

**Before the**  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
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**Case No. 124 of 2022**

**Petition of M/s ReNew Sun Bright Private Limited seeking relief on account of Change in Law due to the increase in Goods and Service Tax (GST) rates on Renewable Energy Devices and increase in Basic Custom Duty on import of Solar inverters.**

M/s ReNew Sun Bright Private Ltd. (RSBPL)...	Petitioner
Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) ...	Respondent

**Coram**

**Sanjay Kumar, Chairperson**  
**I.M. Bohari, Member**  
**Mukesh Khullar, Member**

**Appearance in the Case:**

For the Petitioner:	: Mr. Sujit Ghosh (Adv.)
For the Respondent:	: Ms. Deepa Chawan (Adv)

**ORDER**

**Date: 24 May 2023**

1. M/s. ReNew Sun Bright Private Limited (RSBPL) has filed the present Petition on 15 June 2022 seeking approval of 'Change in Law' under Article 9 of the Power Purchase Agreement (PPA) dated 26 June 2019 and an appropriate mechanism for grant of an adjustment/ compensation to offset financial/ commercial impact of change in law event(s).

**2. Prayers of RSBPL are as follows:**

“

- a) *Declare the imposition of increased rate of Basic Customs Duty and subsequent increase in quantum of social welfare surcharge and IGST on account of rescission of Notification No. 1/2011-Customs dated 06.01.2011 vide Notification No. 07/2021-Customs dated 01.02.2021 issued by Central Government as Change in Law in terms of the PPA which have led to an increase in the expenditure for the Project;*
  - b) *Declare the increased rate of CGST / IGST on renewable energy devices and parts for their manufacture imposed vide Notification No. 8/2021-Central Tax (Rate) and Notification No. 8/2021- Integrated Tax (Rate) dated September 30, 2021 (effective October 1, 2021) as Change in Law in terms of the PPA which have led to an increase in the expenditure for the Project.;*
  - c) *Evolve a suitable mechanism to compensate the Petitioner for the increase in expenditure incurred by the Petitioner on account of Change in Law;*
  - d) *Direct Respondent to compensate the Petitioner towards CGST/IGST, and additional levy of Basic Custom Duty as one-time lump sum amount or mechanism devised by this commission in prayer (c)*
  - e) *Grant interest/carrying cost from the date of incurring of the cost by the Petitioner till the date of order by this Commission restoring the Petitioner to the same economic position as before the occurrence of the Change in Law events;*
  - f) *Allow legal and administrative costs incurred by the Petitioner in pursuing the instant petition; and*
- ....”

**3. RSBPL in its Petition stated as follows:**

- 3.1. MSEDCL floated a Tender on 05 December 2018 to procure 1000 MW (AC) from projects through competitive bidding process. In furtherance to the RfS, Renew Solar Energy (Jharkhand) Four Pvt. Ltd. (RSEFPL) submitted its bid on 22 January 2019.
- 3.2. After being successful in bidding exercise, MSEDCL issued the Letter of Award (LOA) to RSEFPL for development of the solar power project of 300 MW capacity located in the State of Rajasthan on 19 March 2019.
- 3.3. Thereafter, RSEFPL has formed a SPV company, ReNew Sun Bright Pvt. Ltd (RSBPL) within the provisions of the RfS, for implementation of the project. Accordingly, on 26 June 2019, MSEDCL entered into a PPA with RSBPL for development of 300 MW

(AC)/420 MW (DC) capacity of Solar Power Project at Village Mandhopura, Tehsil Fatehgarh, District Jaisalmer, Rajasthan.

**(A) Increase in expenditure on import of inverters on account of rescission of Notification No. 1/2011-Customs dated 06 January 2011**

- 3.4. Vide Notification bearing No. 1/2011- Customs dated 06 January 2011 ('Notification 1/2011') the Central Government in the public interest had exempted all items of machinery, including prime movers, instruments, apparatus and appliances, control gear and transmission equipment and auxiliary equipment (including those required for testing and quality control) and components, required for the initial setting up of a solar power generation project or facility, when imported into India, from so much of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), as is in excess of 5% ad valorem, and from the whole of the Additional Duty of Customs leviable thereon under section 3 of the said Customs Tariff Act subject to certain conditions.
- 3.5. However, the Central Government vide Notification No. 7/2021 - Customs dated 01 February 2021 ('Notification 7/2021') rescinded an earlier Notification 1/2011. Consequently, the exemption provided for by Notification 1/2011, which levied a basic customs duty of 5% ad valorem on import of solar inverters, was no longer available to RSBPL and hence, the basic customs duty imposed on solar inverters increased to 20% ad valorem upon operation of Chapter 85 of the First Schedule to the Customs Tariff Act, 1975.
- 3.6. Moreover, the MNRE, vide its Office Memorandum dated 25 February 2021 stopped processing of applications in relation to concessional customs duty certificates consequent to the rescission of Notification No. 1/2011.
- 3.7. Additionally, the increase in rate of Basic Customs Duty levied on import of machinery and auxiliary equipment for the initial setting up of solar power generation project has directly increased the quantum of Social Welfare Surcharge, payable under Section 110 of the Finance Act, 2018, on such import, which is fixed at a rate of 10% on aggregate duties and taxes which are levied and collected by the Central Government under Section 12 of the Customs Act, 1962.
- 3.8. Lastly, the increase in rate of Basic Customs Duty and the quantum of Social Welfare Surcharge imposed thereon has led to an increase in the quantum of integrated goods and services tax (IGST) payable under Section 5 of the Integrated Goods and Services Tax Act,

2017 (IGST Act) on such import by RSBPL, which is fixed at 5% of the Basic Customs Duty coupled with the social welfare surcharge.

3.9. The following table illustrates the impact of increase in total duty on the import of solar inverter:

Duty, surcharge, and Tax imposed	Regime when Notification No. 1/2011-Customs dated 06.01.2011 was in operation. (06.01.2011– 01.02.2021	Regime when Notification No. 7/2021-Customs dated 01.02.2021 rescinded Notification 01/2011 (02.02.2021 – till date)	Net increase in rate of tax
Basic customs duty (BCD)	5.00%	20.00%	15.00%
Social welfare surcharge (SWS) on BCD	0.50%	2.00%	1.50%
IGST (on BCD + SWS)	0.28%	1.10%	0.83%
<b>Total Duty</b>	<b>5.78%</b>	<b>23.10%</b>	<b>17.33%</b>

**(B) Introduction of Notification No. 8/2021- Central Tax (Rate) dated 30.09.2021 which has increased the rate of GST from 5% to 12% on renewable energy devices and parts for their manufacture qualifies as a Change in Law under Article 9.1**

3.10. The power to levy Goods and Service Tax vests with the Central Government in terms of Section 9 of the Central Goods and Services Tax Act, 2017 (CGST Act). In exercise of the powers conferred *inter alia* under Section 9 of the CGST Act, the Central Government issued Notification No. 8/2021- Central Tax (Rate) dated 30 September 2021 which has increased the rate of GST from 5% to 12% on renewable energy parts. Thus, with effect from 01 October 2021, supply of all renewable energy devices and parts for their manufacture, including modules and solar power generators would be leviable to 12% GST vis-à-vis the earlier lower rate of 5% GST.

3.11. Thus, basis the above, the increase in rate of GST, pursuant to the Notification No. 8/2021- Central Tax (Rate) dated 30 September 2021 would qualify as a Change in Law event in terms of the PPA in as much as such increase in rate of GST by virtue of the recent Notification would be covered by the phrase any in rates of taxes, duties and cess which have direct effect on the Project. Thus, the increase in rate of GST would qualify as a change in law event under the fifth bullet of Article 9.1 of the PPA.

- 3.12. Alternatively, it is submitted that the increase in rate of GST, pursuant to the Notification No. 8/2021- Central Tax (Rate) dated 30 September 2021 is in the nature of an enactment of a new law in as much as the same has been imposed by a notification of the Ministry of Finance. Thus, the increase in rate of GST would also qualify as a change in law event under the first bullet of Article 9 of the PPA.
- 3.13. RSBPL has issued notices of Change in Law highlighting the rescission of Notification 01/2011 thereby leading to levy of Basic Custom Duty and impact of change in rates of GST to MSEDCL in line with the provisions of the PPA to consider the said events as Change in Law events but MSEDCL did not act upon the notices nor did it respond to the said notices. The present Petition is being filed seeking compensation on account of 'change in law'.
- 3.14. As increase in rate of CGST/IGST, and rescission of Notification 01/2011 qualifies as an event of Change in Law under Article 9.1 of the PPA, RSBPL is entitled to relief under Article 9.2 of the PPA. Article 9.2 provides that the aggrieved party shall be required to approach the Commission for seeking approval of Change in Law.
- 3.15. The increase in costs due to Change in Law events have a direct bearing on debt and equity required for setting up of the Project. These components are integral to the all-inclusive tariff bid. At the time of the submissions of bid, RSBPL had factored in 'interest on working capital' and return on equity based on the costs prevalent at the time of bid. With the increase in the costs due to the Change in Law events, the working capital requirement, and consequently, the interest on working capital have also increased as compared to requirement and rate prevalent at the time of bid. Thus, RSBPL is entitled to interest on incremental working capital at normative interest rate to put RSBPL to the same economic position as if change in law had not occurred.
- 3.16. RSBPL has funded the additional Basic Custom Duty, and CGST/IGST upfront from its equity as the same was not envisaged at the time of bidding and was not a part of project cost. Therefore, RSBPL is also entitled for reimbursement of carrying cost from the date of actual payment of additional Basic Custom Duty and CGST/IGST till the date of Order, so that RSBPL is put to the same economic position as if change in law had not occurred.
- 3.17. On the basis of Article 9.2 of the PPA, it is imperative that RSBPL is granted an interest on working capital at normative interest rate on equity, in addition to reimbursement towards payment of additional Basic Custom Duty, and GST as well as the carrying cost

in order to put RSBPL to the same economic position as if change in law has not occurred.

- 3.18. RSBPL referred to Judgement of the Hon'ble APTEL in *M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors.* (Appeal No. 111 of 2017) and *Adani Power Limited v. Central Electricity Regulatory Commission and Ors.* (Appeal No. 210 of 2017). In said matters Hon'ble APTEL held that claims regarding separate 'carrying costs' would be granted only if there is a provision in the PPA for restoration of the party to the same economic position as if no Change in Law event has occurred. Thus, in the present case, as the PPA has a specific clause directing the 'restoration to the same economic position' the carrying costs ought to be allowed.
- 3.19. RSBPL proposes carrying costs to be calculated on the basis of the normative debt equity ratio of 70:30, wherein, the average of the one-year Marginal Cost of Funds-based Lending Rate ('MCLR') as declared by the State Bank of India for the previous year plus 200 basis points, shall be considered as the normative interest applicable in relation to the debt component and Return on Equity shall be computed at the base rate of 14%, to be grossed up as per the Minimum Alternate Tax ('MAT') rate applicable as on 1st April of the previous Financial Year. This is line with MERC (Terms and Conditions for Determination of Renewable Energy Tariff) Regulations, 2019.

**4. MSEDCL, in its submission dated 11 October 2022 has stated the following:**

- 4.1. The original Scheduled Commercial Operation Date was 26 June 2021, which was further extended to 24 November 2021 on account of first wave of Covid-19 and the consequent nationwide lockdown. The 300 MW solar project was commissioned on 15 November 2021.
- 4.2. RSBPL issued notices for reimbursement of Basic Custom Duty on 09 July 2021. It is pertinent to consider that the BCD was increased by the Notification dated 01 February 2021. Furthermore, RSBPL vide its Notice dated 07 October 2021 has issued notice regarding change in law event i.e. increase in GST, effectuated vide Government Notification dated 30 September 2021.
- 4.3. RSBPL had also, vide its letter dated 18 February 2022 and 25 April 2022, raised the claims for Change in Law event.
- 4.4. The PPA provides that, in case where the seller is desirous of claiming change in law, then a mandatory notice has to be issued to the procurer of electricity, within 7 days of becoming aware of the same. However, in the present case, in reference to seeking

reimbursement of Basic Custom Duty, which was increased vide Notification dated 01 February 2021, RSBPL had given notice to MSEDCL only on 09 July 2021, which considerably surpasses the mandatory requirement as provided under clause 9.3.1 of PPA. Further, RSBPL has failed to establish or elaborate regarding the delay in sending a notice to MSEDCL for Change in Law event. Hence, the claim of RSBPL with respect of BCD ought not to be considered by the Commission and the same may be dismissed.

- 4.5. Further, the Appellate Tribunal for Electricity in the case of *Maruti Clean Coal and Power Limited v. Power Grid Corporation of India Limited and Anr [2017 SCC OnLine APTEL 70]* has categorically held that a party claiming relaxation/compensation, citing an event under an agreement, is mandatorily required to fulfil such pre-requisite as mentioned in the corresponding Article of the respective agreement, being the Subject PPA, in the instant matter.
- 4.6. MSEDCL also referred to the Commission's Order dated 04 August 2022 in Case No. 39 & 41 of 2022 (M/s. Sunfree Paschim Renewable Energy Private Limited & M/s. Nature International Private Limited vs MSEDCL) wherein it has disallowed the Impact of Change in Law on account of increased Basic Custom Duty on inverters vide notification dated 1 February 2021, stating that the same cannot be allowed as mandatory condition of Notice for Change in Law event has not been fulfilled.
- 4.7. The claim of RSBPL regarding the increase in GST was effectuated vide Government of India Notification dated 30 September 2021. RSBPL gave notice regarding the same, i.e., Change in Law event, vide its Notice dated 07 October 2021 which falls within the time limit/ parameters as stipulated under Clause 9.3.1 of the PPA. On verification of documents under above change in law event, MSEDCL observed following:
  - (a) There are 17 instances where Bill of entry, Bill of Lading, GRN is not attached having impact of Rs. 13,87,900/-.
  - (b) There are 7 instances where invoice was not found for audit as per excel sheet having impact of Rs. 9,39,142/-
  - (c) Additional documents such as GST payment by Renew Solar (Jharkhand One) Pvt. Ltd. viz. GST payment challans of Renew Solar (Jharkhand One) Pvt Ltd.; GSTR-1, GSTR-2B of Renew Solar (Jharkhand One) Pvt. Ltd. and GSTR- 2B of RSBPL are required.
  - (d) CA/CMA Certified material utilization certificate and closing stock report as on COD to verify whether all material procured are utilized for said project or not is required.
- 4.8. MSEDCL communicated the above observations on 27 July 2022. RSBPL has responded to the queries of MSEDCL on 29 July 2022 & 24 August 2022. The scrutiny of the said

documents is under process. The summary of GST claim evaluated by MSEDCL is as below:

<b>Particular</b>	<b>As Per RSBPL</b>	<b>As per MSEDCL</b>	<b>Difference</b>
GST Impact	4,76,21,067	4,76,21,067	--
Less:- Credit/debit Note (Net)	81,89,587	1,74,74,465	92,84,878
Less:- Post COD claim Disallowed	--	31,51,228	31,51,228
<b>Net GST impact</b>	<b>3,94,31,480</b>	<b>2,69,95,374</b>	<b>1,24,36,106</b>

- 4.9. MSEDCL pointed out that few invoices have been issued before the GST notification dated 30 September 2021, for which RSBPL has issued the credit note of Rs.90,26,218/- and debit note of Rs. 8,36,631/- has been issued for the invoices which does not fall under the category of the parts of SPG. The Net GST impact of debit and credit note Rs.,81,89,587/- has been reduced by the RSBPL from the total GST impact. However, on the verification it is observed that, the GST impact of invoices issued before GST notification dated 30 September 2021 comes to Rs.1,74,74,465/-
- 4.10. Further, some of the invoices had been issued after SCOD date of 15 November 2021, the total GST impact of such invoices are Rs.31,51,228/-. MSEDCL referred to CERC Order date 28 January 2020 passed in Case No. 67/MP/2019 and 68/MP/2019. CERC in said Order categorically held that the liability of payment on account of impact of GST on procurement of Solar PV panels and associated equipment by the Petitioners shall lie with the Respondents till the commercial operation date (COD) only. Therefore, it is the specific case of the MSEDCL that the liability is limited to the commercial operation date.
- 4.11. On the last day of bid submission (22 January 2019), Safeguard duty as per Notification No. 01/2018 dated 30 July 2018, on the import of solar module was applicable. As per said Notification the safeguard duty at following rate was applicable:

<b>Period</b>	<b>Rate</b>
30/07/2018 to 29/07/2019	25%
30/07/2019 to 29/01/2020	20%
30/01/2020 to 29/07/2020	15%

Furthermore, the imposition of safeguard duty was further extended by GOI vide Notification No. 02/2020 dated 29 July 2020 till 29 July 2021. As per said Notification the rates are as follows.

<b>Period</b>	<b>Rate</b>
30/07/2020 to 29/01/2021	14.9%



30/01/2021 to 29/07/2021
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14.5%
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From the data provided by RSBPL it is evident that the Solar Modules were imported after August 2021. i.e. after repeal of Safeguard duty. Hence, as per Article 9.2.1 of PPA, gain arising due to non-applicability of safeguard duty ought to be passed by RSBPL to MSEDCL. Considering safeguard duty at the rate of 25%, i.e., rate applicable at the time of bid submission, then gain of Rs.16.97 Crore ought to be passed on by RSBPL to MSEDCL.

- 4.12. With regards to devising a mechanism for compensation and carrying cost computation, MSEDCL suggested that the approach taken by the Commission in its Order dated 13 November 2019 in Case No. 259 of 2019 needs to be followed. RSBPL is conveniently hiding the details of financial model used by it to arrive at the bid Tariff of Rs.2.75 per unit and instead seeking shelter of parameters used in the RE tariff Regulations, 2019.
- 4.13. The PPA is a sacrosanct document which provides for 'Late Payment Charge' @ 1.25% in case of delay in payment of bills. There cannot be any other penalty in the form of additional interest which is not provided in the PPA. In the present case, no delay is there in payment of 'Change in Law' bills as the same still needs to be approved by the Commission and raised by the RSBPL on MSEDCL. Hence a claim of interest is not only fallacious but farcical as well.
- 4.14. The very purpose of imposing the Basic Custom Duty is to promote domestic industry and discourage imports from foreign nations. However, this very purpose is defeated when the impact of Basic Custom Duty is allowed to pass through in the tariff or directions being passed to compensate the generator to that extent. Thus, it was for RSBPL to show that it has done due diligence while coming to the conclusion on going for procurement of solar modules from China in case the modules supplied by Indian manufactures were not competitive for it.
- 4.15. Also, it is noticed that RSBPL has executed procurement through its company ReNew Solar Energy (Jharkhand One) Pvt. Ltd. which carries procurement for PPA executed for other Licensee too. Hence, it is for RSBPL to show that it or its procurement of modules has not got any indirect tax credit benefits.
5. During the hearing held on dated 18 October 2022, Commission heard the Advocate/Representatives of RSBPL and MSEDCL. Advocate of RSBPL stated that MSEDCL's Reply is received only on 12 October 2022 and hence additional time is required for filing its Rejoinder. She further informed that documents related to its change in law claim is being scrutinized by MSEDCL. Advocate of MSEDCL admitted that scrutiny of Change in Law claim on account of increase in GST rate is under process and

may require some time. She does not oppose adjournment request of RSBPL. Accordingly, the Commission directed MSEDCL to complete scrutiny process within two weeks and file its detailed submission on change in law impact vis-à-vis claim of RSBPL.

**6. RSBPL in its Rejoinder dated 30 December 2022 stated as below:**

**6.1. The conditions as indicated in the PPA relating to issuance of Notice stand fulfilled**

6.1.1 The exact wording of Article 9.3.1 of the PPA, which provides for issuance of a Notice prior to claiming change in law reads as below:

“

*9.3.1 If the Seller is affected by a Change in Law in accordance with Article 9.1 and wishes to claim in Law under this Article, it shall give notice to MSEDCL of such Change in Law within 7 days after becoming aware of the same or **should reasonably have known of the Change in Law.**”*

6.1.2 Article 9.3.1 envisages that where RSBPL wishes to claim Change in law, it is required to give notice to MSEDCL, either within 7 days of becoming aware or within 7 days of when it should have reasonably has known of such Change in Law.

6.1.3 In the present case, admittedly, the rescission of Notification 1/2011 was issued on 01 February 2021, and thus with effect from 02 February 2021, the import of inverters were subject to BCD at 20%. However, on the date on which the rate of BCD stood increased, RSBPL had not imported and was neither contemplating to import such inverters from outside India. The commercial decision to import the inverters was taken at a later date. Subsequently, on becoming aware that there was an increase in the rate of BCD on inverters, RSBPL took immediate steps to comply with Article 9.3.1 of the PPA and proceeded to issue the Notice regarding such Change in Law. It is also relevant to submit that the said Notice was issued much prior to the first import of the Inverters (which commenced in August 2021) and accordingly, indicates the bona fide of RSBPL to inform MSEDCL at the first possible instance, on becoming aware that such Imports would suffer a higher rate of duty which would be covered under Change in Law envisaged under Article 9.1 of the PPA. Accordingly, the Petitioner has duly followed the mechanism for issuing Notice under Article 9.3.1 of the PPA.

6.1.4 MSEDCL has proceeded to rely upon Article 9.3.1 of the PPA in an isolated manner and in complete ignorance of Article 13.4 of the PPA, without adopting a harmonious construction of various clauses of the PPA.

6.1.5 Article 13.4 of the PPA provides for waiver of any Right under the PPA, in case the said right is not exercised within a period of three years.

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**13.4 Waiver:**

**Any failure on the part of a Party to exercise, and any delay in exercising, exceeding three years, any right hereunder shall operate as a waiver thereof.** No waiver by a Party of any right hereunder with respect to any matter or default arising in connection with this Agreement shall be considered a waiver with respect to subsequent matter or default.”

6.1.6 Thus, on the basis of the aforementioned, it is abundantly clear that a right of a party to claim change in law under the PPA does not stand waived until 3 years have lapsed from the date of said failure to exercise the right. In the present case, since the right to claim change in law has been exercised well within three years, such right does not stand waived and accordingly, RSBPL is rightfully entitled to its claim for change in law under Article 9 of the PPA.

6.1.7 The reliance on *Maruti Clean Coal and Power Limited v. Power Grid Corporation of India Limited and Anr [2017 SCC OnLine APTEL 70]* and the Commission’s Order dated 04 August 2022 in *Case No. 39 and 41 of 2022, in the case of M/s. Sunfree Paschim Renewable Energy Private Limited & M/s. Nature International Private Limited* is misplaced.

6.1.8 Purpose of Article 9.3.1 is to make the other Party aware of the change in law claim which would be filed by the claimant so as to enable the other side to take reasonable steps as would be required to be taken. Vide Notice dated 09 July 2022, RSBPL has duly met such purpose by informing MSEDCL regarding such change in law claim.

6.2. **PPA does not restrict compensation on account of Change in Law event up to SCOD and the linking of the date of issuance of invoice to the reimbursement for change in law claims is without any basis**

6.2.1 From a perusal of the Article 9 of PPA, it follows that as long as the event qualifies as a ‘Change in Law’ and results in RSBPL’s costs directly attributable to the Project being decreased or increased by one percent (1%), of the estimated revenue from the electricity for the Contract Year for which such adjustment becomes applicable or more, during Operation Period, RSBPL is entitled to file a Petition before the Commission

seeking compensation in relation to the additional expenditure incurred by RSBPL on account of Change in Law.

- 6.2.2 Only trigger for invoking Change in Law clause is the Effective Date of the PPA and the SCOD has no relation whatsoever to the claim of change in law. Thus, restricting the benefit to SCOD will effectively lead to addition of extraneous conditions which are not borne out from a perusal of Article 9 of the PPA.
- 6.2.3 RSBPL referred to APTEL's Judgement dated 15 September 2022 in *Parampujya Solar Energy Private Limited & Anr. v. Central Electricity Regulatory Commission & Ors., Appeal 256 of 2019 and batch*, wherein the APTEL has particularly held that restriction on the claim for compensation to the invoices raised till SCOD are extraneous. Further, the Change in Law clause of the PPA provides for restitution of the affected party in the same financial position as it was prior to occurrence of Change in Law, therefore, the said restriction of benefits only till SCOD will amount to a restrictive covenant being read into the provisions of the PPA.
- 6.2.4 Rule 55(4) of the CGST Rules allows the supplier to issue an invoice after delivery of goods in certain circumstances. GST Laws clearly envisage a situation where invoice can be issued after the delivery of goods. Hence, the assumption that where the goods are procured prior to SCOD, the invoice has to necessarily be issued prior to SCOD, is erroneous as such invoice could be issued even after the delivery of the goods and the same is permissible under the GST Laws.
- 6.2.5 The date of delivery of goods is subject to contractual understanding between the Supplier and Recipient of the goods. The Parties to a contract can contractually agree that the delivery of the goods would be at a future date i.e. a date much after the receipt of the goods or utilization of the goods for a specific purpose. Accordingly, in such cases, even the invoice can be issued at a later date, with no co-relation to the actual receipt of goods or payment of tax. To suffice the arguments, RSBPL referred to the decision of Hon'ble Supreme Court in *State of West Bengal v. B.K. Mondal and Sons, (AIR 1962 SC 779)*.

6.3. **MSEDCL's claim on Safeguard Duty not maintainable:**

- 6.3.1 MSEDCL in its Reply making a counter claim of Rs.16.97 Crores towards alleged gain made by RSBPL on the import of solar panels towards safeguard duty. The present counter claim is in complete disregard and contravention of the detailed mechanism as envisaged under Article 9.3.1 of the PPA.

- 6.3.2 The Law does not permit a person to both approbate and reprobate. In the present case MSEDCL on one hand is alleging that this Petition must be rejected on the grounds that the procedure under the PPA for issuance of Notice for Change in Law was not followed by RSBPL and on the other hand is making a counter claim that it should be given benefit of provisions for Change in Law in the PPA under the same Petition.
- 6.3.3 Notification 01/2018-Customs (SG) was with an expiry date which was ending on 29 July 2020. Since, the said Notification would have expired on 29 July 2020 and the commissioning of the project was at a date which was later than expiry of such Notification, RSBPL following prudent utility practice had planned the import of solar panel near to the date of commissioning.
- 6.3.4 A second Notification i.e., Notification No. 02/2020-Customs (SG) is issued on 29 July 2020 (Second Notification). If RSBPL had proceeded to import modules during the operation of the Second Notification, it could have claimed change in law on the ground that the Second Notification has increased the rate of safeguard duty from 0 to 14.9%. However, since the Imports took place in August 2021 following prudent utility practice, after the expiry of the Second Notification, the Imports did not suffer any SGD and accordingly RSBPL did not file any claim for Change in Law.
- 6.3.5 Therefore, the counter claim of MSEDCL that RSBPL has derived a net gain of Rs.16.97 Crores on the import of solar panels towards safeguard duty is misconceived and fallacious.

6.4. **RSBPL is entitled to claim Carrying Cost on actuals along with interest on Carrying Cost in order to be restored to the same financial position:**

- 6.4.1 The very purpose of a Change in Law clause is to restore the affected parties to the same economic position as it was prior to such occurrence of Change in Law Event. The rate of interest as suggested by MSEDCL in the Reply will in no way place RSBPL in the same economic position as it was before the Change in Law events had occurred, which is the essence of restitution under the Change in Law clause.
- 6.4.2 In order to be restored to the same economic position, the Petitioner has highlighted that the rate of carrying cost is to be calculated on the basis of normative debt equity ratio of 70:30 as mentioned in MERC (Terms and Conditions for Determination of Renewable Energy Tariff) Regulations, 2019.

- 6.4.3 In this regard RSBPL placed its reliance on the Hon'ble APTEL Judgement dated 15 September 2022, whereby, the Hon'ble APTEL placed reliance on a decision of the Hon'ble Supreme Court and held that since the Developers arrange funds on the basis of an interest rate framework followed by scheduled commercial banks, they ought to be compensated in a similar manner. Additionally, RSBPL referred to the Commission dated 17 February 2022 in Case No. 61 and 62 of 2020. Vide the said Order the Commission has held that carrying cost is compensation towards time value of money for the time gaps between date on which affected party incurred such additional expenses. Further, in order to restore the affected party in the same economic position as if the change in law event has not occurred, the carrying cost has to be allowed at actuals.
- 6.4.4 In addition to the carrying cost, RSBPL is also entitled to interest on delayed payment of carrying cost. In this regard, the Petitioner places its reliance on the recent decision of Hon'ble Supreme Court dated 24 August 2022 in *Uttar Haryana Bijlivitran Nigam Ltd and Anr. v Adani Power (Mundra) Limited and Anr., Civil Appeal No. 7129 of 2021* whereby the Court held that, interest on carrying cost is nothing but time value for money and necessary for the restoration of the party in the same economic position.
- 6.5. As per Section 14 (i) of the CGST Act, the time of supply shall be the date on which invoices were issued or the date on which the payment was received whichever is earlier. In the present case, in relation to the disputed claim, since both the invoices and payment are issued and received post the revision in rate of GST i.e., increase from 5% to 12%, therefore, the applicable rate of tax shall be 12% and not 5%, even though the goods are received prior to change in rate of GST. Accordingly, RSBPL is entitled to claim a reimbursement of Rs. 3,94,31,480 (including the disputed claim of Rs. 92,84,878).
7. MSEDCL in its additional submission dated 17 November 2023 stated that it has verified the claims and its calculation of incremental GST to the tune of Rs.2.699 Crores stand unaffected.
8. During the hearing held on 18 November 2022, Advocate of RSBPL stated that MSEDCL's scrutiny note is received only on 17 November 2022 and hence required additional time for filing its Rejoinder. The Commission noted that RSBPL has not supported its claim in the Petition with computation and necessary document. Hence, the Commission directed RSBPL to file holistic Rejoinder.
9. The Commission notes that RSBPL did not file its submission pursuant to directives in Daily Order dated 18 November 2022.

10. During the hearing held on 10 January 2023, Advocate of RSBPL and MSEDCL reiterated the submission. The Commission directed RSBPL to file its submission on the date on which it became aware of the change in rates of Basic Customs Duty on the import of inverters and detail the steps undertaken towards execution of the Project from the date of signing of the PPA till the final Commissioning of the Project.

**11. RSBPL vide its Rejoinders dated 10 January 2023 stated as follows:**

11.1 The EPC Contractor informed RSBPL vide Letter its dated 30 June 2021 regarding change in the rate of BCD on the import of inverters.

11.2 Within a period of 3-4 working days, the RSBPL deliberated the issue in its internal meeting. Pursuant to discussion, RSBPL proceeded to issue the Notice dated 09 July 2021 informing the MSEDCL regarding the change in law and its claim to that effect. The Notice was issued within 9 days from the date on which the RSBPL became aware that change in the rate of BCD would qualify as an event of change in law. The RSBPL craves indulgence from the Commission that for the purpose of calculation of exact days for the purposes of Article 9.3.1 of the PPA, the non-working days i.e., 3 and 4 July 2021 ought to be excluded.

11.3 The delay in issuing the said Notice, is of negligible consequence, as the impact of such change in law has been suffered, subsequent to the agreement of the RSBPL with the contractor and placing of orders for the import of inverters, only in the month of August 2021. Furthermore, the RSBPL is not claiming any amount for the period between February 2021 (the date when the Notification was issued) and the placing of orders for the import.

11.4 It is undisputed that no prejudice has been caused to MSEDCL, by virtue of the said delay in issuing the Notice. RSBPL vide the said Notice duly intimated MSEDCL about the Change in Law event and its desire to claim compensation for the same. Further, MSEDCL had sufficient time to assess the scenario and accordingly was aware well in time regarding the filing of the present Petition before the Commission for approval of such Change in Law, and the claim thereof. It is not the case that RSBPL immediately upon issuance of Notice for Change in Law started raising invoices upon MSEDCL claiming payment for the same. Additionally, despite the occurrence of the Change in Law event, RSBPL duly achieved the Commissioning of the Project before the extended SCOD and the power is being supplied to MSEDCL regularly since the Commissioning of the Project.

11.5 The procedural law is meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights. Hence, the procedure as laid down in the present case, i.e. issuance of notice is to assist and aid the object of informing the other party to the contract regarding the occurrence of the event that would impact the tariff agreed under the Contract. Accordingly, the said object has been duly fulfilled by the RSBPL.

11.6 RSBPL vide a tabular representation has indicated the necessary activities undertaken till the Commissioning of the Project, clearly highlighting the start date and end date of the respective activity. The tabular representation is as follows:

<b>Particulars</b>	<b>Start Date</b>	<b>Finish date</b>
<b>MSEDCL-II Project - 300 MW Solar Project</b>		
LOA	19-Mar-19	19-Mar-19
PPA	26-Jul-19	26-Jul-19
Land acquisition activity started	01-Aug-19	
<b>Land acquisition – registration</b>	10-Dec-19	20-Mar-20
Connectivity from Central Transmission Utility	19-Mar-19	08-Jul-19
MSETCL NOC for off-taking 300 MW Solar Power		30-Dec-19
LTA from Central Transmission Utility including firm-up post MSETCL NOC	20-Mar-19	10-Feb-20
Project registration at RREC	13-Sep-19	16-Dec-19
Financial Closure Document submitted by ReNew	24-Apr-20	
Financial Closure acknowledged MSEDCL		11-Sep-20
Financing Arrangement from lenders		11-May-20
FM notice sent to MSEDCL by ReNew for COVID-19		28-Feb-20
Letter from MSEDCL providing an extension to ReNew		14-Sep-20
FC date extended by MSEDCL	25-Apr-20	24-Sep-20
SCD extended by MSEDCL	25-Jun-21	24-Nov-21
COVID lockdown by Govt of India	24-Mar-20	23-Aug-20
Things normalized and restart of work at the site with COVID precautions		22-Oct-20
Imported Inverter supply agreement closed		28-May-21
LC opened for Inverter		01-Jun-21
EPC company informed the Petitioner about the increase in the rates of BCD on import of inverters		30-Jun-21
Change in law letter sent to MSEDCL		09-Jul-21
Inverter import started		01-Aug-21
1st Letter intimating Project commissioning sent to MSEDCL		03-Aug-21



Particulars	Start Date	Finish date
2nd Letter intimating Project commissioning sent to MSEDCL		13-Aug-21
3rd Letter intimating Project commissioning sent to MSEDCL		29-Aug-21
Letter informing LTA of unavailability and requesting power procurement on a STOA basis		18-Oct-21
Plant charged by ReNew and intimated to MSEDCL		28-Oct-21
Approval from MSEDCL for power procurement on a STOA basis and commissioning certificate		15-Nov-21

11.7 RSBPL proceeded to import inverters post completion of the other necessary activities as per the Project Schedule. It is relevant to note that on account of Covid-19, there was significant disruption which was also acknowledged by MSEDCL in as much as the FC and SCD were extended by the MSEDCL themselves.

11.8 The counterclaim has been raised by MSEDCL vide its Reply whereas, such a claim ought to have been raised vide a separate Petition and inter alia due court fees must be paid. On this basis, at the outset itself, the said counter claim out to be dismissed.

### Commission's Analysis and Rulings

12. RSBPL has filed the present Petition seeking approval of Change in Law and an appropriate mechanism for grant of adjustment/ compensation to offset financial impact of change in law event on account of increase in rate of Basic Custom Duty (BCD) vide Notification No. 7/2021- Customs dated 01 February 2021 on import of inverters and increase in the rate of CGST and SGST/IGST on Renewable Energy Devices from 5% to 12%.

13. MSEDCL has objected to BCD claims of Change in Law on the ground that RSBPL has not complied with the requirement of giving change in law notice within 7 days from date of Change in Law. With regards to claims of GST, MSEDCL has partly agreed on claims amounts.

14. The Commission notes that PPA dated 26 July 2019 signed between parties has following provision related to Change in Law:

“

#### ***Article 9: CHANGE IN LAW***

***9.1. Definitions in this Article 9. the following terms shall have the following meanings:***

*“Change in Law” shall refer to the occurrence of any of the following events after the last date of the bid submission, including:*

- i. the enactment of any new law; or*
- ii. an amendment, modification or repeal of an existing law; or*
- iii. the requirement to obtain a new consent, permit or license; or*
- iv. any modification to the prevailing conditions prescribed for obtaining an consent, permit or license, not owing to any default of the Power Producer; or*
- v. any change in the rates of any Taxes, Duties and Cess which have a direct effect on the Project.*

*However, Change in Law shall not include any change in taxes on corporate income or any change in any withholding tax on income or dividends.*

## **9.2. Relief for Change in Law:**

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

**9.2.2 If a Change in Law results in the Power Producer’s costs directly attributable to the Project being decreased or increased by one percent (1%), of the estimated revenue from the Electricity for the Contract Year for which such adjustment becomes applicable or more, during Operation Period, the Tariff Payment to the Power Producer shall be appropriately increased or decreased with due approval of MERC.**

....

## **9.3 Notification of Change in Law:**

*9.3.1 If the Seller is affected by a Change in Law in accordance with Article 9.1 and wishes to claim change in Law under this Article, it shall give notice to MSEDCL of such Change in Law within 7 days after becoming aware of the same or should reasonably have known of the Change in Law.*

...

## **9.4. Tariff Adjustment Payment on account of Change in Law:**

*9.4.1 Subject to the application and Principles for computing impact of Change in Law mentioned in this Article 9, the adjustment in Monthly Tariff Payment shall be effective from:*

*9.4.2 The date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or*

*9.4.3 The date of Order/Judgment of the Competent Court or Tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law.*

*9.4.4 The revised tariff shall be effective from the date of such Change in Law as approved by MERC, the Parties hereto have caused this Agreement to be executed by their fully authorized officers, and copies delivered to each Party, as of the day and year first above stated ,*

*....”*

Claims made in this Petition need to be tested against above provisions of the PPA signed between the parties.

15. Considering the material placed on record and arguments made during hearing, the Commission frames following issues for its considerations:

- a. Whether Notification dated 1 February 2021 resulting in change in Basic Custom Duty from 5% to 20% and Notification dated 30 September 2021 resulting in Change in GST rate qualifies as Change in Law Event?
- b. Whether modalities stipulated under Article 9.3.1 (Service of Notice of Change in Law) have been followed?
- c. Whether claim of MSEDCL on Safeguard Duty is maintainable?

If the above issue gets answered in affirmative then, below mentioned issues will also be required to be addressed.

- d. Ascertainment of principal claim amount.
- e. What are the modalities for computing carrying cost?

- f. What should be the methodology and the frequency of payment of compensation amount?

The Commission is addressing above issues in the following paragraphs.

**16. Issue A: Whether Notification dated 1 February 2021 resulting in change in Basic Custom Duty from 5% to 20% and Notification dated 30 September 2021 resulting in Change in GST rate qualifies as Change in Law Event?**

- 16.1 The Commission notes that any event can be said to be ‘Change in Law Event’, only if it satisfies the provisions stipulated under Article 9 of the PPA. For ease of reference, Article 9 of the PPA is reproduced at Para (14) above.

**(A) Notification dated 1 February 2021 resulting in change in Basic Custom Duty**

- 16.2 The Commission notes that MSEDCL floated a Tender on 05 December 2018 to procure 1000 MW (AC) from projects through competitive bidding process. As per the RFS, the ‘last date of bid submission’ is 22 January 2019. RSEFPL submitted its bid on last date i.e. on 22 January 2019.

- 16.3 The Commission notes that as on bid submission date, following notification related to Basic Custom Duty was applicable:

Notification No. 1/2011 – Customs dated 6 January 2011 relating to Custom Duty:

*“G.S.R. (E).-In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), and in supersession of the notification of the government of India in the Ministry of Finance ( Department of Revenue ) No. 30/2010 - Customs, dated 27th Feb. 2010, the Central Government on being satisfied that it is necessary in the public interest so to do, hereby exempts all items of machinery, including prime movers, instruments, apparatus and appliances, control gear and transmission equipment and auxiliary equipment (including those required for testing and quality control) and components, required for the initial setting up of a solar power generation project or facility, when imported into India, from so much of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), as is in excess of 5% ad valorem, and from the whole of the Additional Duty of Customs leviable thereon under section 3 of the said Customs Tariff Act, subject to the following conditions, namely:-  
....”*

In addition to above, Social Welfare Surcharge (SWS) is levied and collected, as a duty of customs, vide Section 110 of the Finance Act, 2018 (13 of 2018). Section 110 of the Finance Act, 2018 reads as below:

“

110.

*(1) There shall be levied and collected, in accordance with the provisions of this Chapter, for the purposes of the Union, a duty of Customs, to be called a Social Welfare Surcharge, on the goods specified in the First Schedule to the Customs Tariff Act, 1975 (hereinafter referred to as the Customs Tariff Act), being the goods imported into India, to fulfil the commitment of the Government to provide and finance education, health and social security.*

...

***(3) The Social Welfare Surcharge levied under sub-section (1), shall be calculated at the rate of ten per cent. on the aggregate of duties, taxes and cesses which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue) under section 12 of the Customs Act, 1962 and any sum chargeable on the goods specified in sub-section (1) under any other law for the time being in force, as an addition to, and in the same manner as, a duty of customs, but not including—***

- (a) the safeguard duty referred to in sections 8B and 8C of the Customs Tariff Act;*
- (b) the countervailing duty referred to in section 9 of the Customs Tariff Act;*
- (c) the anti-dumping duty referred to in section 9A of the Customs Tariff Act;*
- (d) the Social Welfare Surcharge on imported goods levied under sub-section (1).”*

Accordingly, as per above notifications, as on bid submission date, Basic Custom Duty of 5% and Social Welfare Surcharge of 10% on custom duty was applicable. Over and above, IGST on import of solar inverters was fixed at 5% of the basic custom duty and Social Welfare Surcharge. Subsequently, the Department of Revenue, Ministry of Finance, Government of India issued Notification No. 07 /2021-Customs dated 01 February 2021, which rescinded Notification No. 1/2011-Customs dated 06 January 2011 providing exemption from levy of the Basic Customs Duty in excess of 5% ad valorem, and from the whole of the additional duty of customs leviable thereon under Section 3 of the Customs Tariff Act, 1975. The Notification dated 1 February 2021 reads as below:

“

*G.S.R..... (E).- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and section 3 of the Customs Tariff Act, 1975 (51 of 1975), the Central Government, on being satisfied that it is necessary in the public*

*interest so to do, hereby rescinds the notifications of the Government of India in the Ministry of Finance (Department of Revenue), published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) specified in column (2), vide corresponding G.S.R. number specified in column (3), of the Table, except as respects things done or omitted to be done before such rescission, namely:-*

<i>Sr. No</i>	<i>Notification No.</i>	<i>G.S.R. No.</i>
<i>(1)</i>	<i>(2)</i>	<i>(3)</i>
<i>1.</i>	<i>1/2011-Customs, dated the 6th January, 2011</i>	<i>6 (E), dated the 6th January, 2011</i>
<i>2.</i>	<i>34/2017-Customs, dated the 30th June, 2017</i>	<i>769 (E), dated the 30th June, 2017</i>
<i>3.</i>	<i>75/2017-Customs, dated the 13th September, 2017</i>	<i>1153 (E), dated the 13th September, 2017</i>

Further, letter dated 1 February 2021 highlighting budgetary provisions in Finance Bill, 2021 stipulated following:

“

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...

*(2) Basic customs duty on Solar Inverters (sub-heading 8504 40) is being raised to 20%. For this purpose, S. No. 13 of the notification No. 57/2017-Customs is being amended. Simultaneously, notification No. 1/2011-Customs, dated 6th January, 2011 is being rescinded. [S. No. (ix) of the notification No. 03/2021-Customs dated 1st February, 2021 and, notification No. 07/2021-Customs, dated 1st February, 2021 refer].*

*(3) Notification No. 1/2011-Customs, dated 6th January, 2011 is being rescinded. Consequently, all items of machinery, including prime movers, instruments, apparatus and appliances, control gear and transmission equipment and auxiliary equipment (including those required for testing and quality control) and components, required for the initial setting up of a solar power generation project or facility will attract applicable BCD. [Notification No. 07/2021-Customs, dated 1st February, 2021 refers].”*

Accordingly, the Basic Custom Duty has increased to 20% with effect from 2 February 2021. Increase in Basic Custom Duty translated in to increase in Social Welfare Surcharge and IGST.

16.4 The Notification dated 01 February 2021 is subsequent to the last date of Bid Submission. Under the provisions of PPAs, an event arising from the actions of an authority covered within the definition of ‘Indian Governmental Instrumentality’ would satisfy the requirement of ‘Change in Law’. Hence, the Commission rules that this Notification dated 01 February 2021 is Change in Law event under the PPA.

**(B) Notification dated 30 September, 2021 resulting in Change in GST rate**

16.5 Ministry of Finance, vide Notification dated 30 September 2021 increased GST on the solar power devises from five percent (5%) to twelve percent (12%).

16.6 The Commission notes that notification dated 30 September 2021 is subsequent to the last date of Bid Submission.

16.7 ‘Indian Government Instrumentality’ as defined under the PPA includes any Ministry of the Government of India. The Ministry of Finance being Ministry under the Government of India is satisfying the requirement of ‘an Indian Government Instrumentality’ under the PPAs. Further, as per Article 9.1 of the PPA, notification of new law or amendment of existing law or introduction / change in tax, duty or cess subsequent to Bid Submission date qualifies as Change in Law. Hence, the Commission rules that this Notification dated 30 September 2021 qualifies as Change in Law event under the PPA.

**17. Issue B: Whether modalities stipulated under Article 9.3.1 (Service of Notice of Change in Law) have been followed?**

17.1 Article 9.3.1 of the PPA, which provides for issuance of a Notice prior to claiming change in law reads as below:

“  
*9.3.1 If the Seller is affected by a Change in Law in accordance with Article 9.1 and wishes to claim in Law under this Article, it shall give notice to MSEDCL of such Change in Law within 7 days after becoming aware of the same or **should reasonably have known of the Change in Law.**”*

Thus, above Change in Law provisions of PPA requires that if RSBPL wishes to claim Change in Law it shall give notice to MSEDCL of such Change in Law event within 7 days after becoming aware of the same or should reasonably have known of such event of Change in Law.

- 17.2 MSEDCL has contended that RSBPL issued notices for reimbursement of BCD on 09 July 2021 whereas BCD was increased by the Notification dated 01 February 2021. Hence, RSBPL has failed to issue notice within 7 days for increase in BCD. With respect of increase in GST vide Government Notification dated 30 September 2021, RSBPL has issued Notice on 07 October 2021 and hence within time period given in the PPA.
- 17.3 As per MSEDCL, as RSBPL failed to comply PPA timeline for Change in Law notice, its claim of BCD compensation needs to be rejected. With regards to GST compensation, MSEDCL has not objected on procedural ground but has re-assessed the claims made by RSBPL.
- 17.4 RSBPL in reply submitted that the rescission of Notification 1/2011 was issued on 01 February 2021. However, on the date on which the rate of BCD stood increased, RSBPL had not imported and was neither contemplating to import such inverters from outside India. The commercial decision to import the inverters was taken at a later date. Subsequently, on becoming aware that there was an increase in the rate of BCD on inverters, RSBPL took immediate steps to comply with Article 9.3.1 of the PPA and proceeded to issue the Notice of such Change in Law event.
- 17.5 Considering rival arguments, the Commission directed RSBPL to provide detailed chronology of events. In reply RSBPL categorically submitted that its EPC Contractor informed RSBPL vide Letter its dated 30 June 2021 regarding change in the rate of BCD on the import of inverters. And thereafter pursuant to internal discussion, RSBPL proceeded to issue the Notice dated 09 July 2021 informing the MSEDCL regarding the change in law and its claim to that effect. The Notice was issued on 9<sup>th</sup> day (and within 7 days after exclusion of non-working days) from the date on which the RSBPL became aware that change in the rate of BCD.
- 17.6 The Commission notes that PPA used the term ‘within 7 days from the date it reasonably should have known of the Change in Law’. RSBPL has relied upon its EPC contractor letter dated 30 June 2021 wherein it has conveyed the RSBPL about such notification as a reference date for having become aware of such Change in Law event. As there is no other document on record to show that RSBPL was aware of such Change in Law before such letter of EPC contractor, the Commission considers the said letter as a date on which RSBPL became aware of Change in Law. RSBPL has issued Change in Law notice to MSEDCL on 9 July 2021 i.e. after 9 days instead of 7 days as stipulated in the PPA. RSBPL has contended that if 2 non-working days are excluded then it meets requirement of 7 days. In this regard, the Commission notes that even if 2 non-working days is not considered then delay would be of 2 days only which cannot be the ground to deny



increased expenses on account of Change in Law event which otherwise is permissible under the PPA. Hence, the Commission rules that by issuing notice dated 9 July 2021 for Change in Law related to BCD, RSBPL has complied with mandatory requirement of issuance of notice under the PPA.

17.7 Notice for Change in Law on account of increased GST rate has been issued within 7 days from date of notification of Change in Law event and MSEDCL has not disputed the same.

17.8 In view of above, as mandatory requirement of notice has been fulfilled, RSBPL is eligible for claiming change in law compensation on account of BCD and GST.

### **18. Issue C: Whether claim of MSEDCL on Safeguard Duty is maintainable?**

18.1. MSEDCL has contended that on the last day of bid submission i.e. 22 January 2019, Safeguard duty @25% was applicable as per Notification No. 01/2018 dated 30 July 2018. Solar Modules have been imported after August-2021, i.e. after repeal of Safeguard duty. As per Article 9.2.1 of PPA, gain arising due to non-applicability of safeguard duty ought to be passed by RSBPL to MSEDCL. MSEDCL computed the gain on this account as Rs.16.97 Crore.

18.2. RSBPL opposed the claim made by MSEDCL. As per RSBPL such a claim ought to have been raised vide a separate Petition. RSBPL averted the impact of safeguard duty by following up prudent utility practice. Since planning stage, RSBPL had planned the import of solar panel near to the date of commissioning. Since the imports took place in August-2021, the imports did not suffer any SGD.

18.3. The Commission notes that Article 9.2 of the PPA provides for passing on financial gain on account of Change in Law. Admittedly, on last date of bid submission SGD Notification No. 01/2018 dated 30 July 2018 was in force which has clearly stated trajectory for reduction of safeguard duty over the period starting from 25% on 30 July 2018 to 15% on 29 July 2020. Thus, as per said notification which was in force on date of bid submission, there is no safeguard duty after 29 July 2020. As per RFS/PPA conditions, project is to be commissioned within 21 months if within Solar Park or within 24 months if outside solar parks. Bid was submitted on 22 January 2019 and hence at that point of time, commissioning of project (21/24 months) would have been envisaged beyond 29 July 2020 for which no SGD was applicable at that point of time. Hence, it is incorrect to state that non levy of SGD has led to financial gain to RSBPL. Therefore, the Commission rejects MSEDCL contention on Change in Law on account of SGD.

19. **Issue D: Ascertainment of principal claim:**

(A) Basic Custom Duty:

19.1. For supplementing the claim, RSBPL has furnished Chartered Accountant's certificate dated 14 April 2022. As per certification impact of BCD is as below:

Particulars	Unit	Value
Total Quantity	No.	1930
Basic Value	Rs.	38,68,17,652
Total Duty Paid (New Regime)	Rs.	10,77,17,111
Claim under Change in Law (BCD Impact)	Rs.	6,56,46,050

19.2. MSEDCL in its reply has not commented on BCD impact. Further, claims have not been scrutinised by MSEDCL.

19.3. After perusal of Chartered Accountant's certificate, it is evident that the Annexures to said certificate are not legible. Apart from certificate, RSBPL has not furnished any documentary evidence such as invoices raised by supplier, custom's bill of entry for home consumption etc. Further, it is not known whether invoices raised are in US Dollars or any other currency, possible impact of exchange rate. Even after specifically having been directed during the hearing, RSBPL has not submitted complete details. Hence, the Commission cannot quantify impact of Change in Law in this respect. However to avoid delay in recovering Change in Law compensation, the Commission allows 50% of BCD impact claimed by RSBPL for recovery purpose. Parties are directed to sit together and scrutinize these invoices. Said exercise shall be completed within a month from date of this Order. Amounts so scrutinized shall be eligible as compensation for Change in Law event of increased BCD. In case of dispute in quantification of claim, aggrieved party may file appropriate Petition before this Commission for adjudication of dispute.

(B) GST rate:

19.4. As per Chartered Accountant's certificate furnished by RSBPL impact of GST is as below:

Particulars	Unit	Value
Basic Value	Rs.	67,88,98,212
GST Payable under old regime	Rs.	3,39,44,911
Actual GST paid due to increase in rate	Rs.	8,15,65,977

Dr Note/Cr note issued by supplier	Rs.	-81,89,587
Claim under change in law (GST impact)	Rs.	3,94,31,480

19.5. MSEDCL in its Reply has contended that it has scrutinised the claim statement. As per MSEDCL net impact is Rs. 2.70 Crores as against Rs.3.94 Crores claimed by RSBPL. Summary statement is as follows:

Particular	As Per RSBPL	As per MSEDCL	Difference
GST Impact	4,76,21,067	4,76,21,067	--
Less:- Credit/debit Note (Net)	81,89,587	1,74,74,465	92,84,878
Less:- Post COD claim Disallowed	--	31,51,228	31,51,228
<b>Net GST impact</b>	<b>3,94,31,480</b>	<b>2,69,95,374</b>	<b>1,24,36,106</b>

19.6. While reducing the claim amount, MSEDCL has contended that few invoices have been issued before the GST notification dated 30 September 2021, for which RSBPL has issued the credit note of Rs.90,26,218/- and debit note of Rs. 8,36,631/- has been issued for the invoices which does not fall under the category of the parts of SPG. The Net GST impact of debit and credit note Rs.,81,89,587/- has been reduced by the RSBPL from the total GST impact. However, on the verification it is observed that, the GST impact of invoices issued before GST notification dated 30 September 2021 comes to Rs.1,74,74,465/- .

MSEDCL has referred to CERC Order date 28 January 2020 passed in Case No. 67/MP/2019 and 68/MP/2019. CERC in said Order has categorically held that the liability of payment on account of impact of GST on procurement of Solar PV panels and associated equipment by the Petitioners shall lie with the Respondents till the commercial operation date (COD) only. By applying the said rationale, invoices that have been issued after SCOD (15 November 2021), the total GST impact of such invoices are Rs.31,51,228/- need not be considered.

19.7. The Commission notes that MSEDCL has provided statement wherein invoices with GRN date prior to GST notification dated 30 September 2021 have been listed. While rebutting the contention, RSBPL referred to Section 14 (i) of the CGST Act. As per Section 14 (i) of CGST Act, the time of supply shall be the date on which invoices were issued or the date on which the payment was received whichever is earlier. In the present both the invoices and payment are issued and received post the revision in rate of GST i.e., increase from 5% to 12%.

19.8. It is relevant to mention Section 12, 13, 14 and 31 of CGST Act, 2017, which reads as below:

“

*TIME AND VALUE OF SUPPLY*

12. (1) *The liability to pay tax on goods shall arise at the time of supply, as determined in accordance with the provisions of this section.*

(2) *The time of supply of goods shall be the earlier of the following dates, namely: -*

(a) *the date of issue of invoice by the supplier or the last date on which he is required, under sub-section (1) of section 31, to issue the invoice with respect to the supply;*  
*or*

(b) *the date on which the supplier receives the payment with respect to the supply:*

*Provided that where the supplier of taxable goods receives an amount up to one thousand rupees in excess of the amount indicated in the tax invoice, the time of supply to the extent of such excess amount shall, at the option of the said supplier, be the date of issue of invoice in respect of such excess amount.*

*Explanation 1. — For the purposes of clauses (a) and (b), “supply” shall be deemed to have been made to the extent it is covered by the invoice or, as the case may be, the payment.*

*Explanation 2. — For the purposes of clause (b), “the date on which the supplier receives the payment” shall be the date on which the payment is entered in his books of account or the date on which the payment is credited to his bank account, whichever is earlier.*

13. (1) *The liability to pay tax on services shall arise at the time of supply, as determined in accordance with the provisions of this section.*

(2) *The time of supply of services shall be the earliest of the following dates, namely:—*

(a) *the date of issue of invoice by the supplier, if the invoice is issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or*

(b) *the date of provision of service, if the invoice is not issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or*

(c) *the date on which the recipient shows the receipt of services in his books of account, in a case where the provisions of clause (a) or clause (b) do not apply:*

*Provided that where the supplier of taxable service receives an amount up to one thousand rupees in excess of the amount indicated in the tax invoice, the time of supply to the extent of such excess amount shall, at the option of the said supplier, be the date of issue of invoice relating to such excess amount.*

*Explanation. — For the purposes of clauses (a) and (b)—*

(i) *the supply shall be deemed to have been made to the extent it is covered by the invoice or, as the case may be, the payment;*

(ii) *“the date of receipt of payment” shall be the date on which the payment is entered in the books of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier.*

....

14. *Notwithstanding anything contained in section 12 or section 13, the time of supply, where there is a change in the rate of tax in respect of goods or services or both, shall be determined in the following manner, namely:—*

(a) *in case the goods or services or both have been supplied before the change in rate of tax,—*

(i) *where the invoice for the same has been issued and the payment is also received after the change in rate of tax, the time of supply shall be the date of receipt of payment or the date of issue of invoice, whichever is earlier; or*

(ii) *where the invoice has been issued prior to the change in rate of tax but payment is received after the change in rate of tax, the time of supply shall be the date of issue of invoice; or*

(iii) *where the payment has been received before the change in rate of tax, but the invoice for the same is issued after the change in rate of tax, the time of supply shall be the date of receipt of payment;*

*(b) in case the goods or services or both have been supplied after the change in rate of tax,—*

- (i) where the payment is received after the change in rate of tax but the invoice has been issued prior to the change in rate of tax, the time of supply shall be the date of receipt of payment; or*
- (ii) where the invoice has been issued and payment is received before the change in rate of tax, the time of supply shall be the date of receipt of payment or date of issue of invoice, whichever is earlier; or*
- (iii) where the invoice has been issued after the change in rate of tax but the payment is received before the change in rate of tax, the time of supply shall be the date of issue of invoice:*

*Provided that the date of receipt of payment shall be the date of credit in the bank account if such credit in the bank account is after four working days from the date of change in the rate of tax.*

*Explanation. —For the purposes of this section, “the date of receipt of payment” shall be the date on which the payment is entered in the books of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier.*

....

## *CHAPTER VII*

### *TAX INVOICE, CREDIT AND DEBIT NOTES*

*31. (1) A registered person supplying taxable goods shall, before or at the time of,—*

*(a) removal of goods for supply to the recipient, where the supply involves movement of goods; or*

*(b) delivery of goods or making available thereof to the recipient, in any other case, issue a tax invoice showing the description, quantity and value of goods, the tax charged thereon and such other particulars as may be prescribed:*

*Provided that the Government may, on the recommendations of the Council, by notification, specify the categories of goods or supplies in respect of which a tax invoice shall be issued, within such time and in such manner as may be prescribed.*

***(2) A registered person supplying taxable services shall, before or after the provision of service but within a prescribed period, issue a tax invoice, showing the description, value, tax charged thereon and such other particulars as may be prescribed:***

*Provided that the Government may, on the recommendations of the Council, by notification and subject to such conditions as may be mentioned therein, specify the categories of services in respect of which—*

*(a) any other document issued in relation to the supply shall be deemed to be a tax invoice;*

*or*

*(b) tax invoice may not be issued.”*

19.9. As per Section 12 and 13 of CGST Act, 2017, the liability to pay tax on goods shall arise at the time of supply of good/services. In absence of invoices and supporting transport challans, it is difficult to establish one-to-one correlation. The exercise of establishing one-to-one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services is pre-requisite for claim settlement. As mentioned earlier, RSBPL has not furnished any details in its Petition. Hence, the Commission cannot quantify impact of Change in Law in this respect.

19.10. As per provisions of GST Law quoted above, invoice for goods has to be issued at the time of supply of goods which invariably has to be before date of commissioning as without such supply of goods commissioning of the plant would have not been possible. With regards to supply of services, the Commission notes that as per Rule 47 of the CGST Rules, 2017, the invoices in respect of taxable supply of services have to be issued within 30 days:

“

*47. Time limit for issuing tax invoice.- The invoice referred to in rule 46, in the case of the taxable supply of services, shall be issued within a period of thirty days from the date of the supply of service:”*

19.11. As plant has been commissioned on 15 November 2021, any invoices related to supply of good shall be dated 15 November 2021 or prior and any invoices for supply of services

shall be prior to 14 December 2021 or prior. All other invoices cannot be considered as per provisions of applicable CGST laws.

19.12. As RSBPL has failed to provide the details. Parties are directed to sit together and scrutinize these invoices. Said exercise shall be completed within a month from date of this Order. Amounts so scrutinized shall be eligible as compensation for Change in Law event of increased GST. In case of dispute in quantification of claim, aggrieved party may file appropriate Petition before this Commission for adjudication of dispute. Meanwhile, MSEDCL shall pay agreed amount of Rs. 2.69 crore on account of increase in GST rate.

**20. Issue E: What are the modalities for computing carrying cost?**

20.1 It is well settled principle that compensation on account of Change in Law provisions has to be granted along with carrying cost so as to restore the affected party to same economic position as if such Change in Law event has not occurred.

20.2 RSBPL proposes carrying costs to be calculated on the basis of the normative debt equity ratio of 70:30, wherein, the average of the one-year MCLR as declared by the SBI for the previous year plus 200 basis points, shall be considered as the normative interest applicable in relation to the debt component and Return on Equity shall be computed at the base rate of 14%, to be grossed up as per the Minimum Alternate Tax ('MAT') rate applicable as on 1st April of the previous Financial Year. This is in line with MERC (Terms and Conditions for Determination of Renewable Energy Tariff) Regulations, 2019.

20.3 The Commission notes that with regards to rate of Carrying Cost, APTEL in its Judgment dated 16 November 2021 in Appeal No.163 of 2020 & 171 of 2020 observed following:

“

*44. It needs to be borne in mind that carrying cost is the value for money denied at the appropriate time and is different from LPS which is payable on non-payment or default in payment of invoices by the Due Date. Payment of carrying cost is a part of the Change in Law clause which is an in-built restitution clause [see Uttar Haryana Bijli Vitran Nigam Ltd. Vs. Adani Power Ltd. (2019) 5 SCC 325]. We are satisfied that carrying costs on the CIL amount should have been on actuals and not the Late Payment Surcharge (“LPS”) rate specified in the PPAs i.e., 1.25% in excess of 1-year MCLR of SBI for the period of 25 years.”*



20.4 RSBPL has not furnished any details regarding actual interest incurred on account of change in law and is rather relying on stipulations provided in MERC RE Tariff Regulations, 2019.

20.5 Issue of carrying cost arises only when there is time gap between spending and realizing the amount. In normal course, for time gap between date of spending and realising the said amount, utility takes Working Capital loan and as per tariff principle such utility is allowed to claim interest on such Working Capital loan. Similarly, when higher expenses are incurred on account of Change in Law which is to be reimbursed at later date, entity may fund such expenses through Working Capital Loan. Hence, in the opinion of the Commission, RSBPL having failed to demonstrate actual rate of interest incurred on additional expenses on account of Change in Law, interest on Working Capital Loan (average of one-year MCLR of SBI plus 150 basis point) allowed in MREC RE Tariff Regulations, 2019 shall be allowed as rate of interest for working out the carrying cost.

**21. Issue F: What should be frequency of payment of compensation amount? What should be the methodology and the frequency of payment of compensation amount?**

21.1 RSBPL in its Petitioners have prayed that compensation for Change in Law event be either paid on lumpsum basis or any other mechanism.

21.2 In this regard, the Commission notes that in similar matters of payment of compensation on account of Change in Law, the Commission had opined that lumpsum payment would avoid further carrying cost on account of deferred payment. Further, Generator may willingly offer some discount on lumpsum payment. Considering all these aspects, the Commission had provided liberty to MSEDCL to decide whether it intends to opt for payment of the compensation on lumpsum basis or per unit basis over the PPA tenure. Accordingly, MSEDCL shall communicate its option of paying Change in Law compensation to Petitioners within a month from the date of this Order.

21.3 In case option of paying compensation amount over the PPA period is selected then per unit rate of compensation shall be computed based on the following methodology:

- a) Firstly, total amount of compensation to be paid is to be determined. Such total amount shall be equally divided over each year of PPA tenure.
- b) Thereafter, carrying cost towards deferred payment shall be computed on the unrecovered part (average of opening and closing balance) of total compensation at the simple interest rate of @ 1.25% plus SBI MCLR per annum.

- c) Summation of installment of compensation computed at 'a' above and carrying cost towards deferred payment computed at 'b' above will be the amount which is to be paid to the Petitioners during that particular year.
- d) Per unit cost for a particular year shall be computed by dividing amount determined in 'c' above by energy to be supplied during that year from the project capacity at declared CUF. However, during the year of commissioning, availability of project only for the part of year shall be appropriately factored while computing energy to be supplied from the project.
- e) At the end of Financial Year, MSEDCL shall reconcile total amount paid through per unit charge as against total amount which is recoverable in that year as per 'c' above. Any over-recovery shall be adjusted in the payment for the month of March.
- f) Although per unit charge at the start of each financial year needs to be decided based on declared CUF, year-end reconciliation at end of each financial year shall be undertaken as per actual CUF within range  $\pm 10\%$  of declared CUF.
- g) Any under-recovery on account of lower generation shall be carried forward to next year and shall be payable without any additional carrying cost and only from the excess generation above declared CUF. Such unrecovered compensation, if any, at the end of PPA tenure shall be reconciled and paid in last month of PPA tenure at no additional carrying cost.

Hence, the following Order:

### **ORDER**

- 1. Case No. 124 of 2022 is partly allowed.**
- 2. Impact of Change in Law on account of increased Basic Custom Duty on inverters vide notification dated 1 February 2021 and increased GST vide notification dated 30 September 2021 is allowed.**
- 3. MSEDCL to scrutinize Changes in Law claims in detail as directed in para 19, 20 & 21 within a period of a month from date of this Order. Meanwhile**

MSEDCL shall pay Rs 3.28 Crore (50% of the claimed amount) towards increased BCD and Rs 2.69 Crore (amount agreed by MSEDCL) towards increased GST rate.

4. Maharashtra State Electricity Distribution Co. Ltd. shall communicate its option of payment of Change in Law compensation to Petitioners as stated in para 21 above within a month from date of this Order.

Sd/-  
(Mukesh Khullar)  
Member

Sd/-  
(I.M. Bohari)  
Member

Sd/-  
(Sanjay Kumar)  
Chairperson

  
(Dr. Rajendra Ambekar)  
I/c Secretary

