common sense and not merely a technical rule of construction. Hence, while interpreting the terms of the PPA the same logic shall be used to determine the relief that can be granted under it. Applying the above ratio of the Hon'ble Supreme Court of India to the present facts, it is clear that with the PPA not providing for restoration of the petitioner to the same position as it would have been in the absence of change in law, the petitioner is barred from claiming such relief. Thus, the petitioner's claim for carrying cost is not tenable as there is no explicit or implicit provision for carrying cost in the PPA. The Hon'ble APTEL and the Hon'ble CERC have held that if the provisions of the PPA are silent on the question of restoration then the relief of carrying cost cannot be granted. If the PPA does not have any provision regarding restoring the seller to the same economic position as if the Change of Law had never occurred, the relief of carrying cost cannot be granted. Thus, as the PPA does not include a clause for restoration of the petitioner's claim for grant of interest/carrying cost from the date of impact till reimbursement is inadmissible and liable to be dismissed.

3.26 That without prejudice to the above contention of admissibility of Carrying Cost, the Carrying Cost is to be restricted to the cost of financing of a prudent and efficient utility i.e. the interest rate at which such utility can borrow money from the lenders and financial institutions after due and sincere efforts to minimize the interest cost. The petitioner is not entitled to Carrying Cost at rate of 15% per month as is claimed in the instant case, which is apparently exorbitant and way higher than the market trend.

3.27 That it is a settled principle that in the matters of restitution, the courts should adopt a pragmatic view and grant relief in a manner as may be reasonable, fair, and practicable. It has been held that the Court should not be oblivious of any unmerited hardship to be suffered by the party against whom action by way of restitution is taken. [Reference: Citibank N.A. –v- Hiten P. Dalal Ors. (2016) 1 SCC 411 and Kerala State Electricity Board Through its Special Officer (Revenue) and Another –v- M.R.F Limited and Others, (1996) 1 SCC 597]. The petitioner should be required to establish to the satisfaction of the Hon'ble Commission that it has made prudent and bona-fide effort to minimize the interest cost.

4. **The petitioner herein (M/s. Avaada), has filed its rejoinder to the reply filed by the HPPC, on an affidavit dated 17.01.2023. The petitioner has submitted as under:-**

SGD Notification being a 'Change in Law' event

4.1 That the 2018 notification was to be in force only for a period of two years, starting from 30.07.2018 and ending on 29.07.2020. Moreover, there was no provision provided in the said notification regarding further extension of the Safeguard Duty beyond 29.07.2020. Quite to the contrary, the end date having been specified, the 2018

Notification thereby conveyed that it would be in effect till the end date. Thus, the notification dated 30.07.2020 is not an extension of the notification dated 30.07.2018.

4.2 That the PPA was entered into on 06.07.2020. The import of solar modules were to be made after the end date (29.07.2020) of the notification dated 30.07.2018. None of the imports were to be made during the currency of the said notification dated 30.07.2018. Accordingly, when the petitioner submitted its bid on 05.08.2019, which is the cut-off date for the purpose of Change in Law claims, there was no occasion to factor in the impact of the 2018 Notification, as the Scheduled Date of Commissioning ('SCOD') of the Project as on 05.08.2019 was 06.01.2022, which leaves about a time period of over 17 months from the date on which the 2018 Notification was coming to an end, i.e. 29.07.2020.

4.3 That the decision to review the levy of safeguard duty beyond 29.07.2020 was also notified after the last date of bid submission (05.08.2019), on 03.03.2020 and the recommendation by the designated authority in this regard was given on 18.07.2020. Finally, Ministry of Finance, on 29.07.2020, vide the SGD Notification, imposed Safeguard Duty, at the rates provided in the said notification.

4.4 That the PPA between the parties was signed on 06.07.2020 i.e. 23 days prior to the expiry of the currency of the 2018 Notification and thus, the petitioner could not have pre-empted the levy of Safeguard Duty under the SGD Notification, and thus, no goods were to be imported during the currency of the 2018 Notification.

4.5 That various commissions have also held the 2020 Notification as a change in law event. In this regard, some of these decisions are provided below:

i) Order dated 05.03.2021 passed by Hon'ble MERC in Case No. 218 of 2020; and

ii) Order dated 28.10.2022 passed by Hon'ble UPERC in Petition No. 1742 of 2021.

4.6 That as regards the respondent's contention that safeguard duty has been imposed only on import from certain specific countries & safeguard duty has not been imposed on import of solar cells from other developing countries, it is submitted that the business and commercial decisions made by the petitioner, such as opting to import modules as opposed to using domestic modules or importing modules from certain countries and not others, cannot be questioned post the award of the bid since no safeguard duty would have had to be paid on import of solar cells from China and Malaysia or any other country, at the relevant time, when the same were to be imported, in considering the relevant dates, as mentioned above. The petitioner has set up the project pursuant to submitting a competitive bid which had factored in the price of modules and other business assumptions for implementing the project including the mode of procurement of goods & services. As the imposition of safeguard duty after the submission of bid resulted in an additional financial burden on the petitioner, the petitioner is entitled to be compensated for the same. The provisions of PPA nowhere specify or prescribe that

modules or any goods required for setting up the project are required to be imported from a specific location or sourced domestically and it is therefore left to the generator to make specific sourcing decisions based on its calculations and assumptions. Reliance in this regard is placed on the decision of Hon'ble CERC dated 05.02.2019 in Petition No. 187/MP/2018.

4.7 That any submissions of the respondent to the extent that the petitioner's claims are belated & should have been raised immediately upon issuance of notification dated 30.07.2020, are irrelevant, misconceived and merits no indulgence by this Hon'ble Commission. In any event, the petitioner issued change in law notice only once the project was fully commissioned on 11.05.2022. The petitioner could have calculated the actual impact of the Change in law events upon completion of the project. Accordingly, the impact of SGD on the project cost and on tariff could only be determined at the time of COD of the project only after considering actual payment made against SGD duly presented with documentary evidence.

GST Notification

4.8 That the original commercial operational date of the project was 18 months from the date of signing of the PPA, i.e. till 06.01.2022. The same was extended till 11.05.2022 in light of the disruptions caused by Covid 19 pandemic. Thus, owing to the aforesaid delays on account of the Covid-19 Pandemic, the petitioner was constrained to buy goods after the imposition of the GST Notification.

4.9 That the petitioner is submitting all the invoices which were raised, of the goods imported, pre and post the GST Notification. The petitioner has computed the impact of GST as per the GST Notification, which computation has been given in CA certificate appended with the petition. A perusal of the said certificate (3rd row) suggests that for the supply contracts the amount of Rs 4,11,18,01,714 is inclusive of tax @12% on the value of supply and for the works contracts the amount of 53,91,13,697 is inclusive of tax @ 13.8% on the composite value (i.e. supply plus services).

4.10 That the tax on the supply part (supply contracts) have been calculated as per the notification @ 12% and the tax on the composite invoices i.e. the invoices under the works contract (supply plus service) is taxed as per the break up provided below, which is in line with the GST Notification:

Value of goods: 70% of total value of supply

Value of services: 30% of total value of supply

The corresponding value is then taxed as per the rates provided in the notification, i.e. goods are taxed @12% and services are taxed @18%.

Requirement to furnish relevant documents

4.11 That relying upon the decisions of the Hon'ble CERC in 50/MP/2018, 52/MP/2018, 14/MP/2019 and 211/MP/2019, the respondent has sought to contend that the petitioner must provide all relevant details and proper documentations and invoices certified by the Auditor for adjudication of its Change in Law claim. Whereas, in the orders relied upon by the respondent, the Hon'ble CERC having held that the claimed event is a 'Change in Law' event, directed the parties to reconcile the accounts, upon the generator furnishing the relevant documents to the procurer, and payment to be made thereafter. The petitioner has filed certificate from its Chartered Accountant certifying the amount due on account of the 'Change in Law' claims.

4.12 That the petitioner has executed agreements with its parent company i.e. Avaada Energy Private Limited ('AEPL') and its affiliate company Avaada Clean Project Private Limited ('ACPPL') for setting up of the power plant (collectively 'EPC Contractors'). The agreements executed with the said companies (along with the amendments thereto) are on record. Thus, no separate purchase orders were issued to the EPC Contractors. Further the agreements executed with the EPC Contractors also mention the dates on or before which the supplies were to be made.

Methodology for payment of compensation

4.13 That the respondent, relying upon MNRE's letter dated 12.03.2020, addressed to SECI, NTPC, IREDA, PFC and REC, has sought to contend that the payments to be made to the Petitioner ought to be passed through annuity payment methodology.

4.14 That the said letter is being selectively read by the respondent. Para 2 of the said letter clearly provides that the Hon'ble CERC has directed the power procurers to pay the change in law dues within 60 days of the relevant CERC Order or from the date of submission of claim by the relevant petitioner. In the alternate, the Hon'ble CERC has directed the parties to mutually agree upon a mechanism of payment.

4.15 That by the said Letter, the MNRE further directed release of the performance bank guarantees submitted by the power developers to free up equity, against letter of undertakings. Clearly, the aforesaid was to mitigate the financial distress caused due to non-payments and does not speak of setting a norm for annuity payments.

4.16 That the respondent has further submitted that, the costs should be recovered only once the supply of electricity has been made for if the petitioner abandons the project and discontinues the supply of power, there is no methodology for adjustments of lump sum payments already made. In this regard, it is submitted that the PPA has built in mechanism for adjudication of the issues & disputes. The said issues, however, cannot have any bearing on the additional expenditure made by the petitioner owing to the Change in Law events in the questions.

The petitioner has been further submitted that as on the bid submission date, the petitioner had formulated its business plan for funding the project as per the expenses that could have been foreseen as on that date. It had accordingly made arrangement for the funds for the purpose of commissioning of the project. However, the additional expenditure on account of the 'Change in Law' event has brought about a disequilibrium in the financial arrangements made by the petitioner, and thus, the same merits being paid upfront to the petitioner on lump sum basis. In this regard, it is also pertinent to note that the Hon'ble CERC, in many cases, has directed lump sum payments for the same change in law events namely:

a. Order dated 05.02.2019 in Petition No. 187/MP/2018; Petition No. 192/MP/2018; Petition No. 193/MP/2018; Petition No. 178/MP/2018; and Petition No. 189/MP/2018;
b. Order dated 02.05.2019 in Petition No: 342/MP/2018; 343/MP/2018;
c. Order dated 15.10.2019 in Petition No. 19/MP/2019 and 46/MP/2019;
d. Order dated 05.02.2020 in Petition No. 176/MP/2019;
e. Order dated 24.08.2020 in Petition No. 47/MP/2019.

Carrying Cost

4.17 The Respondent has sought to contend that the PPA does not have any provision regarding carrying cost or restitution principles of restoration to the same economic position. In light of the same, relying upon the Judgment of Hon'ble APTEL dated 13.04.2018 in Appeal No. 210 of 2017 and Judgment of Hon'ble APTEL dated 14.08.2018 in Appeal No. 111 of 2017, the Respondent has contended that given there is no provision for carrying cost under the PPA, the petitioner is not eligible to receive any carrying cost on its claims.

4.18 That the respondent has given a complete miss to the Article 20 of the PPA, in as much as the said article embodies the very principle of restitution. The relevant provision is reproduced below:

20.1.1 In the event a Change in Law results in any adverse financial loss/ gain to the Solar Power Generator then, in order to ensure, that the Solar Power Generator 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 Solar Power Generator/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 Appropriate Commission.

4.19 That Hon'ble Apex court in its Judgment in Uttar Haryana Bijli Vitran Nigam Limited & Anr. v. Adani Power Ltd. & Ors. (2019) 5 SCC 325 has held as under:-

"

5. Ultimately, the result of this appeal depends upon the interpretation of Article 13 of the PPAs which is set out in full hereinbelow:

13.2 Application and Principles for computing impact of Change in Law
While determining the consequence of Change in Law under this Article 13, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such Change in Law has not occurred.

……

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

Thus, in terms of the Article 20 of the PPA, the petitioner is entitled to be restituted to the same financial position as it would have been had it not been for the occurrence of the Change in Law.

4.20 That compensation under 'change in law' is based on the principle of restitution of the party to the same financial position, which as per the settled principles of law includes carrying cost from the date of impact. Therefore, as a relief for the occurrence of the 'change in law' event, the Petitioner is entitled to claim carrying cost, specifically in view of the principle of complete restitution incorporated under Article 12 of the PPA, and the general law applicable to grant of carrying cost/interest.

4.21 That carrying cost claimed at the rate of 15% per month is neither exorbitant nor higher than the market trend.

5. **The HPPC has filed its written submissions, on an affidavit dated 03.02.2023. HPPC has submitted as under:-**

Issue – Safeguard duty levied vide notification of 29.07.2020 is a 'CHANGE IN LAW'

5.1 That clause 20.1 of the PPA regarding Change in Law clearly specifies that the term Change in Law shall refer to the occurrence of the event after the last date of bid submission any change in the rates of any taxes which have a direct effect on the project cost. The provision of clause 20.1 of PPA is reproduced below:-

" 20.1 CHANGE IN LAW

201.1. In the event a Change in Law results in any adverse financial loss/gain to the Solar Power Generator then, in order to ensure that the Solar Power Generator 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 Solar Power Generator 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 Appropriate Commission.

20.1.2. the term Change in Law shall refer to the occurrence of any of the following events after the last date of 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 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.

20.2. Relief for Change in Law
20.2.1. The aggrieved party shall be required to approach the state Commission (HERC) for seeking approval of change in law and consequent impact on tariff.
20.2.2 The decision of the State Commission to acknowledge a Change in law and the date from which it will become effective provide relief for the same, shall be final and governing on both the parties."

5.2 That it is relevant to put forth salient dates in the case necessary for adjudication of instant claim –

Date	Event
30.07.2018	MoF, Govt. of India issued notification imposing Safeguard duty on the import of solar cells for 2 years at varying rates for different periods ranging from 25% to 15%
05.08.2019	Last date of bid submission. *Clause 1.10.2 of RFP specified that the Bidder shall take into account all costs including capital and operating costs, statutory taxes, levies, duties while quoting such Tariff. All costs in procuring the inputs (including statutory taxes, duties and levies thereof) at the plant location must be included in the Single tariff.* *It is pertinent to mention that Bid did not specify date of signing of PPA. It was mentioned that PPA will be executed within 45 days from issuance of LoI. Further, it was mentioned that LoI may be issued on the adoption of tariff by the Hon'ble Commission*
03.03.2020	Directorate General of Trade Remedies, Ministry of Commerce and Trade, Government of India vide notification sought initiation of review of imposition of safeguard duty and sought continued imposition of the said duty for a further period of four years, pursuant to the first proviso to sub-section 4 of Section 8B of the Customs Tariff Act 1975 (hereinafter also referred as the "Act") read with the first proviso to Rule 16(2) of the Rules.

	The said notification mentioned that there is a prima facie evidence that (a) imports of PUC in India continued at increased levels despite imposition of safeguard duty; (b) DI is adjusting positively in terms of reduced cost of sales, increased production & sales and lowered losses; (c) however, imports still continue to undercut and suppress the prices of DI leading to lower realization and thereby continued financial losses, thus, rendering DI's financial position as fragile. In light of such notification, it was evident that the safeguard duty will be extended for further period.
22.05.2020	LoI was issued to the Petitioner
24.05.2020	Addendum to LoI was issued
06.07.2020	PPA was executed
18.07.2020	Directorate General of Trade Remedies, Ministry of Commerce and Trade, Government of India vide notification recommended continued imposition of safeguard duty on imports , in order to remove injury to the domestic industry.
29.07.2020	Notification issued by MoF wherein in light of recommendation made for continued imposition of safeguard duty, safeguard duty was specified for the period 30.07.2020 till 29.07.2021.
23.03.2022	First Extended date of Commercial Operation in view of disruption of work caused due to COVID-19
11.05.2022	Second Extended date of Commercial Operation in view of disruption caused due to COVID-19

5.3 That in light of the foregoing events, it is evident that:-

a) While submitting Financial Bid against RFP issued by HPPC, the petitioner could not have envisaged that the PPA will be executed as late as 10 months after the bid submission. Therefore, there was no question of having not factored in the prevailing safeguard duty in the bid tariff;

b) No whisper at all was made any time till the filing of the present petition regarding impact on project cost due to notification dated 29.07.2020;

c) The fact that the safeguard duty is likely to be extended came to the knowledge of the petitioner well before issuance of LoI and execution of PPA. However, no communication at all was made as regards 'claim for safeguard duty'. There is therefore, no evidence to suggest that the petitioner did not factor in prevailing safeguard duty while quoting tariff for power supply.

5.4 That in the judgment of *Fortum Solar Plus Private Limited v Solar Energy Corporation of India- (Petition No. RERC-1914/21, 1922/21 and 1941/21) (Decided on 30.12.2021),* Rajasthan State Electricity Commission dealt with the contentions as raised by the petitioner in the present case and it was held that imposition of safeguard duty via notification dated 29.07.2020 along with integrated GST is not a change in law. The relevant excerpts of the said judgment are reproduced herein under for ready reference-

"14. In light of above provisions of PPA we may now discuss each issue to decide the same.

(i) ***Whether imposition of Safeguard Duty via Notification dated 29.07.2020 along with integrated GST is a Change in Law event****.*

15. The Solar Power Developers (SPDs) have prayed to declare the imposition of Safeguard Duty via Notification dated 29.07.2020 as Change in Law in terms of the PPA which has led to an increase in the expenditure for the Project. The SPDs have further prayed to direct the Respondents to compensate the petitioner for additional expenditure towards Safeguard Duty alongwith 5% integrated GST.

*18. RUVN further submitted that by virtue of notification dated 29.07.2020 the Safeguard Duty has been reduced at the rate of 14.9% -Antidumping duty for the period of 30.07.2020 to 29.01.2021 and 14.5% - Antidumping duty between the period of 30.01.2021 to 29.07.2021**. Thus by notification dated 29.07.2020 no new tax was imposed but rather the earlier existing tax was reviewed and reduced thus it cannot fall under the definition of Change in Law as being claimed by the Petitioner. The rates were higher than the present ones notified vide notification dated 29.07.2020 and the Petitioner had gained by payment of lesser Safeguard Duty and therefore, no amount is payable to the Petitioner.***

20. We observe that prior to the Notification dated 29.07.2020 of the Ministry of Finance dealing with Safeguard Duty, the Safeguard Duty was already in force under the Notification dated 30.07.2018 issued by the Ministry of Finance. ***Thus, on the last date of the submission of financial bid, i.e., 19.02.2019, 25% ad valorem of Safeguard Duty- anti dumping duty was leviable on import of solar cells in terms of notification dated 30.07.2018 and as per RFP the SPDs were required to factor in the impact of the same in the tariff quoted by them****.*

21. It is observed that vide ***notification dated 29.07.2020 the safeguard duty has been reduced at the rate of 14.9% ad valorem minus anti-dumping duty for the period of import of solar panels between the period of 30.07.20 to 29.01.2021 and 14.5% ad valorem minus anti-dumping duty between the period of 30.01.2021 to 29.07.2021. Thus Safeguard Duty has actually been reduced from the rate that was applicable on the last day of bid and has no adverse financial impact on the project cost****.*

22. The Commission on perusal of Article 12.1(v) of the PPA has observed that ***introduction of any new tax after the last date of submission of bid, which has a direct effect on the Project cost, is a Change in Law Event. In the present case since the notification dated 29.07.2020 only reduced the rate of Safeguard Duty from the rate which was already applicable on the last date of bid submission. Therefore, Commission is of the considered view that the issuance of the SGD Notification dated 29.07.2020 has not affected the Project cost adversely.***

23. In view of above, the Commission holds that imposition of Safeguard Duty via Notification dated 29.07.2020 is not a Change in Law in terms of Article 12 of the PPAs.

24. The Commission further observes that ***the claim for additional cost on account of levy of IGST on the Safeguard Duty not admissible since the Safeguard Duty notified vide Notification dated 29.07.2020 is not a Change in Law in terms of Article 12 of the PPA. The Commission therefore deems it appropriate not to allow levy of IGST on the Safeguard Duty as Change in Law in terms of PPA****.*

59. ***The summary of our findings are as follows:***
(a) ***Imposition of Safeguard Duty via Notification dated 29.07.2020 along with integrated GST is not a Change in Law in terms of Article 12 of the PPAs. "***
Emphasis Supplied

5.5 That judgments relied upon by the petitioner are clearly distinguishable on the facts and circumstances of the present case, as under:-

a. M/s. Tata Power Renewable Energy Ltd. Tata Power Company Ltd. – Distribution (CERC) Case No. 218 of 2020 (Decided on 05.03.2021)- It was the case of the petitioner that no safeguard duty was payable by them for any import of solar cells into India from China from 30.07.2020 onwards. The petitioner had accordingly planned to import the solar PV modules after July 2020 with specific intent that the import will be made when effective SGD would not be applicable. However, notification dated 29.07.2020 extended the applicability of the safeguard duty for the period of 30 July 2020 to 29 July 2021. Under Para 15 the Commission held as under-

"..Admittedly, MoF's Notification dated 29 July 2020 (which is subsequent to Bid Submission date of 25 September 2019 and e-RA date 10 October 2019) has extended the imposition of SGD, thereby increased rate of SGD from 'Nil' (on account of sunset clause in earlier notification dated 30 Jul 2018) to 14.9% & 14.5% for the period of 30 Jul 2020 to 29 Jan 2021 and 30 Jan 2021 to 29 Jul 2021, respectively. Hence, this Notification dated 29 July 2020 is Change in Law event under the PPA."

Given the facts and circumstances of the present case, the said judgment is distinguishable from the instant case as under:

- In the said judgment, the petitioner entered into the module agreement with a supplier in China on 28.07.2020. The said fact indicates the intention of the petitioner to procure the solar PV modules post-29.07.2020. However, in the instant case, the petitioner entered into works contact with its parent company on 26.02.2021, and at that time the notification dated 29.07.2020 was in existence. In the present case, no such intention of the petitioner to import after 29.07.2020 is apparent. There is no correspondence of the contemporaneous time.

"Para 10- The Commission notes that at the time of floating the RfS and subsequently at E-reverse auction, the MoF's Notification dated 30 July 2018 on imposition of SGD was in force. However, the validity of such enforcement was till 29 July 2020. TPREL has submitted that it had planned the procurement of solar PV modules after July 2020 so that the SGD would not be applicable to it. Further, TPREL entered into module supply agreement with a supplier, based out of China, on 28 July 2020."

The Petitioner has raised afterthought contentions with respect to their intention to procure modules after 29.07.2020 merely to take shelter of this judgment

- The petitioner has attempted to set up a new case under rejoinder so as to come within the purview of the said judgment. The same is evident from the contents mentioned in the rejoinder which is exactly the same as mentioned in the said

judgment. It is however, pertinent to mention that no such intention to procure module without safeguard duty was never communicated to the procurer (Respondent).

- Even the said judgment under para 13 records that notification dated 29.07.2020 is an extension of the imposition of safeguard duty.

"Para 13. The Commission underscores that in various previous Orders, the Commission has held that the MoF's Notification dated 30 July 2018 imposing Safeguard Duty for the Period from 30 July 2018 till 29 July 2020 as Change in Law event. The New Notification of MoF dated 29 July 2020 is an extension of the imposition of SGD to another year till 29 July 2021 at telescopic rates."

- The petitioner has further failed to substantiate its claims in terms of-
  i) Details of the date, vendor, etc. to whom the Purchase Order is placed;
  ii) The origin of the country from where the order is placed along with the technology;
  iii) Details of the date, vendor, etc. to whom the Purchase Order is placed;
  iv) The origin of the country from where the order is placed along with the technology;
  v) The actual impact of Safeguard Duty in addition with GST for procurement of such goods supported by duty challans;
  vi) The date on which the goods have been delivered to the petitioner at the site for commissioning of the said project;

  In the said judgment, the petitioner was directed by the Commission to submit the reply in view of the above-mentioned details in support of their claim. Admittedly, in the present case, no such details have been submitted by the Petitioner.

b. Order dated 28.10.2022 passed by Hon'ble UPERC in Petition No. 1742 of 2021- The said judgment is clearly distinguishable in view of the fact that there was evidence on record evidencing that the bidder did not factor in safeguard duty in delivery of the modules. However, in the present case, there is no such evidence and in fact, on the contrary, there is evidence to the effect that the financial bid submitted in August 2019 factored in prevailing safeguard duty.

Issue – Central Goods and Services Tax imposed vide notification of 30.09.2021

5.6 That the reply of the respondent herein i.e. HPPC and the rejoinder filed by the petitioner, in the matter, has been tabulated as under:-

S. No.	Reply by the Respondent to the Petition filed by the Petitioner	Reply in Rejoinder by the Petitioner
1.	No cogent evidence provided by the petitioner of the goods imported pursuant to 30.09.2021 and the justification for not importing the same prior to 30.09.2021.	• Owing to delays on account of the Covid-19 Pandemic, the Petitioner was constrained to buy goods after the imposition of the GST notification as well. • Relied upon the GST Invoices, pre and post the GST Notification.
2.	Net impact owing to GST owing to notification dated 30.09.2021 is only 4.90% 1. Before 01.10.2021-70% value of Solar Power Generating Station was taxed @5% and balance 30% was taxed @ 18%. 2. After 01.10.2021-70% value of Solar Power Generating Station was taxed @12% and balance 30% was taxed @ 18%.	• CA certificate suggests that for the supply contracts, the amount of Rs 411,18,01,714 is inclusive of tax @12% on the value of supply and for the works contracts, the amount of Rs. 53,91,13,697 is inclusive of tax @ 13.8% on the composite value (i.e. supply plus services).

5.7 That the petitioner has failed to establish and substantiate the extent to which the petitioner's project is subject to taxes existing prior to 30.09.2021 which have been subsumed in the GST Notification dated 30.09.2021. In the pre-GST regime, the petitioner was taxed @5% and post-GST Notification dated 30.09.2021, the Petitioner was taxed @ 12%. Meaning thereby, the net impact owing to GST owing to the notification dated 30.09.2021 is only 4.90%. The said net impact of 4.90% has not been controverted by the petitioner in their Rejoinder.

5.8 That the Petitioner has claimed Rs. 29.83 crores on account of the introduction of GST Notification dated 30.09.2021, however, the invoices appended by them amounts to Rs. 1346,77,88,955.15 (1346 crores). No sincere efforts have been made by the petitioner to give a clear segregation and computation of the amounts so claimed backed by concrete documentary evidence. There are certain discrepancies qua the invoices appended by them which are enumerated herein below-

i. Invoices amounting to Rs. 1346 crores are not supported by any documentary evidence-

a) In support of this purported claim, the petitioner has merely appended the invoices along with the self-tabulated chart which is devoid of the following details-

- Date of Purchase Order;
- Date of raising of Invoice by the Supplier;
- Date of handing over of the goods to the common carrier/delivery date;
- Date at which Goods were installed at site;
- Date of Bill of Lading in case of imported goods;
- Date of Custom clearance in case of imported goods;
- Date of arrival of the goods at the project site;
- Date of rendering of the actual services;
- The GST/Tax Invoice raised;
- Supporting document in rest of each above documents

b) Although the Petitioner has contended that they have appended the bills of exchange, payment challans, manufacturer's invoices, regional packaging receipts, and final invoices for the goods procured. However, the payment challans, manufacturer's invoices, and regional packaging receipts do not correspond to all invoices. The same is reflected in the following invoices mentioned herein under:-

SN	Date	Invoice Number	Description	Consignor	Amount (Invoice Currency: INR)	Page No.
1.	17/6/2021	1108110051	Solar Photovoltaic Module 445WP	AVADA ENERGY PRIVATE LIMITED	61568625.10	378
2.	17/6/2021	1108110050	Solar Photovoltaic Module 445WP	AVADA ENERGY PRIVATE LIMITED	49254900.07	379
3.	17/6/2021	1108110049	Solar Photovoltaic Module 445WP	AVADA ENERGY PRIVATE LIMITED	60774191.22	380
4.	17/6/2021	1108110052	Solar Photovoltaic Module 440WP/445WP	AVADA ENERGY PRIVATE LIMITED	85988535.37	381
5.	06.07.2021	1108110053	Solar Photovoltaic Module 450WP/445WP	AVADA ENERGY PRIVATE LIMITED	61880260.90	382
6.	06.07.2021	1108110054	Solar Photovoltaic Module 450WP	AVADA ENERGY PRIVATE LIMITED	123898795.62	383
7.	07-07-2021	1108110055	Solar Photovoltaic Module 450WP	AVADA ENERGY PRIVATE LIMITED	136288675.18	384
8.	23/7/2021	1108110058	Solar Photovoltaic Module 445WP	AVADA ENERGY PRIVATE LIMITED	24627450.05	385
9.	16/7/2021	1108110056	Solar Photovoltaic Module 450WP	AVADA ENERGY PRIVATE LIMITED	92924096.73	386
10.	23/7/2021	1108110059	Solar Photovoltaic Module 450WP/445WP	AVADA ENERGY PRIVATE LIMITED	61534576.34	387
11.	23/7/2021	1108110062	Solar Photovoltaic Module 450WP/445WP	AVADA ENERGY PRIVATE LIMITED	30836425.10	388
12.	23/7/2021	1108110061	Solar Photovoltaic Module 450WP	AVADA ENERGY PRIVATE LIMITED	185848193.43	389
13.	27/7/2021	1108110063	Solar Photovoltaic Module 450WP	AVADA ENERGY PRIVATE LIMITED	43364578.48	390
14.	31/8/2021	110821221-001	Solar Power Generating Systems	AVADA ENERGY PRIVATE LIMITED	12,83,87,557	391
Total					**Rs. 1018789303.59/-**	

c) It is well trite law that mere filing of invoices is not sufficient and the content of the same needs to be proved. Reliance in this regard is placed upon the judgment of the Hon'ble Bombay High Court in the matter of ***Oil and Natural Gas Corporation Ltd. v. Dolphin Drilling Limited 2012(4) BCR 640 (Decided on 09.05.2012)*** wherein it was held by the Court as under:-

"Para 26. ***There is nothing placed on record by DDL to show that regular payments were made to Drill-quip as per the invoice before raising invoices in question****. It appears that there was no payment made to the sub-contractor by the Respondents and, therefore,* ***the invoices so relied and referred and the claim so raised without placing any supporting material on record and as accepted by the Arbitral Tribunal, in my view, is also unsustainable. Mere filing of invoices are not sufficient. The parties whosoever want to claim any amount on such invoices need to prove the same and its contents, basically when the disputes were raised within time on all the invoices for wellheads, running tools and services. There is nothing in the contract and/or pointed out that it was agreed by the Petitioner that such charges and/or invoices would be paid to Dril-quip, instead of DD****L.*

Para 27. In that I have also observed that though provisions of Evidence Act are not strictly followed nor the provisions of Code of Civil Procedure (Civil Procedure Code), yet the basic principle of assessment and/or re-assessment of the breach committed by the party and quantum of claim on the foundation of mitigation and other surrounding circumstances including proof of the contents of the documents as those invoices were never admitted goes to show that the amount so awarded was not based upon the strict proof of the quantum of its claim. Admittedly, as recorded, payments were not made by DDL to the sub-contractor. ***The external payment vouchers and/or such invoices cannot be treated as proof of payment. The Bank credit invoices or external payment vouchers in no way sufficient to accept the case that actual payments have been made.*** *The witness-Robert (CW 2) admitted in cross-examination that documents such as Exhibit "MM (Mr. Ken Fraser compilation internal document).* ***Some of the credit advices have no particulars and/or accompanying credit documents. As recorded, DDL failed to show the prior payment for rental of wellhead, running tools and services as contemplated in clause 7.1 itself. All the invoices and its contents were specifically challenged at every stage of the proceedings. The award based upon such invoices, therefore, in the facts and circumstances, is therefore, impermissible and contrary to the record and law****. The witness and/or evidence just cannot be relied upon to support the lacuna and/or fill the gaps if the documents as well as its contents are itself not proved as required under the law, specially when the Petitioner never agreed and/or accepted and/or admitted such mode of payment based upon the unpaid invoices of DDL."*

d) With regard to Auditor' certificate appended by the petitioner, it is submitted that the same is subject to prudence check. It is imperative to ascertain the prudency and reasonableness of the expenditure incurred and there cannot be any grant of costs merely based on accounts. Reliance in this regard is placed

upon the ***order of the Hon'ble CERC in the Petition No. 21/MP/2013 dated 03.09.2019*** wherein the Hon'ble Commission held as under-

"Para 10 *(a) The Commission in its order dated 4.2.2015 in Petition No. 21/MP/2013 had allowed certain claims of the Petitioner under change in law and had directed the Petitioner to furnish complete information for computation of the relief. However,* ***the Petitioner merely provided a certificate of Chartered Accountant regarding expenditure which is not sufficient for prudence check. Section 61 of the Electricity Act, 2003 provides for only reasonable costs to be allowed. Therefore, unreasonable or imprudent costs cannot be passed on to the consumers merely because such costs have actually been incurred by the Petitioner. In support of its contention, the Respondents have relied upon the judgments of Appellate Tribunal dated 20.11.2011(Dodson-Lindblom Hydro Power Private Limited Vs. MERC and anr.), 13.1.2011 (Kerala State Electricity Board Vs. Kerala State Electricity Regulatory Commission) and 3.1.2014 (Lanco Amarkantak Power Ltd. Vs. Haryana Electricity Regulatory Commission) in Appeal Nos. 152 of 2010, 177 of 2009 and 65 of 2013 respectively****.*

(b) The Appellate Tribunal vide its judgment dated 1.7.2014 in Appeal Nos. 213 and 214 of 2013 (Jindal Steel and Power Limited Vs. Chhattisgarh State Electricity Regulatory Commission) ***while dealing with the issue of nature of accounts rejected the accounts filed by the distribution company holding that accounts were mere extractions of the audited accounts of the parent company and were based on management assumption and that the account did not reflect the actual expenditure with respect to the business. In the instant case, the Petitioner has claimed to have executed the work/ procured the equipment through its own parent/ group company, i.e. R.Infra/ Reliance Infrastructure. In such cases of related party transaction, it is necessary for the Commission to consider the prudency and reasonableness of the expenditure and there cannot be any grant of costs merely on the basis of accounts****.*

(c) The Appellate Tribunal has directed the Commission to reconsider issue of increase of cost of water intake system afresh on the basis that there may be error in the report of the consultant. However, the Petitioner has not provided any justification for the increase in cost and the reason for reconsideration. The Commission has to consider the issue afresh. Therefore, it is up to the Petitioner to provide justification for claiming the increase.

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(g) The Petitioner is claiming the increase as capital cost and there cannot be any one time payment. The compensation has to be considered on similar terms as any other increase in capital cost due to change in law. Since the Petitioner is claiming an increase in capital cost, the same has to be considered as increase in non-escalable capacity charges. There cannot be any upfront payment of full capital cost. Since the costs have been claimed to have been incurred for supply of power, the costs should be recovered only if the Petitioner makes available the power. If the Petitioner does not supply the requisite power, the Petitioner should not be entitled to recover the cost.

(h) ***The Petitioner has not provided any details with regard to the equipment which was imported. Neither has it provided the break-up of the cost or the rate of custom duty or the computation of the customs duty along with the invoices, etc. The Petitioner has also not provided the details of date of import of the equipment. The certificate claims payment up to 30.9.2018 which does not seem rational as the project was commissioned in 2013 itself. The Petitioner is required to justify the need and prudency for import of the equipment and the need for importing as opposed to domestic procurement****.*

Para 11*. .... (b) The Petitioner failed to furnish adequate details as mandated by the Commission and only furnished a certificate by the Auditor for the costs incurred without providing the necessary documentary proof or documents supporting the same and the same nowhere certifies that it has been prepared on the basis of the audited accounts by the Petitioner. The Petitioner ought to have produced relevant supporting documents for its claim along with the present Petition pursuant to the matter remanded back by the Appellate Tribunal.*

(c) ***The Petitioner is trying to pass on the costs to the procurers without substantiating its claim with material proofs and the Commission may conduct a prudence check on the clams of the Petitioner****.*

(d) ***The Petitioner has only filed a certificate along with the Petition which cannot be construed to be the audited accounts of the Petitioner establishing its claims before this Commission. No claim of the Petitioner can be ascertained without doing a prudence check on the figures furnished by the Petitioner. No expenditure should be allowed beyond the provisions of the PPA.***

xxxx

(g) As regards Custom Duty on Mining equipment, ***the Petitioner has not provided details in regard to the equipment which was imported and the breakup of the cost and rate of custom duty and the computation of the custom duty along with invoices, etc. and also the certificate to that extent does not reveal the exact details pertaining to the mining equipment and the expenditure incurred against it****.*

xxxx

Para 42*. On account of the above observations of the Auditor,* ***we find strength in the objection raised by the Respondents about the authenticity of the expenditure. The expenditure to be allowed under change in law should be the actual expenditure on different items which can be certified by the auditor after examination of the books of accounts and other verifications in accordance with the Standard of Auditing and other authoritative pronouncement of ICAI. However, the Auditors in this case have given a certificate based on the Books of Accounts maintained by the Management****.*

Para 43*.* ***We also observe that the Petitioner has not furnished any information regarding the break up cost, rate of custom duty, computation of the customs duty along with invoices and Auditor certificate pertaining to the mining equipment and the expenditure incurred against it****.*

Para 44. <u>Therefore, as the equipments have not been imported by the Petitioner but have been imported by the R-Infra and the Auditor certificate does not indicate any details of custom duty payment, the prayer of the Petitioner in this regard is rejected</u>."

"Emphasis Supplied"

ii. The invoices related to the supply of the goods can be raised only up to COD for all the equipment-

a) The invoices related to the supply of the goods can be raised till 11.05.2022 i.e., Commercial Operation Date (hereinafter referred as 'COD'). In the case of the supply of services related to goods procured up to COD, the invoices are to be raised within 30 days of the supply of such services, which cannot be later than 30 days of COD. However, the petitioner has to exhibit a clear and one to one correlation between the projects and the supply of goods and services duly supported by the invoices backed with concrete documentary evidence. Clause 2 of the PPA defines 'Commercial Operation Date' as under-

"Commercial Operation Date" (COD) means the date(s) on which the Project achieves the commercial operation and such date as specified in a written notice given to HPPC at least 60 days in advance."

b) Summary of invoices raised post COD pertaining to GST Notification dated 30.09.2021 is as under -

SN	DATE	INVOICE NO.	CONSIGNOR NAME	DESCRIPTION	TOTAL AMOUNT	PAGE NO.
1	21-05-2022	2608210012	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	4879288.64	150-151
2	02-06-2022	2808220005	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	909728.82	114-115
3	02-06-2022	2608220008	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	92860.80	128-129
4	02-06-2022	2608220001	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	676953.82	130-131
5	07-06-2022	2608220015	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	760854.98	132-133
6	13-06-2022	2608210018	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	1952855.66	148-149
7	29-06-2022	2608210026	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	1353441.34	146-147
8	30-06-2022	2608210030	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	593520203.80	144-145
9	21-07-2022	2608110042	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	111545987.33	71-72
10	26-07-2022	2608220051	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	26813.58	98-99

11	28-07-2022	2608220047	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	230597.94	100-101
12	28-07-2022	2608220048	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	47586.52	102-103
13	28-07-2022	2608220049	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	394684.66	104-105
14	28-07-2022	2608220045	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	401344.82	106-107
15	28-07-2022	2608220044	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	18661.10	108-109
16	28-07-2022	2608220043	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	61404.22	110-111
17	28-07-2022	2608220046	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	1411.50	112-113
18	28-07-2022	2608220050	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	3787167.76	116-117
19	28-07-2022	2608220052	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	743722.76	118-119
20	28-07-2022	2608220053	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	1414743.04	120-121
21	28-07-2022	2608220054	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	1811720.58	122-123
22	28-07-2022	2608220055	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	58998.34	124-125
23	28-07-2022	2608220056	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	149231.10	126-127
24	28-07-2022	1108220011	Avada Energy Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	2950025.30	230
25	28-07-2022	1108220012	Avada Energy Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	1366473.97	231
26	28-07-2022	1108220013	Avada Energy Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	248916.67	232
27	29-07-2022	2608110045	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	139062628.77	68-70
28	26-08-2022	2608110053	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	122142580.89	73-75
29	30-08-2022	2608210040	Avada Clean Projects Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	500481.30	142-143
30	31-08-2022	1108110343	Avada Energy Pvt. Ltd.	Supply of G&S for Development of Solar Power Generating Systems.	2922904.00	235
	Total				**994034274.01**	

c) The petitioner while raising invoices post COD i.e., 11.05.2022 has vaguely averred that owing to delays on account of the Covid-19 Pandemic, they were

constrained to buy goods after the imposition of the GST notification. However, no details as mentioned below has been provided clearly:-

- Segregation of good/services required pre and post Commercial Operation Date;
- Affected period on account of Covid-19;
- Quantification of delay and disruption;
- Date of raising of Invoice by the Supplier;
- Date of handing over of the goods to the common carrier/delivery date;
- Date at which Goods were installed at site;
- Invoices at the time of removal of goods for transportation.
- Proof of payment of GST/Tax

d) The issue qua raising of invoices up till COD has been adequately dealt with by the ***Hon'ble Central Commission in 536/MP/2020 (Decided on 20.08.2021)*** wherein the Commission categorically observed as under-

"Para 56....

***Issue No. 3**: Whether the cut-off date for payment of GST/Safeguard Duty claims in respect of orders passed by this Commission needs clarification?*

xxxx

105. The summary of our findings are as follows:

...

Issue No. 3:

 ***Cut-off date for Safeguard Duty Claims: The invoices related to supply of the goods can be raised only up to the COD for all the equipment as per rated project capacity that has been installed and through which energy has flown into the grid**.*

 ***Cut-off date for GST Claims: The invoices related to supply of the goods can be raised only up to COD for all the equipment as per the rated project capacity that has been installed and through which energy has flown into the grid. in case of supply of services related to goods procured up to COD, the invoices are to be raised within 30 days of supply of such services, which cannot be later than 30 day of COD.**"*

"Emphasis Supplied"

Issue – Methodology for payment of compensation (if any)

5.9 The Ministry of New and Renewable Energy ('MNRE') vide letters dated 12.03.2020 and 23.03.2020 directed the Central Agencies implementing the schemes issued by MNRE, to proceed with payment of the change in law claims including the safeguard duty claims based on annuity model. The relevant excerpts of the said letter dated 12.03.2020, is reproduced herein below :-

"2. CERC, in its Orders regarding Compensation for the "Change in Law" event of "Imposition of GST" and "Imposition of Safeguard Duty on import of solar PV cells and modules" has ordered that: The Claim based on CERC Orders to be paid within sixty days of the date of the CERC Order or from the date of submission of claims by the Petitioners whichever is later, failing which it will attract late payment surcharge as provided under Power Purchase Agreements (PPAs)/ Power Sale Agreements (PSAs). OR Alternatively, the parties may mutually agree to mechanism for the payment of such compensation on annuity basis spread over the period not exceeding the duration of the

PPAs as a percentage of the tariff agreed in the PPAs …….. 6. After carefully examining the matter, the Ministry have decided as follows: a) In order to ensure that RE developers are paid their dues on account of 'Change- in-Law' events of imposition of GST/ enhancement of effective rates of GST & levy of Safeguard Duty, which are eligible for pass through, the financial impact thereof will be recovered in annuity mode. The rates for this shall be worked out by SECI/NTPC and realised along with tariff forthwith. This shall begin at once. The rates of recovery shall be as per the norms of Central Electricity Regulatory Commission (CERC)."

Addendum dated 23.03.2020 to the MNRE's letter dated 12.02.2020. The extract of letter dated 23.03.2020 is as under:-

"(i) Orders passed by the Central Electricity Regulatory Commission (CERC) on 'Change in Law' compensation on account of a imposition/enhancement of effective rates of Goods & Services Tax (GST) and levy of Safeguard Duty on import of solar PV cells & models are very clear, such sums be paid within 60 days failing which late payment surcharge (LPS) might be attracted or alternatively the payment on this account be made on annuity basis spread over the duration of the PPA. Since the orders of CERC are very clear, there is no need to go to CERC again in the matter. (ii) It is also clarified that once the principles to be followed regarding change in law have been decided by the CERC in one case, there is no need to ask every Developer to go before CERC for seeking orders individually in similar cases. The same principle would apply to all."

5.10 The Annuity method has been considered just and equitable by the Hon'ble Central Commission in the *536/MP/2020 (Decided on 20.08.2021).* The relevant excerpt of the said judgment is reproduced herein under for ease of reference-

"Issue No. 1: Whether the annuity methodology proposed by SECI is just and equitable and can be approved?

58. SECI, the Petitioner in Petition No. 536/MP/2020, has submitted that the increased costs on account of compensation for Change in Law due to GST Laws/ SGD should be recovered only if SPDs supply the power. If SPDs are allowed to recover the increased cost in lumpsum, this would imply payment of compensation even without the actual supply of power. If, for any reason, the project developers abandon the project and discontinue the supply of power, there is no methodology for adjustment of the lump sum payments already made. These implications will be contrary to the fundamental principle of recovery of capital cost through tariff. SECI has submitted that if the Change in Law event had occurred prior to the cut-off date, SPDs would have factored the higher cost to be incurred by them in establishing the solar power project in the per unit tariff to be quoted. Accordingly, the same methodology should be adopted for servicing the impact of Change in Law. Further, the payment of the amount as one-time in respect of the renewable power developers would result in substantial amount being paid to them upfront by the Buying utilities/ Distribution Companies through SECI on a back to back basis which will cause serious financial prejudice to SECI and the Buying utilities/ Distribution Companies. On the other hand, payment of such amount on annuity basis is consistent with the principles governing the servicing of the capital cost over the duration of the PPAs and, therefore, ought to be the principal basis for settlement of the claims unless in a given case the Buying utilities/ Distribution companies voluntarily agree to make a one-time payment of the amount determined as impact of GST Laws/ Safeguard Duty subject to necessary adjustment by way of determination of the net

present value. SECI has proposed the methodology for making payment on monthly basis (annuity) considering the following parameters:

a) The GST Laws/ Safeguard Duty claims have been provisionally evaluated/ re-evaluated up to Commercial Operation Date (COD) based on the Order dated 28.01.2020 passed by the Commission in Petition No.67/MP/2019 and 68/MP/2019;

b) The discounting factor has been considered as 10.41% which is the rate of interest for the loan component of the capital cost as provided in CERC RE Tariff order dated 19.03.2020 providing for determination of levelized generic tariff for the financial year 2019-2020;

c) The period for payment of the compensation on account of GST/ Safeguard Duty has been taken to be as 13 years from COD;

d) In cases where the projects of SPDs have already achieved COD, the amount of monthly annuity payment for the number of months elapsed till the date of payment i.e. 30.04.2020 or as the case may be, has been made on lumpsum basis from the Payment Security Fund.

63. We observe that Regulation 10(2) of the 2017 RE Tariff Regulations provides for the discount factor equivalent to the post tax weighted average cost of capital (WACC). The discount factor is calculated by considering the normative debt equity ratio (70:30) and the weighted average of the post-tax rates for debt and equity component. As against this, SPDs have proposed the discount factor equivalent to pre-tax weighted average cost of capital. They have contended that the cost of debt should be considered as 10.41% while the cost of equity should be 18.71% pre-tax (by grossing up post tax ROE of 14% by Corporate tax rate of 25.17%), which when applied to the debt equity ratio of 70:30 would yield the discounting factor of 12.90%. Similar is the argument of a few other SPDs who have also computed the WACC at 13.14% based on pre-tax interest on loan and return on equity [(10.75% x 70%) + (18.71% x 30%) = 13.14%] per annum. Therefore, the Commission finds that these methodologies of calculations of WACC on pre-tax rates of debt and equity are not consistent with the methodology the Commission follows for determining the WACC, which is on post tax basis.

65. We find that in Petition No. 536/MP/2020, SECI and the Respondents (SPDs as well as the Discoms) are on the same page in so far as the rate of interest on loan is considered. This is evident from the computation of the weighted average cost of capital advanced by the contending parties. Majority of the parties have used 10.41% (as mentioned in the CERC RE Tariff Order dated 19.03.2019) as the reference rate of interest for building their arguments for the rate of annuity payment. In other words, the parties have accepted this rate as the appropriate normative rate of interest for any debt that they might have taken. Given the fact that it is not possible in case of competitive bidding projects to ascertain either the capital structuring (extent of debt and equity) of the projects, or the actual rate of interest of the debt component or the expected rate of return on equity, we consider it appropriate to use the normative rate of 10.41% as reference for the purpose of annuity payment. As the actual deployment of capital by way of debt or equity and their cost in terms of rate of interest or return, respectively, is unknown, the rate 10.41% can be taken as the uniform rate of compensation for the entire expenditure incurred on account of GST Laws or Safeguard Duty. The

Commission is of the view that the compensation for change in law cannot be a source for earning profit, and therefore, there cannot be any higher rate of return than the prevailing normative cost of debt. Accordingly, we hold that 10.41% shall be the discount rate of annuity payments towards the expenditure incurred on GST or Safeguard Duty (as the case may be) by the Respondent SPDs on account of 'Change in Law'.

68. In view of the above, the liability of SECI/ Discoms for 'Monthly Annuity Payment' starts from 60th (sixtieth) day from the date of orders in respective petitions or from the date of submission of claims by the Respondent (SPDs), whichever is later. In case of delay in the Monthly Annuity Payment beyond the 60th (sixtieth) day from the date of orders in respective petitions or from the date of submission of claims by the Respondent (SPDs), whichever is later, late payment surcharge shall be payable for the delayed period corresponding to each such delayed Monthly Annuity Payment(s), as per respective PPAs/PSAs.

Payment Security Mechanism
71. SPDs have submitted that the Commission may also direct SECI to create a Payment Security Mechanism (PSM) for payment of the annuity payments. This can be either in the form a separate PSM being established by SECI or modifying the existing PSM which has been already established under the PPAs to provision for the annuity payment We observe that PPAs in various Petitions do stipulate 'payment security mechanism'. We are of the view that the payment security mechanism stipulated in the respective PPAs should also cover the annuity payments. Accordingly, we direct that the annuity payment liability shall be a part of the existing payment security mechanism as stipulated in the PPAs and already established under the PPAs by making suitable provision for the annuity payments.

72. The issue stands decided accordingly.
105. The summary of our findings are as follows:
Issue No. 1:
- *The discount rate of annuity payments shall be 10.41% towards the expenditure incurred by SPDs on account of Change in Law (GST Laws or Safeguard Duty, as the case may be).*

.....
- *The annuity payment liability shall be a part of the existing payment security mechanism as stipulated in the PPAs and already established under the PPAs by making suitable provision for the annuity payments."*

5.11 That the Annuity basis method is well recognized mode and the same is further substantiated from the judgments relied upon by the petitioner in *M/s Renew Wind Energy (TN2) Private Limited, v NTPC Limited- CERC-Order dated 05.02.2019 in Petition No. 187/MP/2018; Petition No. 192/MP/2018; Petition No. 193/MP/2018; Petition No. 178/MP/2018; and Petition No. 189/MP/2018* wherein the Hon'ble Commission recognized the Annuity basis as the same would obviate the hardship of the respondents for onetime payments. The petitioner while relying upon the said judgment averred that the Hon'ble CERC has directed lump sum payments for change

in law events. However, it cannot be lost sight of that annuity payment mode was also well recognized by the Hon'ble CERC in the finding as reproduced below -

205. b. Issue No. 2: As regards the claims during construction period, the Petitioners have to exhibit clear and one to one correlation between the projects and the supply of goods and services duly supported by the Invoices raised by the supplier of goods and services and auditors certificate. The amount determined by Petitioner shall be on "back to back" basis shall be paid by DISCOMS to the Petitioners under respective "Power Sale Agreements". The Claim based on discussions in paragraph 174 & 182 above of this Order shall be paid within sixty days of the date of this Order or from the date of submission of claims by the Petitioners whichever is later failing which it will attract late payment surcharge as provided under PPAs/PSAs. Alternatively, the Petitioners and the Respondents may mutually agree to mechanism for the payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs. The claim of the Petitioners on account of additional tax burden on "O&M" expenses (if any), is not maintainable."

5.12 The similar view was also observed by Hon'ble CERC in Order dated 02.05.2019 in Petition No: 342/MP/2018; 343/MP/2018 (Para 157 of the judgment).; Order dated 15.10.2019 in Petition No.19/MP/2019 and 46/MP/2019 (Para 92 of the judgment); Order dated 05.02.2020 in Petition No.176/MP/2019 (Para 65 of the judgment); Order dated 24.08.2020 in Petition No. 47/MP/2019 (Para 75 of the judgment).

Issue - Payment of carrying cost on the claim amount -

5.13 The petitioner has based its claim upon the provisions of Clause 20 of the PPA dated 06.07.2020. A bare perusal of the provision of Clause 20 as reproduced above makes it evident that there is no provision in the PPA dated 06.07.2020 regarding carrying cost or interest for the period till the determination of the relief amount on account of 'Change in Law'.

Reliance is also placed upon the order of the Hon'ble Central Commission order dated 24.01.2021 in Petition No.: 157/MP/2018 wherein the Hon'ble Commission disallowed the claim regarding separate carrying cost in the absence of clear provision in the PPA. A similar stance has been reiterated in Order dated 05.02.109 in Petition No. 187/MP/2018 and Order dated 09.10.2018 in Petition No. 188/MP/2018.

6. **The petitioner has filed its written submissions, vide email dated 08.03.2023, reiterating the contents of its earlier submissions, which for the sake of brevity has not been reproduced here. The petitioner has broadly averred as under:-**

6.1 That SGD Notification of 2018 was expired on 29.07.2020 and the SGD Notification dated 29.07.2020 was a fresh levy of Safeguard Duty. This levy was only contemplated on or after 03.03.2020 and was actually imposed on 29.07.2020, which dates are after

the last date of bid submission. Even the rates under the two notifications vary, thereby implying that the 2020 notification is not an extension of 2018 notification.

6.2 That PPA and RfP does not contain any condition with regard to intimation by the petitioner to HPPC of a change in law event within a specified period of time.

6.3 That reliance has been placed by HPPC on the decision of the Hon'ble RERC in *Fortum Solar Plus Private Limited v. SECI;* whereas the said decision is based on extraneous considerations and does not take into consideration the relevant factors for arriving at the decision. Pertinently, Appeal against the said Order has been admitted by the Hon'ble APTEL (Order dated 01.07.2022 in Appeal No. 26 of 2022).

6.4 That the orders of the Hon'ble UPERC and Hon'ble MERC, as discussed earlier, are relevant and contain cogent and sound reasoning, taking into account the relevant considerations and the provisions of the PPA.

6.5 That the Hon'ble CERC, vide its order dated 20.01.2023 in *Azure Power Forty One Private Limited v. SECIL* (Petition No. 722/MP/2020 & 723/MP/2020) had an occasion to deal with the similar issue as arose before the RERC, UPERC and MERC and now in the present petition. The CERC has taken the same approach and has passed Order in line with the Orders passed by the UPERC and MERC.

6.6 That the petitioner has provided all of the invoices to HPPC including the invoices raised for supplies/services pre–GST Notification and Post GST Notification supported with an auditor certificate. These invoices reflect the total amount of GST, paid by the petitioner, pre and post the GST notification. In any event, the petitioner undertakes to submit all such documents as may be directed by this Hon'ble Commission.

6.7 That regarding HPPC's averment that invoices relating to supply of goods can be raised only up to COD of the project for all equipment; it is submitted that the Article 20 of the PPA does not restrict the petitioner from raising change in law claim for goods/services obtained after the COD of project. On the contrary, the Article 20 of the PPA accounts for "*any adverse financial loss/ gain*" while referring to the impact of a 'change in law' event. Therefore, the petitioner's claims can-not be denied on the basis of fact that the said invoices have been raised post COD of the project.

6.8 That Article 20 of the PPA between the parties, clearly embodies the principle of restitution. Further, the principle of restitution contained in Article 20 of the PPA, closely resembles with the 'change in law' clause in the *Uttar Haryana Bijli Vitran Nigam Limited & Anr. v. Adani Power Ltd. & Ors. [(2019) 5 SCC 325*], in which case the Hon'ble Supreme Court had held that said provision entitles the parties to claim carrying cost.

6.9 That the reliance placed by HPPC on the Order dated 20.08.2021 passed by the Hon'ble CERC in 536/MP/2020, to aver that Annuity method has been considered just and equitable by the Hon'ble CERC, is wholly incorrect & misleading inasmuch as there is no such finding or even observation of this kind in the said Order. It is submitted that the

solar power developers in the said case had themselves provided for multiple options for payments to be made in annuity method therefore there was no occasion for the Hon'ble CERC to rule upon the issue whether Annuity method has been considered just and equitable. The paragraphs that have been reproduced by HPPC in its written submissions, furthering its case, are merely the contentions of the parties that are recorded in the Order and not the findings of the Hon'ble CERC.

6.10 That in all the cases relied upon by the petitioner in its Rejoinder, the Hon'ble CERC has in fact directed the Discoms to pay the entire amount of the awarded claims within a fixed period. In so far as the alternative option of annuity mode of payment is concerned, the Hon'ble CERC has merely left it to the parties to mutually agree over a methodology for the same. This is only a suggestion and not a direction, whereas the payment to be made within fixed period is a direction of the CERC.

Commission's Analysis and Order

7. The case was heard on 09.03.2023, in the court room of the Commission, wherein both the parties reiterated their written submissions, reproduced earlier in this order. The Commission, after hearing the rival contentions and documents placed on record by the parties, has framed the following issues for consideration and order:-

   a) Whether the notification dated 29.07.2020 qualify as a 'Change in Law', qua the safeguard duty in the present case?

   b) Whether the notification dated 30.09.2021 qualify as a 'Change in Law', qua the rate of GST on supply of goods in the present case?

8. **<u>Issue (a):</u> Whether the notification dated 29.07.2020 qualify as a 'Change in Law', qua the safeguard duty in the present case?**

   In order to find an answer to the issue framed herein, the Commission has carefully perused the notifications dated 30.07.2018 and 29.07.2020 in terms of the facts and circumstances of the case as well as the terms and conditions of the PPA subsisting between the parties. The Commission observes that the Ministry of Finance/Government of India, had issued a Notification No. 01/2018-Customs (SG) dated 30.07.2018 (hereinafter 'Notification dated 30.07.2018'), under the provisions of sub-section (1) of section 8 B of the Custom Tariff Act, 1975, imposing Safeguard Duty on the import of solar cells, irrespective of the fact whether assembled or not in modules or panels, at the rates specified as under:-

   (a) 25% ad valorem, minus anti-dumping duty payable, if any, when imported during the period from 30.07.2018 to 29.07.2019 (both days inclusive)

   (b) 20% ad valorem, minus anti-dumping duty payable, if any, when imported during the period from 30.07.2019 to 29.01.2020 (both days inclusive)

(c) 15% ad valorem, minus anti-dumping duty payable, if any, when imported during the period from 30.01.2020 to 29.07.2020 (both days inclusive).

Further, the Ministry of Finance, on 29.07.2020, issued a Notification bearing No. 02/2020-Customs (SG) (SGD Notification dated 29.07.2020) continuing the imposition of Safeguard Duty as imposed vide notification dated 30.07.2018, on the import of solar cells and modules, from China PR, Thailand, and Vietnam, whether or not assembled in modules or panels starting from 30.07.2020 and up to 29.07.2021, at the following rates:-

(a) 14.9% ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th July, 2020 to 29th January, 2021 (both days inclusive); and

(b) 14.5% ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th January, 2021 to 29th July, 2021 (both days inclusive).

In view of the above facts, it is observed that the petitioner herein has sought Rs. 12,82,59,297/- on account of imposition of Safeguard Duty w.e.f. 30.07.2020 claiming it to be a 'Change in Law' event, in terms of Article 20 of the Power Purchase Agreement dated 06.07.2020 executed between Avaada RJHN Private Limited (M/s. Avaada) and Haryana Power Purchase Centre (HPPC).

The Commission observes that the petitioner had offered to supply 240 MW solar power in pursuant to the bids called by the respondent herein. The last date for submission of the bid was 05.08.2019. Letter of Intent (LoI) was issued on 22.05.2020 and the PPA was executed on 06.07.2020. On the date of submissions of bids by the petitioner i.e. by 05.08.2019, the safeguard custom duty was being levied vide SGD notification dated 30.07.2018. Therefore, the petitioner while offering a price bid must have taken into account all the current rates, taxes and a reasonable Return on Investment (RoI). On careful examination of clause 20.1 and 20.2 of the PPA dated 06.07.2020, as reproduced earlier in this order, it is apparent that the term 'Change in Law' shall refer to the occurrence of any of the following events after the last date of 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 which have a direct effect on the project.

Thus, in terms of clause 20.1.2 of the duly executed PPA dated 06.07.2020, the petitioner is allowed to claim any relief under 'change in law', for the events which were

not existing on the date of bids submission and have occurred after the last date of bid submission i.e. 05.08.2019, whereas, the rate of safeguard duty as on 05.08.2019 was 20% which was reduced to 14.9%/ 14.50%, by way of notification dated 29.07.2020. The contention of the petitioner that since the scheduled date of commercial operation (SCOD) of the project was 18 months after the date of signing of the PPA, there was sufficient time available to them to procure solar modules after the notified period of safeguard duty was over, is hardly tenable for a simple reason that a bidder must factor in the duties/taxes prevailing on the date of submission of the bid and only the imposition of new duties/taxes or increase in the rate of duties/taxes after the bid submission is covered under 'Change in Law'.

The Commission tends to agree with the submissions of HPPC that the order dated 05.03.2021 passed by the Hon'ble MERC in Case No. 218 of 2020, order dated 28.10.2022 passed by the Hon'ble UPERC in Petition No. 1742 of 2021 and order dated 20.01.2023 passed by the Hon'ble CERC, Petition No. 722/MP/2020 & 723/MP/2020, are clearly distinguishable in the facts and circumstances of the present case. In the order dated 05.03.2021 passed by the Hon'ble MERC, the petitioner had entered into module agreement with a supplier in China on 28.07.2020, which makes clear the intention of the petitioner to procure the solar PV modules after the period specified in the notification dated 30.07.2018 is over. Similarly, in the judgment dated 28.10.2022 passed by the Hon'ble UPERC the bidder could establish beyond reasonable doubt that they had not factored in the safeguard duty while submitting the bids.

In the present case, there is no such documentary evidence other than the submission of the petitioner that they had not factored in the impact of safeguard duty which was continued beyond the originally envisaged end date of applicability i.e. 29.07.2020, in the bids submitted by them. Similarly, in the order dated 20.01.2023 passed by the Hon'ble CERC, the examination of RfS dated 10.01.2019 read with its amendments dated 05.02.2019 and 06.02.2019, enabled the Hon'ble CERC to conclude that SGD notification dated 29.07.2020 qualifies as change in law event. In the ibid case, RfS dated 10.01.2019 was amended on 05.02.2019 and it was included in Section II Clause 6 that *"any extension of taxes, cess or levies at the same rate on the expiry of the current period shall not be considered as Change in Law."* However, subsequently, Clause 6 of Section II of the RfS, inter-alia, was again amended on 06.02.2019 and the extension clause was dispensed with.

However, in the present case no such facts and circumstances exist to suggest that the petitioner has not factored in the tariff rate bid, the rates of safeguard duty prevailing on the date of submission of the bid. The petitioner, at no point of the proceedings, could place any documentary evidence, to the satisfaction of the Commission, to establish, beyond an iota of doubt that SGD in vogue, was not factored in their bid price.

Thus, the judgment of the Hon'ble Rajasthan State Electricity Commission dated 30.12.2021 in the matter of Fortum Solar Plus Private Limited vs. Solar Energy Corporation of India (Petition No. RERC-1914/21, 1922/21 and 1941/21), is squarely applicable in the present case wherein it was decided that imposition of safeguard duty via notification dated 29.07.2020 along with integrated GST is not a change in law. The relevant excerpts of the said judgment have been reproduced in the earlier part of this order. The Hon'ble RERC has held that prior to the Notification dated 29.07.2020 of the Ministry of Finance dealing with Safeguard Duty, the Safeguard Duty was already in force under the Notification dated 30.07.2018 issued by the Ministry of Finance. Thus, on the last date of the submission of financial bid, 25% ad valorem of Safeguard Duty-anti dumping duty was leviable on import of solar cells in terms of Notification dated 30.07.2018 and as per RFP the SPDs were required to factor in the impact of the same in the tariff quoted by them. The Hon'ble RERC has rightly observed that vide notification dated 29.07.2020, the safeguard duty has been reduced at the rate of 14.9% ad valorem minus anti-dumping duty for the period of import of solar panels between the period of 30.07.20 to 29.01.2021 and 14.5% ad valorem minus anti-dumping duty between the period of 30.01.2021 to 29.07.2021. Thus, Safeguard Duty has actually been reduced from the rate that was applicable on the last day of bid and has no adverse financial impact on the project cost.

Additionally, testing on the anvil of the provisions of the bid document and concluded PPA, any event post the last date of bid submission will only qualify for relief under the 'change in law' clause.

The Commission has also observed that the petitioner has not directly imported the solar module from China. In fact, the solar modules were bought from a domestic company, M/s. Avaada Energy Private Limited, which admittedly, is a parent company of the petitioner. Thus, the petitioner has not paid any custom duty for which the reimbursement is being sought as 'change in law'. It is a trite law that that any person can seek reimbursement of the amount actually paid by him only and not by any other person. The petitioner has entered into contract with M/s. Avaada Energy Private Limited inclusive of all duties and taxes. The Commission has perused the "Agreement for Supply" and "Agreement for supply of goods and services" both dated 26.02.2021, entered into between M/s. Avaada RJHN Private Limited (the petitioner), M/s. Avaada Energy Private Limited and M/s. Avaada Clean Project Private Limited.

Schedule "B" of the "Agreement for Supply" regarding 'contract price and terms of payment' has provided as under:-

*"CONTRACT PRICE **including all taxes and duties** as applicable (Detailed billing break up will be mutually agreed upon between buyer and supplier)*

Item No	Description	Type	Qty	UoM	Currency	Total Price
1.	Supply of material/ equipment for 240 MW (AC) / 336 MW (DC) SPGS, including all taxes, duties & cess.	As per agreed BBU			INR	7,48,00,00,000

"

(Emphasis supplied)

Schedule "B" of the "Agreement for supply of goods and services" regarding 'contract price and terms of payment' has provided as under:-

*"CONTRACT PRICE **including all taxes and duties** as applicable (Detailed billing break up will be mutually agreed upon between buyer and supplier)*

Item No	Description	Type	Qty	UoM	Currency	Total Price
1.	Supply and installation of material/equipment and services for 240 MW (AC) / 336 MW (DC) SPGS, including all taxes, duties & cess.	As per agreed BBU			INR	1,82,00,00,000

"

(Emphasis supplied)

Thus, the petitioner has entered into domestic supply contract with M/s. Avaada Energy Private Limited "inclusive of all duties and taxes". The petitioner has not imported any equipment/solar PV modules, for which it is now claiming reimbursement of safeguard duty as 'change in law'. Rather the solar PV modules were purchased from a domestic company from its group company. Such type of transactions within the group, calls for a high degree of transparency and should have been at a price at which the similar goods would have been sold to a third party. Hence, in case the purchase order was to be routed through a group company, the petitioner should have gone for a competitive bidding and explored the least rates of solar PV modules. In the case of the petitioner, the solar PV modules purchased from a domestic vendor, in an arm's length transaction entered into on 26.02.2021 amounts to Rs. 2.23 crore/MW (Rs. 748 Crore / 336 MW = 2.23 crore/MW), whereas, similarly placed Solar PV Power generator M/s. Amplus Sun Solutions Pvt. Ltd. (in separate proceedings for tariff determination before this Commission), had claimed cost of solar PV modules at Rs. 1.76 Crore/MW, inclusive of all duties and taxes (order dated 18.01.2021) and M/s. LR Energy, had claimed cost of solar PV modules at Rs. 1.99 Crore/MW, inclusive of all duties and taxes (order dated 17.09.2021). However, in the present case of competitive bidding for procuring power under section 63 of the Electricity Act, 2003, there was no occasion for the Commission

to examine the details of cost at which solar PV modules have been tied up by the petitioner with its group company. There is nothing material on record to suggest that the imposition of safeguard duty, which was already existing on the date of submission of bid i.e. 05.08.2019, was not factored in the bid price by the petitioner, particularly when the modules are to be brought under a domestic supply agreement, at an all-inclusive price.

In view of above, the Commission is of the considered view that imposition of Safeguard Duty vide notification dated 29.07.2020 is not a 'Change in Law' in terms of Article 20 of the PPA on two counts: firstly neither any new taxes/duties have been imposed nor any rate of taxes/duties has been increased post last date of submission of the bids and, secondly, the petitioner has neither directly imported the solar modules nor paid any safeguard custom duty which is sought to be reimbursed. The solar modules were rather purchased from an Indian company M/s. Avaada Energy Private Limited, under domestic supply contract agreement.

In view of the above discussions, the issue (a) is answered in negative i.e. qua the petitioner herein, SGD do not qualify as a 'change in law' event.

9. **<u>Issue (b):</u> Whether the notification dated 30.09.2021 qualify as a 'Change in Law', qua the rate of GST on supply of goods in the present case?**

The Commission observes that the original commercial operational date of the project was 06.01.2022 i.e. 18 months from the date of signing of the PPA (06.07.2020). The same was extended till 11.05.2022 due to Covid 19 pandemic. The petitioner has submitted that owing to the aforesaid delays on account of the Covid-19 pandemic, the petitioner was constrained to buy goods after the imposition of the GST Notification dated 30.09.2021 under which GST rate was increased from 5% to 12%. In support of its claim, the petitioner has attached a CA certificate. The CA certificate shows that the increase in project cost due to change in GST rates is Rs. 29,83,77,755/-.

Per-contra, Ms. Sonia Madan, the learned counsel for the respondent has vehemently argued that the petitioner has not given any justification for not importing the same prior to 30.09.2021. The petitioner has merely relied upon the agreements executed with their own group companies dated 26.02.2021. The petitioner has not explained the efforts made by them to execute the project with effect from the date of signing of the PPA i.e. 06.07.2020 till the date of notification increasing the GST rate i.e. 30.09.2021. Further, with the advent of the notification, the next impact on the import is only 13.80%. Before 01.10.2021, 70% value of Solar Power Generating Station was taxed @5% and balance 30% was taxed @18%, thereby giving effective GST rate of 8.90% (i.e. 3.5% + 2.4%). However, with effect from 01.10.2021, 70% value of Solar Power Generating Station is

taxed @12% and balance 30% is still taxed @18, thereby giving effective GST rate of 13.80% (i.e. 8.4% + 2.4%). Thus, the next impact on GST owing to notification dated 30.09.2021 is only 4.90%. The claim made by the petitioner fails to provide a breakup in terms of the foregoing impact.

The Commission has perused the "Agreement for Supply" and "Agreement for supply of goods and services" both dated 26.02.2021 entered into between M/s. Avaada RJHN Private Limited (the petitioner) M/s. Avaada Energy Private Limited and M/s. Avaada Clean Project Private Limited, which are inclusive of all taxes and duties.

The Commission has also perused the amendments to the "Agreement for Supply" and "Agreement for supply of goods and services" both dated 01.03.2022 entered into between M/s. Avaada RJHN Private Limited (the petitioner) and M/s. Avaada Energy Private Limited/ M/s. Avaada Clean Project Private Limited.

Schedule "B" of the "Agreement for Supply" regarding 'contract price and terms of payment' has been revised under Change in Law clause due to revision in GST rate w.e.f. 01.10.2021 as under:-

"The value of the Agreement stands revised as per below table ***including all taxes and duties***

Item No	***Description***	***Currency***	***Total Price***
1.	*Supply Agreement*	***INR** 7,48,00,00,000*	***INR** 7,90,39,85,664*

"

(Emphasis supplied)

Thus, as per the amendment agreement dated 01.03.2022, net increase in the contract price due to increase in GST rate is Rs. 42.39 crore (Rs. 790.39 crore minus Rs. 748 Crore)

Schedule "B" of the "Agreement for supply of goods and services" regarding 'contract price and terms of payment' has been revised under Change in Law clause due to revision in GST rate w.e.f. 01.10.2021, as under:-

"The value of the Agreement stands revised as per below table ***including all taxes and duties***

Item No	***Description***	***Existing Value***	***Amended Value***
1.	*Supply & Service Agreement*	***INR** 1,82,00,00,000*	***INR** 2,24,42,57,641*

"

(Emphasis supplied)

Thus, as per the amendment agreement dated 01.03.2022, net increase in the contract price due to increase in GST rate is Rs. 42.42 crore (Rs. 224.42 crore minus Rs. 182 Crore)

Under both the agreements namely Supply Agreement and Supply and Service Agreement, the increase in the contract price due to increase in GST rate is Rs. 84.81 crore (Rs. 42.39 crore plus 42.42 crore), which on the face of it, is at a large variance with the amount claimed on account of increase in the GST rate i.e. Rs. 29.83 crores. The petitioner, at no stage of the case, could provide a plausible explanation to the contradictory data provided by them.

Further, the break-up of contract price entered into by the petitioner with its affiliate companies, is nowhere mentioned. The price may have included the consultancy charges, freight charges, labour supply, on which GST has not been increased. This has become relevant as the duties/taxes are sought to be recovered over and above the 'all-inclusive' rate mentioned in the agreement. In all-inclusive rate contracts, the risk and rewards of the change in the duties/taxes rest with the supplier. However, in the present contracts entered between M/s. Avaada RJHN Private Limited (the petitioner) and its affiliate companies dated 26.02.2021, change in law clause is also added. Change in law is defined in the present contracts as "the occurrence of any of the following after the date of execution: a) change in the laws of the Country (including the introduction of new Laws and the repeal or modification of existing laws); or b) change in the interpretation or application of any Indian law by a judgement of a court of record which has become final, conclusive and binding, as compared to such interpretation or application by a court of record prior to the date of this agreement; or c) the commencement of any Indian law which has not entered into effect until the date of this agreement; or d) any change in the rates of any of the indirect taxes or royalty or duties that have a direct effect on the Plant which affect the Supplier in the performance of obligations under the Agreement. Further, clause 9.3 of the ibid contract provides for variations due to change in law as under:-

"In the event of Change in Law after the date of execution of this Agreement, the Parties shall meet and mutually discuss the impact of compliance with such Change in Law by the Supplier on the Price and the Timetable.

The Supplier is obligated to keep the Buyer or the Buyer's Representative notified of any Change in Laws within 15 (fifteen) business days of such variation or change in law coming to the knowledge of the supplier for any claim under this clause."

Thus, the principal contract does not provide for a pass through of incremental financial effect of change in law. It specifies that the parties shall meet and mutually discuss the impact of change in law. It nowhere provides that it shall be passed on to the buyer and the manner/ratio in which it shall be passed through. The petitioner has not submitted

any documents to establish that such discussions were held regarding the impact of compliance of change in law and its impact on the contract price, because the contract price was a lump sum amount without separately mentioning the item/head wise break-up of various duties and taxes involved. It may be due to this reason that the amendment agreement executed as late as 01.03.2022, showing the net increase in the contract price due to increase in GST rate as Rs. 84.81 crore, does not appears to be logical. In a tax inclusive contract although containing a provision of 'change in law', there is no sanctity of an amended contract where the original contract does not provide the break-up of all the components i.e. taxes and duties, for which 'change in law' is claimed. In tax inclusive contracts, the base value of the contract is changed to absorb the impact of the change in the tax rates. The petitioner might have agreed to absorb the impact of tax rate change, as the vendor is a related party. In an arm's length transaction, the petitioner should have shown some efforts to mitigate the financial impact of the tax rate change, in an all-inclusive contract.

There is no denial of the fact that in normal circumstances, in terms of clause 20.1.2 of the duly executed PPA dated 06.07.2020, the petitioner is allowed to claim under 'change in law', for the events which were not existing on the date of bids submission like in the present case increase in the rate of GST on supply of renewable energy devices and parts for their manufacture from 5% to 12%. The Commission is well aware of the principle of restitution embodied in article 20.1.1 of the PPA dated 06.07.2020, which provides that in the event a Change in Law results in any adverse financial loss/ gain to the Solar Power Generator then, in order to ensure, that the Solar Power Generator 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 Solar Power Generator/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 Appropriate Commission. However, such adverse financial impact is to be compensated to the petitioner, only if, financial loss has been actually suffered. Where there are adequate safeguards available to the petitioner for such changes in the contracts executed by it with the vendors. However, it defies all logic and commercial decision making for entering into a supplementary agreement wherein the petitioner agreed to absorb the impact of increase in the GST rates.

Additionally, in the present case, a similar provision has not been included in the supply contract signed by the petitioner with the vendors, which is all inclusive 'lump sum' price contract. Under such a contract, the petitioner was having an edge over the vendor and

should have taken stringent efforts to enforce the contract executed with the vendors for mitigating the financial impact of change in rate of GST. The terms of a contract has a vital role in affixing the ultimate liability to bear the burden of taxes.

The following judgements lends credence to the view that in 'all-inclusive' price contract, the vendor/supplier has to bear the impact of the change in the tax rate, by modifying the base price suitably:-

i) The Hon'ble Gujarat High Court in Bipson Surgical (India) Pvt. Ltd. v. State of Gujarat, 2018 (12) TMI 69 held as under:-

"[10.3] In the present case as observed hereinabove as such the liability to pay GST under the GST / CGST Act is upon the supplier. As observed hereinabove the price quoted and the rate contract was inclusive of all the levies and taxes. Therefore, the petitioners shall not be entitled to the revision of price as sought."

Thus, in the absence of a specific clause which permitted price revision due to increase in rate of GST, granting relief by way of directing price revision would tantamount to varying the terms and conditions of the contract. The intention of the parties to the contracts dated 26.02.2021 entered into by the petitioner with the vendors, of contract price to be inclusive of duties/taxes and not allowing the pass through of the same is evident from the fact that no break-up of the contract price has been given in the contract.

ii) In the case of *South East Asia Marine Engineering and Constructions Ltd. (SEAMEC) vs. Oil India Limited (OIL), AIR 2020*, the Hon'ble Supreme Court has held that the contract in question was a fixed-price contract and that SEAMEC must have speculated, included and quoted a price which was inclusive of the expected fluctuation in price, and even if it was not so, the wording of the contract should have provided for a wider interpretation for the purpose of claiming the surged price – which, in reality, was not. Consequently, it set aside the Arbitral Tribunal's ruling on the same as it blatantly disregarded the wordings of the contract.

The Commission is of the view that notification dated 30.09.2021 per se is a change in law. However, qua the petitioner, they failed to establish beyond doubt, that the increased GST was indeed paid by them. Hence, it has been considered that, as per terms of the contract, the petitioner was not liable to bear the financial consequences of the increase in GST rate. Consequently, given the facts and circumstances, the petitioner herein does not qualify for relief under the umbrella of 'change in law'.

Resultantly, as per the data/ information placed before this Commission by the parties, the issue (b) is answered in negative i.e. it does not qualify for any relief under the umbrella of 'change in law' event.

In conclusion, the Commission holds that qua the petitioner herein, based on the facts and circumstances, brought on record before this Commission, SGD as well as GST does not qualify for any financial relief subject to the aforesaid observations. It is added that in case the petitioner is able to demonstrate with documentary proof that the contract price was not inclusive of GST and as per contract the GST was an additional liability which the petitioner is bound to bear, HPPC/ Discoms shall consider the same and take appropriate and fair action in the matter.

10. In terms of the above order, the present petition is disposed of.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 10.04.2023.

Date: 10.04.2023 Place: Panchkula	(Naresh Sardana) Member	(R.K. Pachnanda) Chairman