a Change in Law event in terms of the Power Purchase Agreement dated 27 July 2018, executed with Maharashtra State Electricity Distribution Company Limited

Tata Power Renewable Energy Ltd. Petitioner

Maharashtra State Electricity Distribution Co. Ltd. Respondent

Coram
Shri Sanjay Kumar, Chairperson
I.M. Bohari, Member
Mukesh Khullar, Member

Appearance

For the
Petitioner : Sh. Abhishek Munot (Adv.)
For the Respondent : Sh. Abhishek Khare (Adv.)

ORDER

Date: 30 April, 2021

1. Tata Power Renewable Energy Limited (**TPREL**) filed the initial Petition dated 23 January 2020 under Case No. 25 of 2020 and later filed an amended Petition under Miscellaneous Application (MA) No. 55 of 2020 dated 28 October 2020. The Petition has been filed seeking compensation due to increase in costs on account of change in rate of Goods & Services Tax (**GST**) amounting to a Change in Law event in terms of the Power Purchase Agreement (**PPA**)

dated 27 July 2018, executed with Maharashtra State Electricity Distribution Company Limited (MSEDCL)

2. TPREL's main prayers are as follows:

- 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*

3. TPREL in its Case has stated as follows:

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
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	Inter State Project
4	ACME Solar Holdings Ltd.	250	3	2.72	250	Inter 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	Inter State Project
7	Giriraj Renewable Pvt. Ltd.	250	2.99	2.72	0	Inter 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:-

(1)	(2)	(3)	(4)	(5)
“38.	9954 or 9983 or 9987	<i>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 (WOGEG) (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.</i>	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
- b. 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.

Sr No	Particulars	Rate applicable after notification	Rate applicable prior to notification	Base Value on which Rate is applicable	GST after notification @ 8.9%	GST prior to 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. MSEDCL in its reply dated 2 December 2020 has submitted that:

4.1. The levy of CGST and IGST on supply of goods and services for setting up a Solar Power Generating System has not changed. The Notification No. 27/2018 – CGST (Rate) and Notification No. 28/2018 – IGST (Rate) dated 31 December 2018 only inserts separate tariff entry in Notification No. 11/2017 – CGST dated 30 June 2017 and Notification No. 8/2017 – IGST dated 30 June 2017 for supply of services provided for setting up Solar Power Generating System but the rate of CGST and IGST remains unchanged.

4.2. The Notifications No. 24/2018 – CGST and Notification No. 25/2018 – IGST dated 31 December 2018, only inserts an explanation in Serial No. 234 to Notification 1/2017 – CGST

(Rate) and Notification 1/2017 – IGST (Rate) dated 28 June 2017, to levy rate of GST on 70% on the value of supply of goods and 30% on the value of supply of services provided for setting up a SPGS. Earlier, prior to the introduction of the said Notification, the Supply of goods and services for setting up of a SPGS was treated as Works Contract and the rate of GST will be at 18% for IGST and 9% of CGST and 9% of SGST. Therefore, the introduction of Notifications No. 24/2018 – CGST and Notification No. 25/2018 – IGST dated 31 December 2018 only brings down the effective rate of GST to 8.9%. The overall rate of GST has been reduced from 18% to 8.9% and in view of this, the New Notifications only reduces the rate of GST on supply made to SPGS and the does not change the rate of GST. Hence, implementation of New Notification will not fall under the terms of Change in Law.

- 4.3. Prior to the issuance of the New Notifications, the rate of GST for supply of goods and services to SPGS was at 18% and post issuance of New Notification, the rate of GST for supply of goods and services to SPGS is 8.9%. In any case, the rate of GST for only supply of goods and services provided to SPGS remains the unaltered and only a specific tariff entry and explanation are introduced reducing the rate of GST.
- 4.4. The claim of compensation on account of Change in Law vis-a-viz Change in Tax Rates cannot be accepted as there is no Change of Rates and thereby no Change in Law.
- 4.5. The 31st GST Council Meeting was constituted as there were divergent views as regard to Supply of goods and services provided for setting up a SPGS. There were decisions of Authority for Advance Ruling (AAR) treating the Supply to SPGS as “Composite Supply” and thereby the whole contract for supply to SPGS will be treated as Supply of goods and the rate of CGST (includes rate of SGST at 2.5%) and IGST will be levied at 5%. In few decisions of AAR, it was held that a supply made to SPGS is done under Erection, Procurement and Commissioning Contract (EPC) and performance of the EPC contractor in relation to the supply of goods and supply of services under EPC is to be treated as the whole contract and such supply is treated as “Works Contract” and thereby the whole contract for supply made to SPGS will be levied at 18%.
- 4.6. Due to these divergent interpretations and to reduce the adverse impact of the high tax on solar power generation systems (SPGSs), the GST Council, in its 31st meeting on 22 December 2018, recommended that GST be paid at 5% on 70% of the gross value of the contract and at 18% on the balance value (that is, 30 per cent of the gross value of the contract). The recommendations made in 31st GST Council extracted as below:

“Solar power generating System and other renewable energy system supplied under Erection, Procurement and Commissioning (EPC) (S.No.1): 14.40. The Joint Secretary,

TRU-I explained that this proposal was regarding assigning value to the supplies falling under S.No.234 of Schedule I in Notification No.1/2017-Central Tax (Rates), when supplied along with other supplies like services under EPC and goods not covered under the said entry, and it was recommended to take the deemed value of goods falling under entry 234 as 70% of total amount charged and remaining 30% value may be deemed as value of supply of services. He added that it was based on fair estimation of the cost break-up. He stated that this proposal would eliminate disputes regarding applicable rate of tax on a total solar power project. The Council agreed to the proposal. The Council also agreed to the other proposals at S. Nos. 1 to 13 of Part 'B' of Annexure I.”

- 4.7. The recommendations were effectuated vide Notification No. 24/2018 – CGST and Notification No. 25/2018 – IGST dated 31 December 2018, an explanation was inserted in Sr. No. 234 of Schedule I of Notification. The Explanation inserted vide Notification dated 31 December 2018 is extracted 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.”

- 4.8. Further, the explanation inserted through the New Notifications only weaves a path of reduced rate of GST at 8.9% for supply of goods and services provided for setting up of SPGS.
- 4.9. New Notification No. 27/ 2018 – CGST (Rate) only notifies the rate of CGST for intra state supply of services rendered to a SPGS. However, the rate of CGST for the intra state supply of goods to SPGS remained the same which is 2.5%. It is submitted that the Notification No. 11/2017 – CGST (Rate) is the parent notification which deals with the rate of CGST for transaction dealing with intra state supply of services. The relevant part of notification is extracted below:

“Notification No. 11/2017 – CGST (Rate) dated 28.06.2017 as amended by Notification 27/2018 – CGST (Rate) dated 01.01.2019

S. No.	Chapter Section or heading	Description of Service	Rate (%)	Condition
38	9954 or 9983 or 9987	<p><i>Service by way of construction or engineering or installation or other technical services, provided in relation of setting up of following, -</i></p> <p><i>(a) Bio-gas plant</i></p> <p><i>(b) Solar power based devices</i></p> <p><i>(c) Solar power generating system</i></p> <p><i>(d) Wind mills, Wind Operated Electricity Generator (WOEG)</i></p> <p><i>(e) Waste to energy plants / devices</i></p> <p><i>(f) Ocean waves/tidal waves energy devices/plants</i></p> <p><i>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.</i></p>	9%	-

4.10. Notification No. 27/2018 – CGST inserted a new tariff entry for construction services provided to solar and wind plants but the rate of CGST remained constant. TPREL’s contention is that the GST rate of 5% was increased to 18% due to the introduction of the New Notification namely Notification No. 27/2018. However, the New Notification only lays a path of inserting a new entry exclusively mentioning the rate of CGST for construction services provided to SPGS. Earlier, i.e. prior to the introduction of the New Notification, the

rate of CGST for construction services provided to SPGS were levied at 9% as per Serial No. 3 of Notification 11/2017 – CGST. Therefore, TPREL’s averments on change in rate of GST is completely baseless.

4.11. The Notification 11/2017 – CGST (Rate) dated 28 July 2017 stipulates the rate of CGST on intra state supply of services. Prior to the insertion of Serial No. 38 as mentioned above in Notification 11/2017, all the construction services other than (i), (ia), (ib), (ic), (id), (ie), (if), (iii), (iv), (v), (va), (vi), (vii), (viii), (ix), (x) and (xi) as contained in Notification 11/2017 were charged at the rate of 9% on the value of consideration ascertained by the parties for the supply of services. The relevant part of the notification is extracted:

S. No.	Chapter Section or heading	Description of Service	Rate (%)	Condition
3	Heading 9954 (Construction services)	(xii) Construction services other than (i), (ii), (iii), (iv), (v), (vi), (vii), (viii),(ix), (x)and (xi) above and serial number 38 below Explanation. - For the removal of doubt, it is hereby clarified that, supply by way of services specified at items (i), (ia), (ib), (ic), (id), (ie) and (if) in column (3) shall attract central tax prescribed against them in column (4) subject to conditions specified against them in column (5) and shall not be levied at the rate as specified under this entry.	9%	-

4.12. This New Notification No. 27/2018 – CGST (Rate) is issued to bring in a separate tariff entry for supply of services for setting up SPGS but the rate of CGST on supply of services remained unchanged i.e. 9%. Even the Notification No. 11/2017 – CGST (Rate), there was general entry in Item No. XII of Serial No. 3 covering supply of services for setting up SPGS and the rate of CGST was at 18%. It can be seen that the New Notification is only bringing a separate tariff entry for services provided for setting up of SPGS for ease of convenience but the rate of CGST remained as 9% in both pre and post Notification No. 27/2018 dated 31 December 2018.

4.13. In fact there is no Change in Law as alleged by TPREL, the rate of CGST for supply of goods and services for intra state supply to Solar Power Generating System remained at 2.5% for supply of goods to SPGS and 9% for supply of services for constructing SPGS. The

amendment notification 24/2017 and 27/2017 was a way of introducing a specific tariff entry to avoid confusion, however the rate of tax remained constant i.e. 2.5% and 9% respectively.

- 4.14. Similarly, the IGST rate on interstate supply of construction services to Solar Power Generating System was also at the rate of 18%. Previously the Notification 8/2017 – IGST (Rate) also imposed 18% as rate of IGST for supplies made to construction services. The New Notification 28/2018 – IGST (Rate) dated 31 December 2018 only brings in new tariff entry with the view of the 31st GST Council Meeting to deal with the construction services given to Solar Power Generating System but the rate of IGST remained at 18%.
- 4.15. The insertion of tariff entry vide New Notification No. 27/2018 and 28/2018 is not stand in the way of Change in Law as these New Notifications do not change the rate of CGST and IGST as portrayed by TPREL.
- 4.16. There is inconsistency in the submissions of TPREL. In its Statement of Invoice annexed to the Petition, excess payment of duty on account of increase of rate in GST to 8.9% is claimed. In the supporting Sheet, TPREL has calculated the initial rate of GST at 5% for supply of goods and services to SPGS whereas in the copy of the actual invoice attached by the Petitioner reveals that the Petitioner has paid a total of 5% on supply of goods to SPGS and total of 18% on supply of services to SPGS. While claiming the excess duty, the Petitioner has only considered the rate of tax on supply of goods i.e. 5% and not 18%.
- 4.17. TPREL sees the increased rate of duty only with the respect of rate of tax pertaining to supply of goods to SPGS. However, the Petitioner is failed to note that 8.9% is the effective rate of tax for supply made in relation goods and services towards setting up the SPGS. Hence, the consolidated rate of CGST on supply of goods and services to SPGS was 23% till 31 December 2018 or 18% if it is treated as Works Contract. However, in the New Notifications the effective rate of CGST on supply of goods and services to SPGS works out to only 8.9%.
- 4.18. TPREL has already paid GST at the rate of 18% for receiving services for setting up of SPGS. Same should have been considered as base GST rate while claiming compensation on account of Change in Law.
- 4.19. There is no change in the applicable rate of GST after the last date of bid submission as to invite provisions of Article 9 of PPA dated 27 July 2018. Nevertheless, presuming that there is a change in rate of GST, the rate is decreased from GST 18% to 8.9%. Hence, MSEDCL is entitled to recover the same from Petitioner as per provisions under clause 9.2.1 of PPA and shall be passed on to MSEDCL.

- 4.20. The Clause 9.2.2 will not apply to the present case as there is no Change in Law as explained in the above paragraphs.
- 4.21. The PPA entered with TPREL is for supply of Solar Power and not supply of the SPGS. In the event of additional cost incurred by TPREL for setting up of SPGS, such additional cost cannot be borne by MSEDCL as it has entered for Supply of Solar Power and Supply of Solar Power is exempted from GST.
- 4.22. It has been captured in the RfS in paragraph 3.3 that the successful bidder shall set up SPGS including transmission and Distribution network up to delivery point will be done at his own cost. Any cost or excess cost incurred by the successful bidder for setting up of SGPS will be borne by him. The alleged additional cost is a cost incurred at the time of setting of SPGS which will be completely borne by TPREL as stipulated in the terms of RfS. Further, terms of the RfS is clear that all costs in relation to setting of SPGS will have to be taken care by TPREL. The Change in Law clause in PPA will not apply in the present case as it is important to give weightage to the specific clause of the contract over general clause of the contract.
- 4.23. There is no provision of ‘Carrying Cost’ in the PPA entered between TPREL and MSEDCL and hence any claim of Carrying Cost needs to be rejected by this Commission.
- 4.24. Any Carrying Cost as claimed is a resultant effect of TPREL’s default as the purported “Change in GST rates” happened w.e.f 31 December 2018. However, TPREL raised the said issues for the very first time only on 7 November 2019 and has thereafter filed the instant Petition before the Commission.
- 4.25. For calculation of revised tariff for compensation towards “Change in GST rates” w.e.f 31 December 2018 will require the additional information / data as already highlighted by MSEDCL. To ascertain the impact of safeguard duty on the tariff, it is necessary that the TPREL submits the actual computations exercised by them to arrive at a bid quote of Rs. 2.72 per unit. In the same computation / financial module, if the additional cost incurred due to change in law is substituted then the revised tariff calculated by the module will represent the true picture.
- 4.26. Further, it is evident from the clause 9.2.2 of the PPA that, the additional compensation, if any, due to occurrence of change in law has to be compensated through “Tariff Payment” only. As per Clause 9.2.4 of PPA, after approval from the Commission the agreement has to be executed for the revised tariff. Therefore, the compensation, if any, for Change in Law event has to be through tariff component only.

5. TPREL filed its rejoinder dated 8 February 2021 which has been summarized below:

- 5.1. On one hand MSEDCL has admitted that the contracts are to be taxed 5% on the other hand MSEDCL has stated that GST is payable at the rate of 18%/ 23% as it has to be treated as a “works contract”.
- 5.2. On one hand MSEDCL has stated that the issuance of notifications by the Central and State Governments, relied upon by TPREL, does not amount to change in law and on the other hand it has sought for refund of reduction in tax (from 18%/ 23% to 8.9%) on account of such Change in Law events.
- 5.3. The issuance of Notifications dated 31 December 2018 by the Central Government as well as by the State Governments amounts to Change in Law as it squarely falls under Article 9.1 of the PPA. Further, the impact on account of the Notifications dated 31 December 2018 is as under:-
 - a. Reduction in rate of GST from 18% to 8.9% on the consideration provided in the Civil/ Service Contracts and consequently compensation MSEDCL for such reduction in GST. The same is applicable on inter-state and intra-state supply of services.
 - b. Increase in rate of GST from 5% to 8.9% on the consideration provided in the Supply Contract and consequently TPREL is to be compensated for such increase in GST. The same is applicable on inter-state and intra-state supply of goods.
- 5.4. In view of the above, TPREL most respectfully submits the compensation ought to be granted to it in terms of the Amended Petition filed by TPREL.
- 5.5. MSEDCL’s submissions (i.e. Contracts are to be treated as “works contract”, where GST is payable at the rate of 18% and TPREL has wrongly claimed a compensation on account of increase in rate of GST from 5% to 18%), is contrary to the GST Laws (i.e. CGST, SGST and IGST). MSEDCL has not explained how these two contracts are to be treated as ‘works contract’. Presumably, the said contention is raised by MSEDCL on an assumption that that the supplies made under the contracts is one single supply of ‘Works contract service’, involving supply of goods along with construction services. In this regard, it is submitted that, TPREL has entered into two separate and independent contracts with TPSSL, being:
 - a. Supply Contract – covering supply of SPGS and its components along with commissioning of such SPGS.
 - b. Civil Works Contract – covering the civil and allied works related to the Solar power plant.

5.6. The term ‘works contract’ has been defined under section 2(119) of the CGST Act as under-

“(119) “works contract” means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract; ...”

5.7. In view of the above mentioned definition, a supply would qualify as a ‘works contract’ under section 2(119) of CGST Act only where the supplier makes supply of goods and service for construction, erection, installation, etc. of an immovable property, under a single contract. As stated above, in the facts of the present case, TPREL has entered into two separate contracts with TPSSL. Under the Supply Contract, TPSSL is required to supply the SPGS comprising of various components such as PV modules, inverters, mounting structure, etc. and undertake commissioning of such SPGS. Further, under the Civil Works contract, TPSSL is required to construct foundations and undertake erection and installation activities for setting up the SPGS. Merely because the aforesaid independent supplies are made by a same supplier (TPSSL), they cannot be fused together to treat them a single supply. reliance is placed on the SC’s judgment in the case of *The State of Madras v. Gannon Dunkerley & Co., (Madras) Ltd.* reported at AIR 1958 SC 560, wherein the SC observed where the parties have agreed for making two different supplies under two separate contracts, it shall be treated as two separate agreement or supplies. In other words, it shall not be fused together as a single supply.

5.8. Although the supply contract entered with TPSSL involves activities such as assembling, testing and commissioning of the SPGS, such activities are only incidental to the main supply of SPGS. Therefore, even if the supply contract is treated as a composite supply, it would be treated as a supply of SPGS only. Therefore, the applicable rate of tax for the supply contract prior to the aforesaid amendment was 5% under Sl. 234 of the rate Notification and the Service Contract is to be treated as a Civil Works Contract which is taxed at the rate of 18%.

5.9. The intention of the Government was never to tax the contract for supply of SPGS at the rate of 18%. Hence, the Government specifically provided a concessional rate of tax at 5% for supply of SPGS under GST. If the contention of MSEDCL that the supply made by TPSSL to TPREL amounts to a works contract liable to GST at the rate of 18% are to be accepted, there would be no scenario wherein the supply of SPGS would be taxed at 5%, as it is very common in industry for a single supplier to supply SPGS as well as erection and installation services for setting up the SPGS.

5.10. The government was aware that in case of projects similar to the ones in the present case, the supply of goods and service by way of erection, installation and commissioning would

be generally undertaken by the same person/ contractor. Therefore, in order to ensure that the benefit of concessional rate of 5% GST is not denied to the supplier of SPGS, in case such contracts are held to be works contract by the department, the Government came up with the amendment in Sl. No 234 of the rate notification, by providing a deemed value (of 70%) for the supply of SPGS which shall be subject to GST at the rate of 5%. Thus, by the aforesaid amendment, the Government only sought to ensure that the taxpayer is not deprived of the benefit of concessional rate of 5% GST on the supply of SPGS, whether made under a single EPC contract or under separate contract for supply of SPGS and supply of service. In other words, the aforesaid amendment, by no means, can be interpreted to mean that prior to the said amendment the supply of SPGS and erection and installation service for setting up SPGS were subject to GST at the rate of 18%.

- 5.11. In view of the above, the contention of MSEDCL that the contracts entered between TPSSL and TPREL were subject to GST @ 18% prior to the amendment, is not sustainable at all.
- 5.12. It is pertinent to note that under the services tax regime, there was a single rate of tax (12% /14%) and abatement was provided in respect of taxable value of certain services to reduce the tax liability on such services. However, under GST, instead of providing abatement in the value of taxable supplies, separate rates are provided in respect of various goods and services in the rate notifications. It is for this reason that the legislature did not provide for a specific definition of 'change in rate of tax' under the CGST Act.
- 5.13. However, even under GST, where the legislature has deemed the value of goods and services (by inserting explanation to Sl. No. 234) instead of the adopting the actual values of goods and services supplies, it is submitted that the principle under the services tax regime for treating the change in value of taxable service as a change in effective rate of tax, would also be applicable under the GST regime.
- 5.14. TPSSL would have been able to discharge GST separately on the actual value of goods and services, at the applicable rate of GST. However, after the aforesaid amendment, TPSSL was liable to discharge GST according to the deeming fiction created by Sl. No. 234 i.e. pay GST at the concessional rate of 5% on 70% of the total consideration and at the rate of 18% on 30% of the total consideration receivable from TPREL. The total GST payable on the said contracts for setting up the solar power plant in terms of Explanation to Sl. No. 234 would be different as compared to the GST which would have been payable, had the aforesaid explanation not been inserted. Thus, the said amendment has resulted in change in effective rate of tax required to be paid by TPREL under the said contracts entered with TPSSL.

- 5.15. As regards the reference to AARs ruling that supply of SPGS and erection and installation service under EPC contracts would amount to 'works contract' leviable to GST at the rate of 18%, it is submitted that:
- a. The reasoning given by the AARs to hold that contract for supply of SPGS and erection and installation of SPGS would qualify as works contract is not correct.
 - b. In any case, the advance ruling given by AAR under GST are only applicable to the respective applicants seeking such advance ruling (Section 103 of the CGST Act). Such advance rulings do not form a legal precedent and the same are not binding on TPREL.
- 5.16. Thus, the reliance placed by MSEDCL on advance rulings passed by AAR to contend that the supplies made by TPSSL to TPREL was subject to 18% prior to the amendments is incorrect.
- 5.17. Change in law (amongst others) are risk allocation clauses which provides for adjustment in tariff upon occurrence of events which are outside the control of the parties. Since the PPA is a long-term contract, it is not possible for parties to foresee each and every event which could have an impact on the economics of the project. Consequently, the parties to the PPA agreed that provided for relief upon occurrence of such events. In this context, the Change in Law provision along with the relief for change in law provision was provided in the PPA. Assuming without admitting there is a conflict qua interpretation of the PPA terms, then in terms of the principle of contra proferentem the provisions would have to be construed against MSEDCL, being the author of the PPA.
- 5.18. As regards MSEDCL's submissions that there is a conflict between Article 9.2.2 and Article 5.2 it is submitted that the said submission is wrong and denied. There is no conflict between Article 9.2.2 and 5.2. Article 5.2 merely provides for a tariff payable MSEDCL to TPREL for supply of electricity. Whereas, the Change in Law provision provides that there is an adverse financial impact on TPREL due to occurrence of Change in Law, then the parties TPREL ought to be placed in the same economic position as if such a Change in Law event has not occurred. Language of Article 9.2 clearly provides that it is not subject to Article 5.2 of the PPA. Hence, MSEDCL's submissions is illogical and ought to be dismissed..
- 5.19. As regards MSEDCL's submissions of no carrying cost to be granted, it is submitted that the same is wrong and denied. It is submitted that, Article 9.2 of the PPA provides that, if the Change in Law event results in any adverse financial loss/ gain to TPREL, the relief is to 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'.

- 5.20. Though lumpsum payment would avoid further carrying cost, the mechanism which was agreed for computing the impact of SGD based on the Order of the Commission in Case No. 166 of 2019 be considered for the purpose of computing the impact of change in Law in present matter.
6. At the first e-hearing through video conferencing held on 11 February 2021, the Advocate of MSEDCL submitted that rejoinder from TPREL was received 8 February 2021 and sought some time to study their replies. Accordingly, the Commission passed a Daily Order and adjourned the hearing for a short period.
7. At the second hearing through video conferencing held 23 March 2021, the representative of TPREL and MSEDCL reiterated their submission in the Petition. After hearing at length, the Commission granted 2 weeks' time to the Parties to file their written notes of arguments.
8. **MSEDCL submitted its written submission dated 7 April 2021 which is summarized as below:**
- 8.1. As per Section 2(30) composite supply is defined as (30) *“composite supply” means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply.*
- 8.2. Further “principal supply” is defined under Section 2(90) as (90) *“principal supply” means the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary.*
- 8.3. The term mixed supply is defined under Section 2(74) as (74) *“mixed supply” means two or more individual supplies of goods or services, or any combination thereof; made in conjunction with each Other by a taxable person for a single price where such supply does not constitute a composite supply.*
- 8.4. The definition of ‘works contract’ as provided in Section 2(119) of the CGST Act, 2017. It defines ‘works contract’ as a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract.
- 8.5. The EPC contractor is singularly assigned task of setting up of the entire solar power plant. The various activities the EPC contractor is obligated to perform broadly range from designing the power plant, preparing the drawings/ map, preparing the estimate, sourcing the

various goods required, carrying out the construction of civil structures involved, testing the equipment's and finally commissioning the power project.

- 8.6. It is thus the considered view of the Authority that the EPC contract is a works contract and has to be taxed accordingly. The performance of the EPC contractor in relation to the supply of goods and supply of services related to the installation and commissioning of the goods are so intricately woven that they cannot be evaluated in isolation from each other. This indivisible nature of the total supply imparts the entire contract the nature of a works contract.
- 8.7. Considering the intention of the EPC contractor is for setting up of a Solar Power Project, the said EPC contract cannot be treated as supply of goods but supply of service making it as "Works Contract".
- 8.8. The contract is for the engineering, procurement and commissioning of the solar power generating system and what is transferred is the entire solar power generating system including the civil works involved in the project. The project has a very high element of permanence. Civil structures are created and various equipments are installed on those structures. A project of this magnitude is not envisaged to be one which shall keep shifting its location. It is essentially of the nature of an immovable property. The individual components may be capable of being shifted but in its entirety the project is certainly of the nature of an immovable property. The project after completion at the time of transfer is thus an immovable property, more so as there are no separate considerations for the individual components of the project.
- 8.9. That is the reason where a supply involves engineering, design, procurement, supply, development, testing and commissioning of a civil structure, it is treated as "works contract" in terms of Section 2(119) of the CGST Act, 2017 and not a composite supply as envisaged under Section 2 (30) of the CGST Act.
- 8.10. TPRPL cannot move its Solar Power Project to any other place for 25 years as it needs to fulfil the obligation of sale of solar power for period 25 years. Therefore, it would have noted its obligation under its PPA and there won't be mobility and the Solar Power Project will be permanent structure for 25 years.
- 8.11. The term 'immovable property' has not been defined under the GST Act. However, there are a plethora of judgments of the SC and the Hon. High Courts which have helped understand the term 'immovable property'. These decisions held that machines as immovable property by taking into account facts such that the machines could not be shifted without first dismantling it and then re-erecting it as another site.

- 8.12. The project has to be in the single location as stipulated in the PPA. This proves that the project has high level of permanency and cannot be moved whenever and dismantling may lead to damage and TPREL cannot move the plant because its obligated to generate power from that plant for period of 25 years making it strongly an unmovable plant.
- 8.13. In view of the above submissions, the EPC contract involving engineering, procurement and construction of solar power project falls outside the scope of principal supply.
- 8.14. As per Para 6 of Schedule II of the CGST Act, works contract under section 2(119) of the CGST Act constitutes supply of services, hence, the concessional rate of tax as applicable to supply goods shall not be applicable.
- 8.15. As the activity of Engineering, procurement and construction falls within the scope of Works Contract and they are not ancillary or incidental to the supply of goods. Further, the supply is towards an immovable property and cannot be subjected under composite supply of 2(30) of the CGST.
- 8.16. Even in the pre GST era and post GST era, the rate of GST for construction of the thermal plant was always treated as “Works Contract” taxable at 18%.
- 8.17. Further before the determination of the rate of GST for supply to solar power project, TPREL should have adjudged the rate of GST on basis of the judicial precedents. The judicial precedent clearly states the rate of GST for construction of thermal projects will be at 18% as per Works Contract 2 (119) of the CGST Act.
- 8.18. The decisions of the AAR have persuasive value. The decisions of several AAR in following matters have been relied upon by MSEDCL:
- a. RFE Solar Pvt Ltd Rajasthan/AAR/2018-19/08 dated 1/7/2018,
 - b. RFE Solar Pvt Ltd Rajasthan/AAAR/2018-19/08 dated 29/11/2018,
 - c. Giriraj Renewables Pvt Ltd Maharashtra/AAR/01/2017/B-01 dated 17/2/2018,
 - d. Giriraj Renewables Pvt Ltd Maharashtra/AAAR/SS-RJ/08/2018-19 dated 05/09/2018,
 - e. Ferni Solar Farms Pvt Ltd Maharashtra/AAR/03/2017/B-03 dated 3/3/2018,
 - f. Ferni Solar Farms Pvt Ltd - Maharashtra/AAAR/SS-RJ/07/2018-19 dated 4/9/2018,
 - g. In Re_ M_s. Solarsys Non-Conventional Energy Private Limited
- 8.19. These judgements have unanimously held that supply of goods along with erection, engineering, design, construction and installation cannot be held as composite supply and qualify only as Works contract.

- 8.20. Further prior to the signing of PPA, the position was to tax 18% for a contract for setting up of SPGS.
- 8.21. EPC contract of the TPREL will squarely fits within the definition of the “Works Contract” and the Solar Power Project is also an immovable property. Therefore, the contract of the applicant is covered under works contract under section 2(119) of the CGST Act and by item (ii) of entry no. 3 of the Notification No. 11/2019 - Central Tax (Rate) dated 28 June 2017 up to 31 December 2018.
- 8.22. In view of the above, the rate of tax for supplies of SPGS will be as per Works contract and the rate of tax has been reduced from 18% to 8.9% with view of the amendment notifications.
- 8.23. As per the obligations mentioned in the PPA, TPREL was obligated to take the responsibility of constructing, operating, and maintaining the Solar Power Project and supplying solar power. Other PPA holders such as – Acme, Adani, and ReNew who have analogues PPAs haven’t claimed change in law, they haven’t faced any problems.
- 8.24. From a reading of the contract agreements it is evident that the contract is one single unified contract. It cannot be split into parts as is being sought to be done.
- 8.25. Without prejudice, if two contracts theory is accepted, the rate of GST according to the contract of supply will apply. If it is only supply of goods of SPGS then the rate of GST would be 5% and if supply of services to SPGS would be 18% and the amendment notification of having rate at 8.9% will not apply in the present case. Hence, TPREL’ s claim is not sustainable.
- 8.26. SGD is levied to protect domestic industry from unfair injury. The SGD was levied from 30 July 2018 and the investigation for levy of SGD was started on 19 December 2017. The levy of SGD was at 25% in 2018 however the SGD in the 2020 notification has reduced the rate of safeguard duty to 14.50%. Compensation cannot be claimed as the imposition of safeguard duty was prevalent from 2018.
- 8.27. No compensation is payable on account of amendment Notification Nos. 24/2018, 25/2018, 27/2018 and 28/2018 dated 31.12.2018. The rate of GST on EPC contract for setting up of Solar power generating systems is reduced from 18% to 8.9%.
9. **TPREL submitted its written submission dated 7 April 2021 which is summarized as below:**

9.1. The entire argument made by MSEDCL during the hearing was premised on the fact that consolidated civil and services contracts, for setting up of a solar power plants, was to be considered as ‘works contract’ where GST ought to have been paid at the rate of 18% before the issuance of Notifications dated 31 December 2018. For this, MSEDCL relied upon a few rulings by the AAR and Appellate Authority for Advance Ruling (AAAR). These submissions and the rulings relied upon by MSEDCL are not applicable in the facts of TPREL’s case for the following reasons:

- a. TPREL has executed separate agreements for supply and services availed (to set up its solar power plant) and not a consolidated agreement which could be termed as a works contract.
- b. These agreements are independent of each other and are not interlinked and/or dependent on each other.
- c. The Commission jurisdiction in the present dispute is to determine whether the Notifications dated 31 December 2018 amount to a Change in Law in terms of the PPA and if so, what is the compensation payable by MSEDCL to TPREL. The Commission is the creation of the Electricity Act and assumes power and carries out its functions as assigned to it under the Electricity Act. The rate of GST payable and whether TPREL’s Supply and Civil/ Service Contract is to be treated as a ‘works contract’ is within the purview of tax authorities. This Hon’ble Commission cannot assume powers bestowed upon the tax authorities under the GST laws.
- d. Without prejudice to the above, the decisions of AAR and AAAR relied upon by MSEDCL are not treated as Judgments in rem and are only applicable in the facts of that particular case (Section 103 of the CGST Act, 2017). They cannot be made applicable to TPREL’s case. Even otherwise, these Judgments were passed after the cut-off date (i.e. after submission of bid) in terms of TPREL’s PPA. In any case the facts of these cases relied upon by MSEDCL are not similar to the facts of TPREL’s case.

9.2. Accepting MSEDCL’s submissions that TPREL’s Supply and Civil/ Service Contract ought to be treated as ‘works contract’:

- a. Would tantamount that all Solar Contracts (i.e. Supply and/ or Civil / Services) are to be taxed at the rate of 18%, thereby defeating the purpose of imposing GST at the rate of 5% on supply of modules and other equipment for setting up of Solar Power Plant.

- b. Could lead to a peculiar situation where TPREL is paying GST at the rate of 5% and 18% on Supply and Civil/ Service Contract, while this Hon'ble Commission assumes that the GST is payable at the rate of 18% on such Supply and Civil/ Service Contract.
- 9.3. TPREL had considered GST at the rate of 5% on Supply Contract and 18% on Supply and Civil/ Service Contract. This is evident from the Consideration Clause of Supply and Civil/ Service Contract executed by TPREL with TPSSL, which records that GST is payable at the rate of 5% and 18% respectively.
- 9.4. TPREL has paid GST at the rate of 5% on Supply Contract and 18% on Service Contract.
- 9.5. Till date, no issue has been raised by Tax Authorities qua payment of GST at the rate of 5% and 18% on Supply and Civil/ Service Contract respectively in the facts of TPREL's case. Further, there is no Order passed by AAR and/ or AAAR in TPREL's case holding that Supply and Civil/ Service Contract executed by it with TPSSL is a 'Works Contract'.
- 9.6. The Commission has itself allowed GST at the rate of 5% on Supply Component in TPREL's Case No. 166 of 2019 (i.e. SGD matter). The said decision is passed on the basis that TPREL's contract cannot be considered as a 'works contract'. MSEDCL was a party to the said proceedings and no appeal has been filed by MSEDCL qua the said order. In fact, MSEDCL has been paying compensation to TPREL in terms of the said order of the Commission. Hence, MSEDCL submissions herein is contrary to its submissions and conduct in Case No. 166 of 2019.
- 9.7. Thus, in light of the facts of the present case, Electricity Act does not empower the Commission to either determine whether the Supply and Civil/ Service Contract are 'Works Contract' or assume such contracts as 'works contract', especially when there is no such determination by tax authorities.
- 9.8. TPREL and TPSSL have entered into two separate contracts viz. (a) Supply Contract which deals with supply of various components such as PV modules, inverters, mounting structure, etc. required for setting up a solar power plants; and (b) Civil Contract which deals with construction, installation and erecting activities for setting up a solar power plant. In other words, there are two separate contracts dealing with separate subject matter, unlike one contract providing for construction services as well as supply of goods as is contemplated in the definition of 'works contract'.
- 9.9. In any case, the definition of 'works contract' relates to immovable property'. The term 'immovable property' is not defined in the GST Laws but the same is defined in General Clauses Act, 1897 and Transfer of Properties Act, 182 as:

(a) Section 3(26) of the General Clauses Act, 1897:-

“(26) ‘immovable property’ shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth;..”

(b) Section 3 of the Transfer of Properties Act, 1882:-

“immoveable property” does not include standing timber, growing crops or grass”.

....

“attached to the earth” means—

(a) rooted in the earth, as in the case of trees and shrubs;

(b) imbedded in the earth, as in the case of walls or buildings; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached;

9.10. The Supply Contract cannot be considered as a “works contract” since the said contract relates to procurement of good/ materials for construction of a solar power plant. Further, the services pertaining to erecting, commissioning etc does not fall within the scope of ‘attached to the earth’ since the solar power plant with the help of nuts and bolts to a foundation which prevents vibration/wobble free operation. Further, this is being done for a limited purpose of holding the solar panel in a particular angle and not to bring into existence an immovable property. In this regard, reliance is placed on the SC’s Judgment in the case of CCE, Ahmedabad vs. Solid & Correct Engineering Works reported at (2010) 5 SCC 122.

9.11. The Solar panels are affixed on a foundation/platform for its efficient performance and not beneficial enjoyment of the land parcel. Further, the said Solar panels can be uninstalled without causing any significant damage to its parts and can be shifted to another location, if and when required. In fact, very often solar modules are replaced with new module, meaning thereby that they are not permanently attached to the earth. Therefore, placing of solar modules cannot be considered as an immovable property. In view of the above, it is most respectfully submitted that, Supply Contract cannot be considered as a works contract and consequently the same cannot be taxed at the rate of 18%, as wrongly alleged by MSEDCL.

9.12. In the present case, TPREL and TPSSL have entered in a Supply contract and a Civil works contract. Since the goods required for setting up are supplied under the supply contract to TPREL, the property in the goods is transferred from TPSSL to TPREL when the same are dispatched by TPSSL under the Supply contract. Thereafter, TPSSL separately undertakes the activity of erection of the SPGS under the Civil works contract for TPREL. Thus, the

transfer of property in goods in the present case takes place before the execution of the civil works contract and not during its execution. Therefore, it is submitted that even though the SPGS is treated as an immovable property, it cannot qualify as a supply of 'works contract' service under section 2(119) of the CGST Act.

- 9.13. If the intent of the Government was to impose tax rate of 18% even on supply of goods for setting up a solar power plant, concessional tax rate of 5% was not provided, while continuing to impose GST at the rate of 18% on services qua construction of solar plant. More so, when as an industry practice a single supplier usually provides equipment for setting up solar plant as well provide construction services qua erecting and installing a solar power plant.
- 9.14. Further, if the contract for supply and service for setting up a solar power plant was to be taxed at the rate of 18%, the Government would not have issued the Notifications dated 31 December 2018 reducing the rate of tax to 8.9%. Thus, MSEDCL's submissions that the Supply and Service Contract be treated as 'works contract' ought to be ignored.
- 9.15. The advance ruling given by AAR/ AAAR 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 judgment in personam and not in rem. Hence, Orders of AAR/ AAAR do not form a legal precedent and the same are not binding on TPREL.
- 9.16. Solar power generating system' as a whole is referred to as a renewable energy device. It is logical that a Solar Power Generating System would come into existence only after erection, installation and commissioning of the various goods such as solar panel, stands, cables, etc. on a suitable parcel of land. The legislature is aware that a Solar Power Generating System can be of a huge size and spread across a vast area of land. Even then, the legislature has prescribed a rate of 5% for supply of Solar Power Generating System. Further, the said entry not only applies to supply of renewable energy devices listed therein, but also for parts supplied for manufacture of such renewable energy devices. Thus, even parts supplied for manufacture of Solar Power Generating System would be subject to 5% GST under the aforesaid entry.
- 9.17. It is pertinent to note that the word 'manufacture' is not used in the traditional sense to mean the process of manufacture of goods using machines but it also includes assembling, erecting, installing and putting together parts of a system such as Solar Power Generation System to generate electricity.

9.18. In view of the above, it is submitted that the MSEDCL's submissions be rejected and compensation as sought by TPREL in its Amended Petition be allowed along with Carrying Cost.

Commission's Analysis and Rulings

10. TPREL has filed the present Petition seeking compensation for the increase in costs on account of Change in Law event i.e. increase in rate of GST post submission of bid. TPREL had entered into PPA on 27 July 2018 with MSEDCL for capacity of 150 MW from Solar power project to be located in Rajasthan. TPREL has contended that it incurred additional amount of Rs. 28.10 Cr. on account of change of rate of GST and accordingly it is seeking compensation of this amount along with carrying cost from MSEDCL by relying on restitution principle stipulated in the PPA.
11. TPREL has submitted that at the time of bid submission i.e. 8 May 2018, which was prior to the MoF Notification dated 31 December 2018, the GST of 5% was applicable on Supply contracts and 18% on Service contracts for setting up of solar power projects. However, MoF notification dated 31 December 2018 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). Thus, effective GST rate becomes 8.9%. TRPEL has also stated that the change in GST has resulted in increase of payment on SGD by Rs. 3.48 Crs which is included in total claim of Rs. 28.10 Cr.
12. MSEDCL has opposed such contention and stated that prior to the MoF's Notifications dated 31 December 2018, rate of GST for supply of goods and services for setting of SPGS was at 18% and that the same is applicable in this case which is required to be treated as 'Works Contracts' as per Section 2(119) of the CGST Act, 2017. Post the notification dated 31 December 2018, the GST rate has been reduced to 8.9% for supply of goods and services for setting up of SPGS. MSEDCL further claims that there is no change in the GST rate. Hence, TPREL's claim for additional expenses can not be sustained.
13. In view of above submissions, the Commission notes that parties are mainly disputing about GST rate which was applicable on date of submission of bid and whether changes which has been introduced by 2018 notifications (which is post bid submission date) have changed the rate of applicable GST for the project under consideration.
14. The Commission notes that any event can be said to be 'Change in Law Event', only if satisfies the provisions stipulated under the PPA. Relevant part of PPA dealing with provisions of Change in Law are reproduced below:

“Law” shall mean any valid legislation, statute, rule, regulation, notification, directive or order, issued or promulgated by any Governmental Instrumentality.”

“Governmental Instrumentality” shall mean the GoI, the GoM and their ministries, inspectorate, departments, agencies, bodies, authorities, legislative bodies.”

Article 9. CHANGE IN LAW

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 Solar Power Generator; 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.

.....”

15. Thus, the Change in Law provisions of the PPA have the following ingredients, and the evaluation of whether or not an event qualifies as a Change in Law or not, and its consequences, has to be addressed accordingly:

- a. The definition of ‘Law’ under the PPA is an inclusive definition and contemplates all laws applicable in India in various forms. However, for an event to be considered a ‘Change in Law’ event requires that it be caused by the operation of law or by an Indian Governmental Instrumentality;

- b. The term ‘Indian Governmental Instrumentality’ covers GoI, GoM and any Ministry, Inspectorate, Department, Agency, Body, Authority or Legislative body under their direct or indirect control;
- c. ‘Change in Law’ encompasses introduction, increase, or modification of any law after last date of Bid submission (which is 8 May, 2018 in this case) which results in additional expenditure to the Power Producer, or in increase or decrease in revenues or cost to it;
- d. The expenditure or income or decrease in cost must be on actual basis and must financially impact the Power Producer;
- e. The object of the ‘Change in Law’ provision is to compensate the Party affected by such an event which was beyond its control so as to restore it, to the same financial position as if such Change in Law event had not occurred.

These are the guiding principles for ascertaining whether the events claimed as ‘Change in Law’ by Power Producers are to be treated as such under the PPA or not.

16. In present case, TPREL has claimed MoF notifications issued in December 2018 as Change in Law event. MoF is a Government Instrumentality as per PPA and MSEDCL has not disputed the same. TPREL has claimed Change in Law as per Article 9.1 (v) of the PPA i.e. *any change in the rates of any Taxes, Duties and Cess which have a direct effect on the Project*. While disputing TPREL’s claim, MSEDCL has contended that rate of taxes applicable at the date of submission of bid has not increased but in fact have reduced due to subsequent MoF notification issued in December 2018.

17. In view of above, the Commission frames following issues for its considerations:

- a. What was applicable tax rates at the time of bid submission?
- b. Whether MoF’s notifications in December 2018 has changed tax rates applicable for TPREL’s project?
- c. Whether TPREL is eligible for claiming increased expenses on account of Change in Law event?

The Commission is addressing these issues in following paragraphs.

18. Issue A: What was applicable tax rates at the time of bid submission?

18.1. The Commission notes that bid submission date in present matter was 8 May 2018. GST was applicable at that time. Further, GST law provides different tax rates for supply of goods and

supply of services. As construction of Solar projects involves supply of goods such as Solar panels/ modules, inverters, etc and also includes services such as design, construction etc. both tax rates i.e. GST on supply of goods and GST on supply of services can become applicable for respective activity.

18.2. GST notifications issued in 2017 was applicable at the time of bid submission. As per said notifications, Solar projects falls under following tax classification:

a. For Supply of Goods (Notification 1/2017):

S. No.	Chapter/Heading/Sub-Heading/Tariff item	Description of Goods	CGST rate	SGCT rate	IGST rate
234	84 to 85	Following renewable energy devices & parts for their manufacture: (c) Solar power generating system	2.5%	2.5%	5%

b. For Supply of Services (Notification 11/2017):

S. No.	Chapter/Section or Heading	Description of Services	CGST rate	SGCT rate	IGST rate
3	Heading 9954 (Construction services)	(i) Construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.	9%	9%	18%
		(ii) composite supply of works contract as	9%	9%	18%

S. No.	Chapter/Section or Heading	Description of Services	CGST rate	SGCT rate	IGST rate
		defined in clause 119 of section 2 of Central Goods and services Tax Act, 2017			
		(iii) construction services other than (i) and (ii) above	9%	9%	18%

18.3. As per above notifications, for supply of goods to Solar Power Generating System, GST at rate of 5% is applicable and for supply of services such as construction activities, GST at rate of 18% was applicable.

18.4. In present case, TPREL has placed following two separate work orders with Tata Power Solar System limited:

- a. An Erection, Procurement and Construction Contract for Supply of Solar Power Generation System such as Solar Modules, Solar Inverter, Cables, 33 kV Switchgear System, Transformers, Auxiliary Power System, etc.
- b. For Civil Works for construction of Civil foundation, Construction of Transformer foundation, installation etc.

TPREL has claimed that its EPC contract (referred at 'a' above) is covered under 'Supply' and hence GST at rate of 5% was applicable whereas as construction contract (referred at 'b' above) is covered under 'Services' and hence GST at rate of 18% was applicable at the time of bid submission. There is no dispute about GST rate of 18% applicable to contract referred at 'b' above.

18.5. However, with respect of EPC contract, MSEDCL has contended that as such contract includes activities such as erecting/construction which is other than supply of goods, it falls under composite supply and hence GST at rate of 18% is applicable. The Commission notes that GST Act 2017 defined the 'composite supply' as follows:

*“(30) ‘composite supply’ means a **supply made** by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply.*

Illustration – Where goods are packed and transported with insurance, the supply of goods, packing materials, transport and insurance is a composite supply and supply of goods is a principal supply. [emphasis added]

In present case, TPREL stated that its EPC contract of Rs. 695.61 crore includes Rs. 512 Crore towards supply of modules and remaining value is towards other goods and services. Thus, the Commission is of the opinion that above referred EPC contract of TPREL is to be treated as composite supply as defined under GST Act, 2017.

18.6. The Commission also notes that Section 8 of the GST Act 2017 stipulates criteria for fixing tax liability of composite supply as follows:

“8. The tax liability on a composite or a mixed supply shall be determined in the following manner, namely-

(a) a composite supply comprising two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply; and

(b) a mixed supply comprising two or more supplies shall be treated as a supply of that particular supply which attracts the highest rate of tax” [emphasis added]

Further Schedule II (‘Activities to be treated as Supply of Goods or Supply of Services’) of GST Act 2017 has also stipulated about composite supply for the purpose of levy of GST as follows:

“6. Composite Supply

The following composite supplies shall be treated as supply of services, namely:-

(a) Works contract as defined in clause (119) of section 2; and

(b) Supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption), where such supply or service is for cash, deferred payment or other valuable consideration” [emphasis added]

Thus, as per GST Act 2017, composite supply can either be treated as ‘works contract’ if it fulfills requirement of definition in clause (119) of section 2 of GST Act and accordingly be treated as supply of services with GST rate of 18%. In case composite supply cannot be treated as ‘Work Contract’ and involves supply of two or more supplies and one of them is

principal supply then tax rate applicable for principal supply shall be applicable for composite supply.

18.7. The Commission notes that ‘principal supply’ and ‘work contract’ has been defined under GST Act 2017 as below:

*“(90) ‘principal supply’ means the **supply of goods or services which constitutes the predominant element of a composite supply** and to which any other supply forming part of that composite supply is ancillary.*

.....

*(119) ‘work contract’ means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alternation or commissioning of any **immovable property** wherein transfer of property in goods (whether as goods or in some other form) is involved in execution of such contract;” [emphasis added]*

Thus, composite supply can be treated as ‘work contract’ only if it involves installation of immovable property.

18.8. In present case, TPREL has entered into two separate contracts. One is EPC contract for supply of goods for Solar Power generating system along with designing, testing, and commissioning of such goods. And second separate contract is for civil works for Solar power generating system. Solar power plant cannot be erected without the associated civil work. Thus, TPREL’s EPC contract on its own cannot create any immovable property. Hence, EPC contract of TPREL cannot be termed as ‘work contract’. Whereas as stated above, EPC contract of Rs. 695.61crore includes Rs. 512 Crore towards supply of solar modules and remaining value is towards other goods and services. Thus, Solar module which contributes 74% of contract value is predominate element of composite supply and hence as per definition of principal supply, GST rate applicable for supply of Solar module i.e. 5% would be applicable for such composite supply (EPC Contract).

18.9. In view of above analysis, the Commission concludes that as on bid submission date, as per GST notifications applicable at that point of time, 5% GST was applicable on EPC contract and 18% GST was applicable on separate ‘Service Contract’ of TPREL.

18.10. MSEDCL has referred to decisions of AAR treating EPC contracts for Solar plants as ‘Work Contract’ and ruling that GST rate of 18% is applicable. However, as both parties have agreed that such rulings are not decision in rem, hence same has not been referred/considered by this Commission in its analysis.

19. Issue B: Whether MoF’s notifications in December 2018 has changed tax rates applicable for TPREL’s project?

19.1. Post issuance of GST notification in 2017, there seems to be confusion about applicable tax rate for EPC contract of setting up of Solar power generating system. It is evident from the decision of AAR referred by MSEDCL in its submission.

19.2. Issue of clarification on GST rate applicable to EPC contracts of solar plants and other Renewable Energy Generating System was discussed during 31st GST Council Meeting held on 22 December 2018. Minutes of the said meeting is reproduced below:

“14.40. The Joint Secretary, TRU-I explained that this proposal was regarding assigning value to the supplies falling under S. No. 234 of Schedule I in Notification No. 1/2017-Central Tax (rates), when supplied along with other supplies like services under EPC and goods not covered under the said entry, and it was recommended to take the deemed value of goods falling under entry 234 as 70% of total amount charged and remaining 30% value may be deemed as value of supply of services. He added that it was based on fair estimation of the cost break-up. He stated that this proposal would eliminate disputes regarding applicable rate of tax on a total solar power project. The Council agreed to the proposal.”

19.3. In order to simplify taxation of EPC contract, GST Council in above referred 31st Meeting has decided to value EPC contract for taxation purpose as supply of goods for 70% of contract value and supply of services for remaining 30% of contract value. Accordingly, following amendments have been made in GST notifications in the month of December 2018:

a. For Supply of Goods (Notification 24/2018):

S. No.	Chapter/Heading /Sub-Heading /Tariff item	Description of Goods	CGST rate	SGCT rate	IGST rate
234	84 to 85	Following renewable energy devices & parts for their manufacture: (c) Solar power generating system Explanation: If the goods specified in this entry are supplied, by a supplier, along with supplies of other goods and services, one of	2.5%	2.5%	5%

S. No.	Chapter/Heading /Sub-Heading /Tariff item	Description of Goods	CGST rate	SGCT rate	IGST rate
		<i>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),, the value of supply of goods for the purpose 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 services.”</i>			

b. For Supply of Services (Notification 28/2018):

S. No.	Chapter/Section or Heading	Description of Services	CGST rate	SGCT rate	IGST rate
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 – (c) Solar power generating system Explanation – This entry shall be read in conjunction with serial number 234 of Schedule I of the notification No. 1/2017-.....	9%	9%	18%

Thus, through amendment in GST Notifications, Government has introduced entry no 38 (earlier only 37 entries were there) in ‘Supply of Services’ for EPC contracts for setting of Solar power generating system and fixed GST rate of 18% for such services. Explanation added to this entry no. 38 and entry no. 234 in ‘Supply of Goods’ has further clarified that in case supply of goods for Solar power generating system which falls under entry no. 234 of ‘Supply of Goods’ is undertaken with supply of other goods or EPC services as stipulated in entry no. 38 of ‘Supply of Services’ then value of supply of goods for the purpose of tax

rate 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 services i.e. EPC services.

19.4. As an effect of above said 2018 notifications, Supply and Service Contracts for setting up of the Solar Power Plant attracts a composite tax rate 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).

19.5. In view of above, the Commission concludes that post 2018 GST notifications, tax rate for supply of goods to Solar power generating system remains 5%. Separate category of EPC services has been introduced at tax rate of 18%. And in case of composite supply wherein goods under entry 234 of 'Supply of Goods' is being supplied along with other goods and EPC services then effective tax rate of 8.9% will be applicable on such contract.

20. Issue C: Whether TPREL is eligible for claiming increased expenses on account of Change in Law event?

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:

Sr. No.	Contract Details	Applicable GST Rate	
		As on Bid Submission date (2017 GST Notifications)	Post 2018 GST Notifications
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

it is also important to note that such provision of Change in Law is incorporated in the PPA to safeguard interest of contracting parties from the Change in Law event which is beyond their controls. Although, clause relating to Change in Law in the PPA do not talk about controllable factors, but PPA mandates prudent utility practices to be adopted. Considering settled legal principal of harmonious reading, the Commission is of the opinion that if party through prudent utility practice can able to control impact of Change in Law event, it shall do the same and thereafter can claiming compensation for any residual impact, if any. In present case, although change in GST rate is clearly beyond the control of contracting parties, in the opinion of the Commission, TPREL could have controlled the expenses on taxes.

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.

21. Hence, the following Order:


ORDER

1. Case No. 25 of 2020 & MA No. 55 of 2020 is dismissed.

**Sd/-
(Mukesh Khullar)
Member**

**Sd/-
(I.M. Bohari)
Member**

**Sd/-
(Shri Sanjay Kumar)
Chairperson**


**(Abhijit Deshpande)
Secretary**

