



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 226/MP/2021 and
Petition No. 227/MP/2021

कोरम/ Coram:

श्री पी. के. पुजारी, अध्यक्ष/ Shri P. K. Pujari, Chairperson
श्री आई. एस. झा, सदस्य/ Shri I. S. Jha, Member
श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member
श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 16th of December, 2021

IN THE MATTER OF:

Petition under section 79 of the Electricity Act 2003 for approval of Change in Law and seeking an appropriate mechanism for grant of an appropriate adjustment/ compensation to offset financial/ commercial impact of change in law event on account of rescission of Notification No. 1/2011 - Customs dated 06.01.2011 vide Notification No. 7/2021 - Customs dated 01.02.2021, which has resulted in increase in rate of basic customs duty on solar inverters imported into India, in terms of Article 12 of the Power Purchase Agreements.

PETITION No. 226/MP/2021

IN THE MATTER OF:

1. Azure Power Forty One Private Limited,
5th Floor, Southern Park, D-II, Saket Place, Saket,
New Delhi-110017
2. Azure Power India Private Limited,
5th Floor, Southern Park, D-II, Saket Place, Saket,
New Delhi-110017

...Petitioners

VERSUS

1. Solar Energy Corporation of India Limited,
1st Floor, A-Wing,
D-3, District Centre, Saket,
New Delhi, 110017
2. Grid Corporation of Odisha,
Janpath, Bhubaneswar,
Odisha - 751022
3. BSES Rajdhani Power Limited,
BSES Bhawan, Nehru Place,
New Delhi -110019

...Respondents

PETITION No. 227/MP/2021

IN THE MATTER OF:

1. Azure Power Maple Private Limited,
5th Floor, Southern Park, D-II, Saket Place, Saket,
New Delhi-110017
2. Azure Power India Private Limited,
5th Floor, Southern Park, D-II, Saket Place, Saket,
New Delhi-110017

... Petitioners

VERSUS

1. Solar Energy Corporation of India Limited,
1st Floor, A-Wing,
D-3, District Centre, Saket,
New Delhi, 110017
2. Madhya Pradesh Power Management Company Limited,
Shakti Bhawan, Rampur,
Jabalpur, Madhya Pradesh - 482008

... Respondents

Parties Present: Shri Buddy Ranganadhan, Advocate, APMPL
Shri Shashwat Kumar, Advocate, APFOPL and APMPL
Shri Rahul Chouhan, Advocate, APFOPL and APMPL
Ms. Tanya Sareen, Advocate, SECI
Ms. Poorva Saigal, Advocate, SECI
Shri Ravi Nair, Advocate, SECI
Ms. Neha Singh, SECI



आदेश/ ORDER

The Petitioners, Azure Power Forty One Private Limited, and Azure Power India Private Limited (in Petition No. 226/MP/2021), and Azure Power Maple Private Limited and Azure Power India Private Limited (in Petition No. 227/MP/2021) have filed the present petitions under Section 79 of the Electricity Act, 2003 (hereinafter referred to as the 'the Act') read with Article 12 of the Power Purchase Agreements ('PPAs') dated 17.09.2021 in Petition No. 226/MP/2021 and dated 27.11.2019 in Petition No. 227/MP/2021 seeking an appropriate mechanism for grant of adjustment/ compensation to offset financial/ commercial impact of change in law event on account of rescission of Notification No. 1/2011 - Customs dated 06.01.2011 vide Notification No. 7/2021 - Customs dated 01.02.2021, which has resulted in increase in rate of basic customs duty on solar inverters imported into India, in terms of Article 12 of the respective PPAs. The Petitioners have made the following prayers:

In Petition No. 226/MP/2021

- a) *Admit the present Petition;*
- b) *Hold and declare the imposition of increased rate of Basic Customs Duty and consequent 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 the Department of Revenue, Ministry of Finance, Government of India as Change in Law in terms of the PPA which have led to an increase in the expenditure for the Project;*
- c) *Specify and declare that 02.02.2021, i.e. the date of coming into force of the Notification No. 07/2021- Customs dated 01.02.2021 issued by the Department of Revenue, Ministry of Finance, Government of India, is the date from which the Change in Law is effective for the purposes of the PPA;*
- d) *Evolve a suitable mechanism to compensate the Petitioner No. 1 for the increase in expenditure incurred by the Petitioner No. 1 on account of Change in Law event;*

- e) *Direct Respondent No. 1 / SECI to compensate the Petitioner No. 1 with the amount of ₹ 6,87,68,176.85/- towards the additional Basic Customs Duty and consequent increase in Social Welfare Surcharge and IGST as one time lump sum amount or as per the mechanism devised by this Hon'ble Commission in prayer (d), no later than sixty (60) days of the issuance of the final order in the present Petition;*
- f) *Declare that the Carrying Cost, as mentioned in paragraph 5 of the present Petition, is allowed on the additional cost incurred by the Petitioner No. 1 with effect from 26.08.2021 i.e., date of payment made to the Customs Department by the Petitioner No. 1;*
- g) *Allow legal and administrative costs incurred by the Petitioners in pursuing the instant Petition; and*
- h) *Pass such other and further order or orders as the Hon'ble Commission deems appropriate under the facts and circumstances of the present case.*

In Petition No. 227/MP/2021

- a) *Admit the Petition;*
- b) *Allow the imposition of increased rate of Basic Customs Duty and consequent 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 the Department of Revenue, Ministry of Finance, Government of India as Change in Law in terms of the PPA which have led to an increase in the expenditure for the Project;*
- c) *Specify and declare that 02.02.2021, i.e. the date of coming into force of the Notification No. 07/2021- Customs dated 01.02.2021 issued by the Department of Revenue, Ministry of Finance, Government of India, is the date from which the Change in Law is effective for the purposes of the PPA;*
- d) *Evolve a suitable mechanism to compensate the Petitioner No. 1 for the increase in expenditure to be incurred by the Petitioner No. 1 on account of Change in Law event;*

- e) *Direct Respondent No. 1 / SECI to compensate the Petitioner No. 1 with the additional duty amount to be paid to Customs Department equivalent to the additional Basic Customs Duty and consequent increase in Social Welfare Surcharge and IGST as one time lump sum amount or as per the mechanism devised by this Hon'ble Commission in prayer (d), no later than sixty (60) days of the issuance of the final order in the present petition or from the date of actual payment made by Petitioner No. 1 to the Customs Department;*
- f) *Declare that the Carrying Cost, as mentioned in paragraph 5 of the present Petition, is allowed on the additional cost incurred by the Petitioner No. 1 with effect from date of payment made to the Customs Department by the Petitioner No. 1 till the final adjudication of the present Petition by this Hon'ble Commission;*
- g) *Allow legal and administrative costs incurred by the Petitioners in pursuing the instant Petition; and*
- h) *To pass such other and further order or orders as the Commission deems appropriate under the facts and circumstances of the present case.*

3. The cases were called out for admission through virtual hearing on 02.12.2021.
4. The learned counsel for the Petitioners in Petition No. 226/MP/2021 submitted that the two petitions involve identical issues and, therefore, would be covered by the submissions made by the learned counsel for the Petitioners in Petition No. 227/MP/2021.
5. As the subject matter in Petition No. 226/MP/2021 and Petition No. 227/MP/2021 were the same, the matters were heard together.
6. During the course of hearing, the learned counsels for the Petitioners submitted that the present petitions have been filed seeking approval of the Change in Law event that has resulted in increase in rate of Basic Custom Duty on solar inverters being imported into India, on account of rescission of Notification No. 1/2011- Customs dated 06.01.2011 vide Notification No.7/2021-Customs dated 01.02.2021 issued by the Department of Revenue, Ministry of Finance, Government of India. The Petitioners have also prayed for evolving a suitable mechanism for grant of an appropriate adjustment/ compensation to offset financial/ commercial impact of the aforesaid Change in Law event.

7. In response to the Commission's observation regarding Ministry of Power, Government of India having notified *the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021* (hereinafter referred to as 'the Change in Law Rules') and the Petitioners, therefore, being required to follow the process specified thereunder, the learned counsel submitted that the Petitioners were in fact already in the process of filing the present petitions prior to the notification of the Change in Law Rules. The learned counsel also contended that the Change in Law Rules had a prospective application and that the Change in Law event relating to the rescission of Notification No. 1/2011- Customs dated 06.01.2011 vide Notification No.7/2021-Customs dated 01.02.2021 had occurred prior to the notification of the Change in Law Rules.
8. The learned counsel for the Petitioners further submitted that if the Commission disposes of the petitions in line with the observation made in the Order dated 02.12.2021 in Petition No. 188/MP/2021, the filing fees paid in the petitions be adjusted against the petitions to be filed in future.
9. After hearing the learned counsel for the Petitioners, the Commission reserved the Order on the 'admissibility' of the petitions.
10. We have considered the submissions made by the learned counsel for the Petitioner. Relevant portion of Change in Law Rules notified by the Ministry of Power, Government of India, are extracted as under (emphasis by us):

*"2(c) "change in law", in relation to tariff, **unless otherwise defined in the agreement**, means any enactment or amendment or repeal of any law, made after the determination of tariff under section 62 or section 63 of the Act, leading to corresponding changes in the cost requiring change in tariff, and includes —*

- (i) -----*
- (ii) -----*
- (iii) -----*

3. Adjustment in tariff on change in law— (1) On the occurrence of a change in law, the monthly tariff or charges shall be adjusted and be recovered in accordance with these rules to compensate the affected party so as to restore such affected party to the same economic position as if such change in law had not occurred.

(2) For the purposes of sub-rule (1), the generating company or transmission licensee, being the affected party, which intends to adjust and recover the costs due to change in law, shall give a three weeks prior notice to the other party about the proposed impact in the tariff or charges, positive or negative, to be recovered from such other party.

(3) The affected party shall furnish to the other party, the computation of impact in tariff or charges to be adjusted and recovered, within thirty days of the occurrence of the change in law or on the expiry of three weeks from the date of the notice referred to in sub-rule (2), whichever is later, and the recovery of the proposed impact in tariff or charges shall start from the next billing cycle of the tariff.

(4) The impact of change in law to be adjusted and recovered may be computed as one time or monthly charges or per unit basis or a combination thereof and shall be recovered in the monthly bill as the part of tariff.

(5) The amount of the impact of change in law to be adjusted and recovered, shall be calculated -

(a) where the agreement lays down any formula, in accordance with such formula; or

(b) where the agreement does not lay down any formula, in accordance with the formula given in the Schedule to these rules;

(6) The recovery of the impacted amount, in case of the fixed amount shall be —

(a) in case of generation project, within a period of one-hundred eighty months; or

(b) in case of recurring impact, until the impact persists.

(7) The generating company or transmission licensee shall, within thirty days of the coming into effect of the recovery of impact of change in law, furnish all relevant documents along with the details of calculation to the Appropriate Commission for adjustment of the amount of the impact in the monthly tariff or charges.

(8) The Appropriate Commission shall verify the calculation and adjust the amount of the impact in the monthly tariff or charges within sixty days from the date of receipt of the relevant documents under sub-rule (7).

(9) After the adjustment of the amount of the impact in the monthly tariff or charges under sub-rule (8), the generating company or transmission licensee, as the case may be, shall adjust the monthly tariff or charges annually based on actual amount recovered, to ensure that the payment to the affected party is not more than the yearly annuity amount. ”

11. As per the above-quoted provisions, on occurrence of a Change in Law, the affected party, in the present case being the Petitioners, and other parties, in the present case being the Respondents, are to settle the Change in Law claims among themselves and approach the Commission only in terms of Rule 3(8) of the Change in Law Rules.

12. From a plain reading of the definition of Change in Law as given in Rule 2(1)(c) of the Change in Law Rules, it is amply clear that the said definition of Change in Law shall come into effect unless otherwise defined in the agreement and cannot, in any manner, be construed to mean that the Change in Law Rules shall apply only to those agreements which do not

have the Change in Law provisions. The phrase “*unless otherwise defined in the agreement*” has been used in the context of the definition of Change in Law and not in the context of applicability of the Change in Law Rules.

13. It is a settled law that as a general rule, no law operates retrospectively unless it has been provided differently in the law itself, or with exceptions as have been delineated by Hon`ble Supreme Court. Hon`ble Supreme Court in the case of *T. Kaliamurthi and Anr. v. Five Gori Thaikal Wakf and Ors.* [2008 (9) SCC 306], dealing with law of limitation has succinctly laid down the principle as under (emphasis by us):

*“22. It is well settled that no statute shall be construed to have a **retrospective** operation until its language is such that would require such conclusion. The exception to this rule is enactments dealing with **procedure**. This would mean that the **law** of limitation, being a **procedural law**, is **retrospective** in operation in the sense that it will also apply to proceedings pending at the time of the enactment as also to proceedings commenced thereafter, notwithstanding that the cause of action may have arisen before the new provisions came into force. However, it must be noted that there is an important exception to this rule also. Where the right of suit is barred under the **law** of limitation in force before the new provision came into operation and a vested right has accrued to another, the new provision cannot revive the barred right or take away the accrued vested right.”*

14. It is also a settled principle of law that where a particular provision operates in future, it cannot be retrospective merely because within the sweep of its operation, all existing rights are included. In this regard, it would be relevant to refer to the extracts of the decision of the Hon`ble Supreme Court in the case of *Trimbak Damodhar Raipurkar v. Assaram Hiranman Patil*, [(162) Supp. (1) SCR 700]:

“9. In this connection it is relevant to distinguish between an existing right and a vested right. Where a statute operates in future it cannot be said to be retrospective merely because within the sweep of its operation all existing rights are included.”

15. We observe that the Petitioners have not pointed out any specific provision in the Change in Law Rules which prevents it from recovering Custom duty under Change in Law.
16. It is evident that the Change in Law Rules has been framed to facilitate timely recovery of costs due to Change in Law events and provides a process and methodology to be followed. Accordingly, the Petitioners need to first approach SECI/ procurers in terms of the Change in Law Rules for adjustment of tariff on account of such Change in Law.

17. We note that the compensation for Change in Law shall be computed in terms of Rule 3(5) of the Change in Law Rules, which provides that where the agreement lays down any formula, the same shall be in accordance with such formula; or where the agreement does not lay down any formula, it would be in accordance with the formula given in the Schedule to the Change in Law Rules.
18. In view of the above, the Petitioners may approach SECI/procurers for settlement of Change in Law claims in terms of the Change in Law Rules and approach the Commission only in terms of Rule 3(8) of the Change in Law Rules.
19. As prayed by the Petitioner, the filing fees paid in these petitions shall be adjusted against the petitions to be filed by the Petitioners in future.
20. Accordingly, Petition No. 226/MP/2021 and Petition No. 227/MP/20121 are disposed of in terms of the above, at the admission stage.

Sd/-
(पी. के. सिंह)
सदस्य

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(अरुण गोयल)
सदस्य

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(आई. एस. झा)
सदस्य

Sd/-
(पी. के. पुजारी)
अध्यक्ष

