



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 374/MP/2020

कोरम/ Coram:

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: 6th December , 2022

IN THE MATTER OF:

Petition under 79(1)(f) of the Electricity Act, 2003 read with Article 17 of the Power Purchase Agreement dated 17.04.2017 executed by ACME Jaipur Solar Power Private Limited with M. P. Power Management Company Limited and Delhi Metro Rail Corporation Ltd and in terms of the directions issued by the Central Government vide its Notification bearing No. 23/43/2018-R&R dated 27.08.2018 for allowing pass through of additional expenditure incurred by the generator on account of events pertaining to 'Change in Law' along with this Hon'ble Commission order dated 09.10.2018.

AND IN THE MATTER OF:

ACME Jaipur Solar Power Private Limited,
B-4, Plot No. 12, Basement-2,
Gopi Nath Marg, Purohit ji ka Bagh, MI Road,
Jaipur- 302001, Rajasthan, India.

...Petitioner

Versus

1. M. P. Power Management Company Limited,
Shakti Bhawan, Rampur,
Jabalpur, Madhya Pradesh - 482008.
2. Delhi Metro Rail Corporation Limited,

Metro Bhavan, Fire Brigade Lane,
Barakhamba Road,
New Delhi

3. Rewa Ultra Mega Solar Limited,
Urja Bhawan, Link Road No, 2. Shivaji Nagar,
Bhopal - 462003, Madhya Pradesh.

...Respondents

Parties Present: Shri Sujit Ghosh, Advocate, AJSPPL
Ms. Mannat Waraich, Advocate, AJSPPL
Shri Mohd. Munis, Advocate, AJSPPL
Shri Mridul Gupta, Advocate, AJSPPL
Shri G. Umopathy, Sr. Advocate, MPPMCL
Shri Rajnish Kumar Reja, Advocate, MPPMCL
Shri Tarun Johri, Advocate, DMRC
Shri Sanjay V Kute, DMRC
Shri Surendra Kumar Gupta, DMRC

आदेश/ ORDER

The Petitioner, ACME Jaipur Solar Power Private Limited, is a generating company engaged in the business of development, building, owning, operating and maintaining utility scale grid connected solar power projects, for generation of solar power. The Petitioner has filed petition under 79(1)(f) of the Electricity Act, 2003 read with Article 17 of the Power Purchase Agreement dated 17.04.2017 for allowing pass through of additional expenditure incurred by the generator on account of events pertaining to 'Change in Law' along with this Commission Order dated 09.10.2018.

2. The Respondent No. 1, M. P. Power Management Company Limited (MPPMCL), is a company incorporated with the principal object of engaging in the business of distribution and supply of electricity and is the holding company of the three distribution licensees in the State of Madhya Pradesh.
3. The Respondent No. 2, Delhi Metro Rail Corporation Ltd (DMRC), is a company incorporated for implementation of the construction and operation of a world class metro rapid transport system in Delhi.

4. The Respondent No. 3, Rewa Ultra Mega Solar Limited (RUMSL), has been incorporated as a joint venture company between Solar Energy Corporation of India Limited and Madhya Pradesh Urja Vikas Nigam Limited with the stated objective to develop and facilitate the development of large scale solar projects.
5. The Petitioner has made the following prayers:
- a) *Hold and declare that Respondents are liable to pay GST claims against the invoices submitted by Petitioner for the period during which Petitioner was not registered under GST but has paid GST to its vendors who are registered with GST;*
 - b) *Hold and declare that Respondents should compensate the Petitioner by considering pre-GST tax rate of 11% on 40% value of services and 15% tax rate on balance 60% value of services which increase to 18% post GST;*
 - c) *Direct Respondents to compensate Petitioner the balance GST claims along with LPS as applicable under PPA;*
 - d) *Grant exemption from filing duly affirmed affidavit in view of the extension of the countrywide lockdown due to the outbreak of COVID-19 with an undertaking that the duly affirmed affidavit will be submitted once the regular functioning of the Courts resume;*
 - e) *pass such other orders that the Commission deems fit in the interest of justice.*

Brief factual background:

6. The Government of Madhya Pradesh (GoMP) and the Government of India (Gol) set up a 750 MW solar project in Rewa District in the State of Madhya Pradesh (Rewa Solar Project) which was supported by the Ministry of New & Renewable Energy (MNRE) in accordance with the Scheme for Development of Solar Parks and Ultra Mega Units issued by MNRE on 12.12.2014. In this regard RUMSL, being a JV company between Madhya Pradesh Urja Vikas Nigam Limited and Solar Energy Corporation of India was incorporated and established as a solar park developer for Rewa Solar Project. A Request for Proposal (RfP) was issued on 16.03.2016 for the development of three Units comprising of 250 MW capacity each in the Rewa Solar Project, followed by a reverse auction process. ACME Solar Holdings Limited was declared as the successful bidder and thereafter incorporated as an SPV i.e. ACME Jaipur Solar Power Private Limited (the Petitioner) for implementation of the project. The Petitioner executed separate Power Purchase Agreements (PPAs) with Respondent No. 1 and Respondent No. 2 on 17.04.2017 for sale of the contracted capacity of 250 MW. The

Central Goods & Services Tax Act, 2017 came into force on 01.07.2017 (GST Law). The Petitioner filed the petition bearing No. 33/MP/2018 before this Commission on 24.01.2018 for (i) declaration of enactment of GST Laws as Change in law (CIL) event; and (ii) grant of consequential relief to compensate for the increase in capital cost due to introduction and imposition of GST Law. The Commission issued its Order dated 09.10.2018 in Petition No. 33/MP/2018, where it inter alia was held as under:

“375. To sum up the:

- a. Issue No. 1: The Commission has jurisdiction to adjudicate in the matter.*
- b. Issue No. 2: The enactment of “GST laws” is covered as “Change in Law” under Article 12 of the PPA.*
- c. Issue No. 3 & 4: “GST Laws” are applicable on all cases except in case of the generating company where the “actual date of Commissioning” is prior to 01.07.2017. As regards its claim (subject to threshold limit in case of Petition No. 33/MP/2018) during construction period, **the Petitioners have to exhibit clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services backed by auditor certificate. In respect of PV Modules post enactment of “GST Laws” 5% will be applicable on intra state procurement as well as import by EPC or SPV. The amount as determined by Petitioners shall be on “back to back” basis to be paid by DISCOMS to Petitioners under the respective “Power Sales Agreements”. The claim of the Petitioners on account of additional tax burden on “O&M” expenses (if any), is not maintainable.***
- d. Issue No. 5: The relief for “Change in Law” is allowed as a separate element on one time basis in a time bound manner. The Claim based on discussions in paragraph 338 & 348 of this Order shall be paid within sixty days of the date of this Order failing which it will attract late payment surcharge as provided under PPA.*
- e. Issue No. 6: The claim is to be raised as one-time upfront lumpsum payment which becomes due on the sixtieth date from the date of this Order by the Commission and after that the “late payment surcharge” as provided under PPAs is to be levied. Therefore, the claim regarding separate “Carrying Cost” in the instant petitions is not attracted.”*

7. In compliance to the Order dated 09.10.2018 passed by the Commission, the Petitioner issued letter dated 12.12.2018 to MPPMCL and DMRC wherein the Petitioner submitted claim of Rs. 51,48,00,000/- towards Change in Law as per the GST order dated 09.10.2018 and relevant documents to support its claim. Respondents No. 1 and 2 after alleged reconciliation of Petitioner’s claims’, made payment of (a) Rs. 29,71,61,332/- on 26.12.2019 against the claim amount of its share of Rs. 40.15 Crores and (b) Rs. 8,08,32,555/- against the claim amount of its share of Rs. 11.33 Crores on 21.11.2019 and 23.01.2020 respectively. However, the Petitioner is aggrieved by the contents of letter dated 28.12.2019, by virtue of which the Respondents have denied the lawful amounts due to the Petitioner, claiming that

the Petitioner has failed to claim one-to-one correlation as mandated in the Order in 33/MP/2018.

8. The Petition was filed on 28.04.2020 and admitted by the Commission on 07.07.2020, whereby the Respondents were directed to file their replies by 27.07.2020 with an advance copy to the Petitioner who could file its rejoinders, if any, by 10.8.2020. Accordingly, DMRC filed its reply on 27.07.2020 and MPPCL filed its reply on 23.07.2020. The Petitioner filed the rejoinders to both replies on 10.08.2020.

Hearing dated 06.10.2021:

9. On 06.10.2021, the case was called out for virtual hearing. During the course of hearing, the learned counsel for the Petitioner advanced detailed submissions regarding liability of the Respondents to pay the GST claims against the invoices submitted by the Petitioner for the period during which the Petitioner was not registered under GST as the Petitioner has paid GST to its vendors who are registered under GST. Further, detailed submissions were made regarding compensation to the Petitioner for work contracts by considering pre-GST tax rate of 11% [VAT of 5% + Service Tax of 6% (i.e. 15% of 40% value of services)] on 40% value of services and 15% tax rate on balance 60% value of services, which increased to 18% post-GST. In response to this, the learned counsel for the Respondents, MPPMCL and Delhi Metro Rail Corporation advanced their detailed submissions refuting the claims of the Petitioner on the grounds that (i) claims are barred by res judicata, (ii) the Petitioner has failed to establish one to one co-relation for its claims in the absence of its GST returns and (iii) agreements entered into by the Petitioner with ACME Solar Holding Company Limited are service contracts and not works contracts. The matter was thereby reserved for Orders.

10. **Subsequent proceedings:**

- a) After being reserved for Orders on 06.10.2021, the petition was re-listed for hearing before this Commission on 11.01.2022, in view of the issuance of Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (*Change in Law Rules*) by the Ministry of Power, Government of India which provided for a procedure dealing with the Change in Law cases.
- b) During the course of hearing, the Petitioner submitted that the Change in Law Rules have no application where the other party to the agreement has already disputed/ contested the

Change in Law events and where such matters have been reserved for Orders. The learned senior counsel submitted that in the present case, the Respondents have disputed the Change in Law claims of the Petitioner in their replies filed on an affidavit and thus, parties have already disclosed their position regarding Change in Law event. Therefore, the Change in Law Rules ought not to be applied.

- c) Learned senior counsel for the Respondent, MPPMCL submitted since the matter had been reserved for Orders, the Commission may proceed to pass an appropriate Order. Accordingly, the Petition was again reserved for Orders.

Commission's Order dated 14.02.2022:

- d) The Commission disposed of the petition vide its Order dated 14.02.2022, on the following grounds:

“9. It is apparent from a plain reading of the Change in Law Rules that it provides for quantification of claims and a process and methodology for early recovery of mutually agreed claims relating to impact of change in law. The Change in Law Rules also provide that if there is a formula in the agreement for adjusting and recovering the amount of the impact of change in law, it shall be applied, otherwise the formula as prescribed in the Change in Law Rules is to be applied. We also find that the Change in Law Rules provide a time bound mechanism for settlement of such claims.

10. We consider the process and methodology as prescribed in the Change in Law Rules as a mechanism for time bound settlement of claims in a deterministic manner and the Petitioner is not going to be prejudiced by adopting the said mechanism. We have already held in our earlier Orders (e.g. Order dated 06.12.2021 in Petition No. 228/MP/2021) that since the Change in Law Rules is in the nature of procedural law and under the Change in Law Rules any substantive rights are not being taken away, it is to be applied retrospectively in all pending proceedings.

11. In view of the foregoing discussions, the Petitioner may approach the procurer for settlement of Change in Law claims among themselves in terms of the Change in Law Rules and approach the Commission only in terms of Rule 3(7) of the Change in Law Rules.

12. Accordingly, the Petition No. 373/MP/2019 is disposed of in terms of the above discussions and findings.”

- e) The Commission disposed several Petitions seeking similar reliefs under Change in Law events, taking the view that the concerned entities must have recourse to the Change in Law Rules, 2021. Several of these decisions were appealed against, before the Appellate Tribunal in O.P No. 1 of 2022 and Appeal Nos. 116, 74, 75 & 76 of 2022.

Order of Appellate Tribunal dated 05.04.2022:

- f) The Appellate Tribunal passed its judgment, setting aside the Orders of this Commission challenged in O.P No. 1 of 2022 and Appeal Nos. 116, 74, 75 & 76 of 2022, which originally sought compensation on account of Change in Law events, and were disposed by this Commission. Appellate Tribunal passed the following decision in the aforementioned appeals:

72. For the foregoing reasons, we find the impugned orders of the Central Commission applying the CIL Rules to matters pending before it for adjudication under Section 79(1)(f) of Electricity Act on the date of coming into force of said rules wholly erroneous, improper and bad in law. The said orders are thus set aside. In the result, the proceedings in claim cases (in which impugned orders were passed – and that includes the orders dated 04.02.2022 in the Original Petitions) remain inchoate. The Central Commission is duty-bound to consider each of them on the merits of the claims and adjudicate in accordance with law on the dispute(s) in proper exercise of its jurisdiction under Section 79 of the Electricity Act. It is directed to proceed to do so expeditiously.

73. We would be failing in our duty if we do not also note here (as also indicated earlier in this judgment) that prior to the decisions which were challenged by the captioned petitions/appeals, as indeed subsequently, the Central Commission has been taking the impugned approach on pending claims which has and would have resulted in a large number of such claims being unduly scuttled, non-suited the parties similarly placed as the petitioners/appellants herein. If the factual back-ground is same as in the cases at hand, such decisions would also constitute want of performance of statutory function by the Central Commission meriting an appropriate direction by this tribunal. This would be constrained to seek remedy against such order, if it thereby feels aggrieved. The remedies available in law include approaching the Central Commission for review or this tribunal ordinarily by an appeal.

74. Such that the affected parties do not suffer on account of faulty approach of adjudicatory authority, and this tribunal is not flooded by appeals raising identical issues against such other decisions as above, rendered in similar fact-situation by the Central Commission, it would be appropriate that it be asked to properly and fully perform its statutory function by exercise of its review jurisdiction, suo motu, in all similarly-placed claims for compensation founded on change in law events where similar decisions have been taken by the Central Commission after coming into force of CIL Rules on 22.10.2021 and, if such decisions are found running afoul of the view taken by this tribunal by this judgment, to vacate the same and restore the concerned Claim cases to its file and complete the process of adjudication thereupon in accordance with law. Needful action in above nature shall be initiated by the Central Commission within four weeks of this judgment. Of course, review can be undertaken even at the instance of the parties in question should they approach the Commission on their own. We may add that these directions are without prejudice to the remedy, if any, already pursued or intended to be pursued by the concerned parties vis-à-vis other such cases.”

- g) Pursuant to the decision of the Appellate Tribunal, the present petition, along with several

others were listed before this Commission where it passed the following Order on 14.05.2022 in 8/SM/2022:

“3. After hearing the suggestions put forth by the learned senior counsels and the learned counsels for the parties, the Commission is of the view that as per the directions of the APTEL in judgment dated 5.4.2022 in OP No. 1 of 2022 and Ors., in particular at paragraph 74, suo-motu order(s) are required to be issued to restore the petitions which were disposed by the Commission by applying the Change in Law Rules but which were not challenged before the APTEL. However, for the Petitions where the orders of the Commission have been set aside by the APTEL in terms of para 72 of the judgment, the petitions shall be restored on the records of the Commission for further necessary action.

4. Accordingly, as per the direction of the APTEL, in exercise of our suo-motu power of review, we hereby restore the Petitions mentioned in paragraph 1 above, on the record of the Commission at same stages, as were existing prior to the disposal of petitions.”

h) The present petition was re-listed for hearing on 14.07.2022, where the Commission made the following observations:

“Case was called out for virtual hearing.

2. During the course of hearing, learned counsel for the Petitioner and the learned senior counsel and learned counsel for the Respondent Nos. 1 & 2 made detailed submissions in the matter.

3. After hearing the learned senior counsel and learned counsel for the parties, the Commission directed the Petitioner to file its written submissions along with the relevant extract of GST Returns of its vendors for GST claims to the tune of Rs. 10.41 crore concerning the period prior to the Petitioner’s GST registration w.e.f. 5.6.2018 within a week with copy to the Respondents, who may file their response thereon, if any, within a week thereafter.

4. Subject to the above, the Commission reserved the matter for order.”

Written Submissions of MPPMCL:

11. MPPMCL filed its written submissions on 28.07.2022, vide which they submitted as under:

Re: Claim Barred by Res Judicata

a) The present petition is barred by *res judicata* in view of Section 11 of the Code of Civil Procedure, 1908 (CPC). The Petitioner is barred from raising a dispute which ought to have been raised by the Petitioner in Petition No. 33/MP/2018 in view of Explanation IV of Section 11 of CPC. Section 11 of CPC reads as under:-

“11. Res Judicata. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation IV.- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

- b) Reliance is placed on the judgment of Hon'ble Supreme Court in *Forward Construction Co. v. Prabhat Mandal (Regd.) (1986) 1 SCC 100*; *State of Karnataka v. All India Manufacturers Organisation (2006) 4 SCC 683*; the judgment dated 18.05.2011 of APTEL in *Bihar Steel Manufacturers Association Vs Bihar Electricity Regulatory Commission in Appeal No. 172 of 2010*.
- c) In light of the above, the present Petition seeking relief of GST for the period prior to registration with GST and other reliefs ought to be dismissed in light of the Order passed in Petition No. 33/MP/2018 by the Commission.

Re: No GST claim for invoices where GST returns are not available for such invoices

- d) The contention of the Petitioner that Respondents are liable to pay GST claims against the invoices submitted by Petitioner for the period during which Petitioner was not registered under GST but paid GST to its vendors who are registered with GST is wholly misconceived and liable to be rejected.
- e) The Petitioner was not registered under GST in the relevant period between 01.07.2017 to 04.06.2018. A Chartered Accountant certificate dated 07.03.2019, issued by EPC Contractor shows that the vendor, i.e. M/s ACME Cleantech paid GST on invoices raised on the Petitioner through input credit up to June 2018. The Petitioner also requested to consider letters from various vendors allowing invoices raised by the vendors on the Petitioner. However, it is pertinent to note that the said invoices are neither reflected in the input credit of the Petitioner nor in the returns. As per Order dated 09.10.2018 passed in 33/MP/2018, the Petitioner is bound to exhibit clear one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services backed by auditor's certificate.
- f) The Petitioner was registered under GST w.e.f. 05.06.2018 for the purpose of taking input credit, though it was mandatory to obtain GST registration under the corresponding law. The Petitioner having failed to comply with the provisions of law during the period 01.07.2017 till 04.06.2018, is therefore not entitled to claim reimbursement of GST on inputs from the Respondents. The submission made in the Rejoinder that it only realized later that it had to obtain GST Registration as per Section 24 (iii) of GST Act is of no

avail.

- g) The Commission vide Order dated 09.10.2018 allowed the impact of GST on the project cost based on the impact of 'Change in Law'. It is, therefore, necessary to reconcile that the GST was actually paid / deposited and the invoices produced for capital cost of the solar project of the Petitioner are reflected in GST records. It further directed that Petitioner should make available to the Respondents, the relevant documents to exhibit clear and one to one correlation and Respondent shall reconcile the claim and then pay the amount so claimed to the SPD. The Petitioner failed to provide such documents. Therefore, in the absence of the invoices being reflected in the GST returns of the Petitioner, the answering Respondent cannot legally reimburse the said amounts to the Petitioner.

Re: Pre- GST Regime Tax Amount Against Reconciled Claim

- h) GST on reconciled invoices was calculated as Rs 15,71,45,809/- by MPPMCL, whereas, as per the Petitioner's Statutory Auditor Certificate dated 24.10.2019, the pre-GST regime tax amount on reconciled invoices is Rs 14,33,68,756/-. This difference of Rs. 1,37,77,053/- is due to applicability of pre-GST Tax rates on invoices raised by M/s ACME Solar Holding Company Ltd. (EPC Service Contractor) to the Petitioner which was considered at the rate of 13.40%. The Petitioner entered into a Service EPC contract with M/s ACME Solar Holding Company Ltd. to avail the services for Installation, Testing and Commissioning of all the equipment for the Project. In the Statutory Auditor Certificate dated 24.10.2019 also, these invoices are shown under expense head 'Services' and the Service tax rate was 15% at the time of enactment of GST.
- i) The Petitioner has not submitted any ground to substantiate its claim for considering 11% tax for 40% value of services and 15% tax for balance 60% value being available during pre-GST regime. In case of a service contract, between Petitioner and EPC service provider, service tax @ 15 % has been correctly considered.

Re: Non-entitlement to late payment surcharge

- j) It is the responsibility of the Petitioner to provide relevant tenable documents and establish clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services and necessary to reconcile that GST is actually paid. Based on the documents provided by the Petitioner ,

the claim has been reconciled and complete admissible amount of Rs.29,71,61,332 /- payable against GST Claim of the petitioner has already been paid by the Answering Respondent. Thus, there is no question of any late payment surcharge. The claim for LPS is wholly untenable.

Re: Applicability of 9% GST instead of 18% GST for civil and general works due to inadvertent error in Order dated 09.10.2018 and faulty method of calculation.

- k) The Petitioner has claimed GST at a rate of 18% in invoices for construction work contract services. GST at the rate of 9% has been allowed for such services in accordance with the orders of this Commission dated 09.10.2018. In this regard, the Petitioner had preferred a Review Petition being 6/RP/2020 which was allowed in favour of the Petitioner vide order dated 24.01.2021. MMPMCL has complied with the Order dated 24.01.2021 passed in Review Petition No. 6/RP/2020 to the Petitioner. The issue has thus been resolved.

Submissions of the Petitioner:

12. The Petitioner in the plaint had submitted that its business is to generate electricity and the end product i.e. “electricity” falling into the category of “exempted” under HSN Code 27160000 is chargeable to NIL rate of GST as per GST rate Notification No. 2/2017 dated 28.06.2017. The Petitioner during the period 01.07.2017 to 04.06.2018 did not obtain GST registration due to the understanding that its end product i.e. electricity was exempted from GST (as per S.No. 104 of Notification No. 2/2017 of GST Act) and only took registration on 05.06.2018. Further, it is not the case that the Petitioner has not made the requisite payments to its vendors for the GST claimed by them but is a case where GST Return for the said period is not available with the Petitioner due to non-registration with GST till June, 2018. Therefore, now the Petitioner has procured GST registration for the purpose of taking input credit and since the Respondents have denied the GST claim of the Petitioner for the period during which the Petitioner has paid the GST to its vendors which form part of the invoices raised by such vendors being registered with GST and the same is reflecting in Auditor’s certificate provided by the Petitioner to the Respondents.
13. The Petitioner had filed a short submission on 05.08.2022 vide which it has submitted as under:

- a) The submissions are filed pursuant to the directions of this Commission during the course of the hearing dated 14.07.2022, wherein this Commission directed the Petitioner to submit the relevant extract of the GST returns of its vendors for GST claims amounting to Rs. 10.14 crores for the period prior to the GST registration of the Petitioner i.e. prior to 05.06.2018.
- b) The GST claim can be bifurcated as follows:
- (i) **GST claim amounting to Rs. 10,14,10,501/-** The claim of the Petitioner has been rejected on account of non-furnishing of proper documentation.
 - (ii) **GST claim amounting to Rs. 2,05,54,288/-** The claim of the Petitioner in relation to Proforma invoices dated 03.12.2018 and 31.12.2018 has been rejected on account of non-furnishing of proper documentation.
 - (iii) **GST claim amounting to Rs. 1,37,77,053/-** The claim of the Petitioner in the pre-GST regime has increased from Rs. 14,33,68,756/- to Rs. 15,71, 45,890 leading to an excess deduction of Rs. 1,37,77,053/-
- c) Vide the present submissions, the Petitioner has stated as to why the present Petition is not barred by Res Judicata and submitted documentary evidence to establish its GST claim of Rs. 10,14,10,501/- and Rs. 1,37,77,053/-.
- d) The present Petition is not barred by res judicata as provided under Section 11 of the Code of Civil Procedure, 1908 (CPC). This is based on the reasoning that the cause of action leading to the institution of the present proceeding is wholly different from the cause of action in Petition No. 33/MP/2018. The cause of action in the present Petition pertains to partial denial of GST claims by the Respondent due to non-reconciliation of the claim amounts between the Petitioner and the Respondent. This is wholly different from the cause of action in Petition No. 33/MP/2018 which *inter alia* pertained to approval of GST as a claim for change in law. The dispute as raised in the present Petition could not have been raised in the earlier petition as the whole issue emanates solely on account of the reconciliation and denial of the GST claim by the Respondent, a dispute which did not exist at the time of filing Petition no 33/MP/2018. Accordingly, the preliminary objection as raised by the Respondent is liable to be rejected on this ground alone.

Re: Reconciliation of GST claim of Rs. 10,14,10,501/- through Auditor Certificate of the Petitioner, GST returns of the Petitioner's vendors, CA Certificates issued by the Vendors and payment certificates issued by the Vendors

- e) The GST claim amounting to Rs. 10,14,10,501/- is a valid and legitimate claim duly supported by documentary evidence. As submitted before this Commission, the Petitioner has time and again provided various documents to the Respondent in support of its claim.
- f) In light of the directions of this Commission, the Petitioner is enclosing the following documents evidencing the payment of Rs. 10,14,10,501/- to the vendors of the Petitioner who have duly deposited the same with the Government:
- (i) A copy of the GST returns of the vendors i.e., of Acme Cleantech Solutions Pvt. Ltd., Rewa Ultra Mega Solar Limited, Global Safety Solutions, VISTRA ITCL (INDIA) LIMITED (formerly known as IL & FS Trust Company Ltd), India Insure Risk Management, Tractbel Engineering Pvt. Ltd., DNV Energy India Pvt Ltd (formerly known as Garrad Hassan India Private Limited).
 - (ii) Auditor's certificate dated 07.03.2019 of Acme Cleantech Solutions Pvt. Ltd wherein it has been certified that the GST in relation to invoices raised by ACME Cleantech on the Petitioner has been considered and GST has been paid in relation to the same.
 - (iii) Certificate of L&T Finance Limited (vendor) confirming the payment of GST in relation to the invoice raised on the Petitioner. *The GST return was not shared by the vendor on account of confidentiality. Petitioner has already submitted certificate from CA certifying payment of GST to L&T Finance Limited and is annexed as Annexure P-12 of the main petition (page 584-587 of the main petition copy).*
 - (iv) Certificate of ICICI Lombard (vendor) confirming the payment of GST and screenshot of its GST return portal. *The complete GST return was not shared by the vendor on account of confidentiality. Petitioner has already submitted certificate from CA certifying payment of GST to L&T Finance Limited and is annexed as Annexure P-12 of the main petition (page 584-587 of the main petition copy).*
 - (v) Certificate dated 24.10.2019 issued by the Statutory Auditor listing invoices raised by the vendors on the Petitioner and the GST rate therein.
 - (vi) Certificate from CA certifying payment of GST to its vendors during the period when it was not registered in GST but made GST payments to its vendors. .

g) Thus, on the basis of the above, the claim of Rs. 10,14,10,501/- is duly supported by documentary evidence and accordingly, the Respondent is bound to disburse the claim in accordance with the Orders of this Commission.

Re: Reconciliation of GST claim of 1,37,77,053

- h) The Respondent has considered the tax in the pre-GST regime as Rs. 15,71,45,809/-. However, the said amount is incorrect and erroneous as the tax in the pre-GST regime was Rs. 14,33,68,756/- which has been duly certified by the Statutory Auditor vide Certificate dated 24.10.2019. Accordingly, considering the tax in the pre-GST regime as 14,33,68,756/-, the GST claim of the Petitioner would increase by Rs. 1,37,77,053/- which is bound to be disbursed to the Petitioner.
- i) The pre-GST tax claim of the Petitioner is based on the reasoning that in the pre-GST tax regime, the Petitioner was treating 60% of its entire contract value as pure services and thereby discharging service tax at 15% and the remaining 40% as works contract services taxable at 11% (effective tax) and thereby discharging VAT and service tax on the same. However, in complete disregard of the aforementioned tax structure, the Respondents have proceeded to treat the entire contract value as pure services taxable at 15%.
- j) The Respondents have failed to provide any basis or explanation to support its claim of tax in the pre-GST regime. Furthermore, the Respondent has also disregarded the tax positions adopted by the Petitioner without providing any cogent explanation for the same.
- k) The Commission vide its order dated 05.02.2019 in 187/MP/2018 and batch has held that commercial decision of adoption of tax for implementation of the project including the mode of procurement of goods and services taken by a solar power developer (the Petitioner in the present case) cannot be questioned by the power procurer (the Respondents in the present case) if the decision of such adoption predates GST. For ready reference, relevant paragraph is extracted hereinbelow:

“ ...

*183. The Petitioners are directed to make available to the Respondents all relevant documents exhibiting clear and one to one correlation between the projects and the supply of goods or services, duly supported by relevant invoices and Auditor's Certificate. The Respondents are further directed to reconcile the claims for Change in Law on receipt of the relevant documents and pay the amount so claimed to the SPDs as per the methodology discussed in Para 174 and 182 above. **It has been brought to our notice that in some cases, the Respondent Procurers are questioning the rationale of the commercial decisions taken by***

the SPDs in cases where the rates of GST are on the higher side. Since, the decision for project implementation including the mode of procurement of goods and services were taken by SPDs prior to the implementation of GST, it would not be appropriate to question such commercial decisions on the basis of the differential rates of GST on certain goods and services, and payments should be made based on the invoices raised and supported by Auditor's Certificate

- l) In light of the order dated 05.02.2019 by this Commission, since the tax rate was based on the commercial decision of the Petitioner and it was in place prior to GST, the same cannot be doubted/questioned by the Respondent. On this basis, it is submitted that tax amount in the pre-GST regime as considered by the Respondent for the purpose of reconciliation is incorrect, erroneous. Therefore, the claim amount of Rs. 1,37,77,053/- by Petitioner must be disbursed/reimbursed by the Respondent in a time bound manner.
- m) Accordingly, on the basis of aforementioned submissions and the detailed evidences enclosed with the present Written Submissions, the entire amount of Rs. 10,14,10,501/- may be reimbursed to the Petitioner.

Analysis and Decision

14. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records.
15. The brief facts of the Petition are that the Petitioner has alleged that in consonance with the Commission's order dated 09.10.2018, it had raised GST claims amounting to Rs. 51,48,00,000/- along with relevant documents, vide its letter dated 12.12.2018. However, the Respondents after reconciliation has only made payment as under:
- (a) MPPMCL has made payment of Rs. 29,71,61,332/- on 26.12.2019 against the claim amount of its share of Rs. 40.15 Crores and
 - (b) DMRC has made payment of Rs. 8,08,32,555/- on 21.11.2019 and 23.01.2020 against the claim amount of its share of Rs. 11.33 Crores.
16. The Petitioner has submitted that GST claims for Rs. 12,19,64,789/- against the invoices for which one to one correlation with GST returns could not be established was disallowed for payment by the Respondents. Further, MPPMCL has wrongly considered tax in pre-GST regime as Rs. 15,71,45,809/-. However, as per the Statutory Auditor Certificate dated

24.10.2019, the tax in Pre-GST regime is Rs. 14,33,68,756 (details as in the letter dated 06.01.2020). Therefore, an additional deduction of Rs. 1,37,77,053/- (15,71,45,809 – 14,33,68,756) has been wrongfully made by MPPMCL and thus required for the balance payment.

17. Before going into merit of the case, we think it appropriate to first deal with the preliminary objections raised by the Respondents. The Respondent No. 1 (MPPMCL) has submitted that the present petition is barred by *res judicata* in view of Section 11 of the Code of Civil Procedure, 1908 (CPC). The Petitioner is barred from raising a dispute which ought to have been raised by them in Petition No. 33/MP/2018 in view of Explanation IV of Section 11 of CPC.

18. We observe that Section 11 of the Code of Civil Procedure, 1908 (CPC) stipulates as under:

“11. Res judicata - No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.- The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II. - For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III. - The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV. - Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V. - Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI. - Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII. - The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII. - An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in as subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.

19. We observe that Order II Rule 2 of the Code of Civil Procedure, 1908 stipulates as under:

“ORDER II- FRAME OF SUIT

...

2. Suit to include the whole claim—

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.”

20. From the above, the Commission observes that Section 11 of the Code of Civil Procedure, 1908 mandates that any suit or issue in which matter directly and substantially in issue has been heard and finally decided on merits by the competent Court, it cannot be tried again by any Court provided the matter directly and substantially in issue is same between the same parties to the suit. The Rule of constructive res judicata is engrafted under Explanation IV of Section 11 of the Civil Procedure Code, 1908. It is observed that whereas, res judicata basically prohibits suit which has already been decided by a competent court, constructive res judicata prohibits raising issues which ought to be raised in the previous suit. It provides that if a plea could have been taken by a party in a proceeding between him and his opponent, he should not be permitted to take that plea against the same party in a subsequent proceeding with reference to the same subject-matter. Further, Order II Rule 2 of the Code of Civil Procedure, 1908 mandates that the suit filed should include the whole claim.

21. The Commission observes that the object underlying Section 11 of the Code of Civil Procedure, 1908 is that if the proceeding originally instituted is proper, the decision given therein is binding on all the persons on whom the right or interest may devolve. Further, it also prohibits raising issues which ought to be raised in the previous suit with reference to the

same subject-matter. The doctrine of res-judicata is conceived in the larger public interest that all the litigation must, sooner than later come to an end. Similarly, the object of Order II Rule 2 of the Code of Civil Procedure, 1908 is to ensure that no defendant is sued or vexed twice with regard to the same cause of action and to prevent a plaintiff from splitting claims and remedies based on the same cause of action. The effect of Order II Rule 2 of CPC is to bar a plaintiff who had earlier claimed certain remedies with regard to a cause of action, from filing a second suit with regard to other reliefs based on the same cause of action. The Commission observes that Section 11 the Code of Civil Procedure read with Order II Rule 2 of the Code of Civil Procedure bars the subsequent suit on the same cause of action but does not however bar a subsequent suit based on a different and distinct cause of action.

22. The Commission observes that in the Petition No. 33/MP/2018 along with IA 50 of 2018, the Petitioner made the following prayer:

“a. Declare that the introduction of the GST Law is a “Change in Law” event in accordance with Article 17 of the PPAs dated 17.04.2017 executed between the Petitioner and Respondent Nos. 1 & 2 and that the Petitioner is entitled to relief thereunder;

b. Direct the Respondent No. 1 & 2 to compensate the Petitioner for the additional capital/ operational cost incurred/ to be incurred by it due to introduction of GST Law by way of adjustment in the quoted tariff as well as an upfront lumpsum payment, as the case may be, in terms of Article 17.1(e) of the PPAs;

c. Pursuant to grant of prayer (a) and (b) above, approve the necessary consequential amendments to the PPAs and LoIs;

d. Allow legal and administrative costs incurred by the Petitioner in pursuing the instant petition; and

e. Grant such order, further relief(s) in the facts and circumstances of the case as this Ld. Commission may deem just and equitable in favour of the Petitioner.

Connected I.A No. 50/2018

a. Permit the Petitioner to amend prayer (b) of the instant petition in terms stated in the instant application; and

b. Pass any other order or direction that this Ld. Commission may deem fit in the eyes of equity, justice and good conscience.”

23. The Commission vide its Order dated 09.10.2018, in Petition No. 188/MP/2017 & Ors. (including Petition No. 33/MP/2018 along with connected I.A. 50 of 2018) held as under:

“375. To sum up the:

- a. Issue No. 1: The Commission has jurisdiction to adjudicate in the matter.
- b. Issue No. 2: The enactment of “GST laws” is covered as “Change in Law” under Article 12 of the PPA.
- c. Issue No. 3 & 4: “GST Laws” are applicable on all cases except in case of the generating company where the “actual date of Commissioning” is prior to 01.07.2017. As regards its claim (subject to threshold limit in case of *Petition No. 33/MP/2018*) during construction period, the Petitioners have to exhibit clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services backed by auditor certificate. In respect of PV Modules post enactment of “GST Laws” 5% will be applicable on intra state procurement as well as import by EPC or SPV. The amount as determined by Petitioners shall be on “back to back” basis to be paid by DISCOMS to Petitioners under the respective “Power Sales Agreements”. The claim of the Petitioners on account of additional tax burden on “O&M” expenses (if any), is not maintainable.
- d. Issue No. 5: The relief for “Change in Law” is allowed as a separate element on one time basis in a time bound manner. The Claim based on discussions in paragraph 338 & 348 of this Order shall be paid within sixty days of the date of this Order failing which it will attract late payment surcharge as provided under PPA.
- e. Issue No. 6: The claim is to be raised as one-time upfront lumpsum payment which becomes due on the sixtieth date from the date of this Order by the Commission and after that the “late payment surcharge” as provided under PPAs is to be levied. Therefore, the claim regarding separate “Carrying Cost” in the instant petitions is not attracted.”

24. From the above, the Commission observes that vide Order dated 09.10.2018 in *Petition No. 33/MP/2018* along with connected I.A. 50 of 2018, it was, *inter-alia*, held that for GST claims (subject to threshold limit in case of *Petition No. 33/MP/2018*) during construction period, the Petitioner had to exhibit clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services backed by auditor certificate. The amount as determined by Petitioners shall be on back to back basis to be paid by DISCOMS to Petitioners under the respective Power Sales Agreements. The claim on account of O&M was not maintainable. The claims were to be paid within sixty days of the date of this Order failing which it will attract late payment surcharge as provided under PPA. The claim was to be raised as one-time upfront lumpsum payment which becomes due on the sixtieth date from the date of the Order by the Commission and after that the late payment surcharge as provided under PPAs is to be levied. Therefore, the claim regarding separate “Carrying Cost” in the instant petitions is not attracted.

25. It is further observed that in the instant petition the Petitioner is asking for declaration that Respondents are liable to pay GST claims against the invoices submitted by Petitioner for the period during which Petitioner was not registered under GST but has paid GST to its vendors who are registered with GST and declaration that Respondents should compensate the Petitioner by considering pre-GST tax rate of 11% on 40% value of services and 15% tax rate on balance 60% value of services which increased to 18% post GST and to compensate the Petitioner for the balance GST claims along with LPS as applicable under PPA.
26. The Commission observes that the prayers in the instant petition are not covered under the prayers of previous petition 33/MP/2018. Rather the instant petition is outcome of the observations of the Respondents and rejection of claims of the Petitioner, in compliance to the implementation of directions given while disposing of Petition No. 33/MP/2018. Therefore, the Commission holds that the argument that the Petition is barred by the Principles of Constructive Res-judicata and Order II Rule II of Code of Civil Procedure, 1908 is not tenable and does not sustain.
27. From the submissions of the contracting parties, following issues emerge for adjudication before the Commission:
- a) ***Issue No. 1:*** *Whether the Respondents are liable to pay GST claims against the invoices submitted by Petitioner for the period during which Petitioner was not registered under GST but has paid GST to its vendors who are registered with GST?*
 - b) ***Issue No. 2:*** *Whether the Respondents should be directed to compensate the Petitioner by considering pre-GST tax rate of 11% on 40% value of services and 15% tax rate on balance 60% value of services which increased to 18% post GST?*
 - c) ***Issue No. 3:*** *Whether the Respondents should be directed to compensate Petitioner the balance GST claims along with LPS as applicable under PPA?*

28. We will now discuss these issues.

Issue No. 1: *Whether the Respondents are liable to pay GST claims against the invoices submitted by Petitioner for the period during which Petitioner was not registered under GST but has paid GST to its vendors who are registered with GST?*

29. The case of the Petitioner is that MPPMCL and DMRC have wrongfully, rejected due claims,

on the reason that, the Petitioner could not establish ‘one to one correlation with GST returns’ as certain invoices raised on account of GST claims fail to reflect in GST returns.

30. MPPMCL has submitted that the Petitioner was not registered under GST between 01.07.2017 to 04.06.2018. A Chartered Accountant Certificate dated 07.03.2019, issued by EPC Contractor shows that the vendor, i.e. M/s ACME Cleantech paid GST on invoices raised to the Petitioner through input credit up to June 2018. Further, the invoices of the vendor are not reflected in the input credit of the Petitioner and such invoices are not reflected in the returns. In the absence of the invoices being reflected in the GST returns of the Petitioner, MPPMCL cannot legally reimburse the said amounts to the Petitioner.
31. *Per contra*, the Petitioner has submitted that the business of Petitioner is to generate electricity and the end product i.e. “*electricity*” falling into the category of “*exempted*” under HSN Code 27160000 is chargeable to *NIL* rate of GST as per GST rate Notification No. 2/2017 dated 28.06.2017. The Petitioner during the period 01.07.2017 to 04.06.2018 did not obtain the GST registration due to the understanding that its end product i.e. electricity was exempted from GST (as per S.No. 104 of Notification No. 2/2017 of GST Act) and only took registration subsequently, on 05.06.2018 for the purpose of taking input credit. The Petitioner has made the requisite payments to its vendors for the GST claimed by them.
32. We observe that, in compliance to the directions given in Order dated 09.10.2018 in Petition No. 33/MP/2018, the Petitioner is duty bound “*to exhibit clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services backed by auditor certificate*”. The principle enunciated here is that for claiming compensation of GST, specific invoices (depicting GST claims) being raised by the SPD’s becomes payable by the Respondents, if and only if, the invoices are identifiable with the project of the SPDs and the Auditor substantiates that the actual payments have been made towards GST. Therefore, once the SPDs have made the GST payments to their vendors and can establish one to one correlation with the project of the SPDs, the Respondents have to reimburse the same to the SPDs.
33. We observe that the relevant sections under The Central Goods and Services Tax Act, 2017 No. 12 of 2017 stipulate as under:

Eligibility and conditions for taking input tax credit

16 (1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.

Registration

22. (1) Every supplier shall be liable to be registered under this Act in the State or Union territory, other than special category States, from where he makes a taxable supply of goods or services or both, if his aggregate turnover in a financial year exceeds twenty lakh rupees:

Provided that where such person makes taxable supplies of goods or services or both from any of the special category States, he shall be liable to be registered if his aggregate turnover in a financial year exceeds ten lakh rupees.

24. Notwithstanding anything contained in sub-section (1) of section 22, the following categories of persons shall be required to be registered under this Act,—

....

(iii) persons who are required to pay tax under reverse charge;

34. We observe that as per Section 16(1) GST Act, Input tax credit is available only to a registered person. When a registered person is supplied with goods or services or both, on which tax has been charged, he is allowed to take credit of the input tax paid. This is subject to the provisions relating to use of ITC under section 49 and the conditions & restrictions in the rules. This means, if a person is unregistered he will not be eligible to claim Input tax credit. We also observe that as per Section 22(1) every supplier is required to register under the GST law in the State/Union territory from where it makes a taxable supply of goods or services or both. As per Section 24 (iii) supplier who is required to pay tax under reverse charge is also required to be registered under this GST Act. We note that in the instant petition the Petitioner has admitted on the records that it was not registered under the GST Act during the period 01.07.2017 to 04.06.2018 and that it had got registered itself under GST Act only on 05.06.2018.

35. During the hearing held on 14.07.2022, the Petitioner has admitted its mistake due to misconception that since the supply of electricity is not taxable under GST Act, there was no need for any registration. However, subsequently, it got itself registered realizing that it may become liable to pay GST under Reverse Charge. The Petitioner has submitted that under GST Laws there is a requirement of filing GSTR 3B on the revenue side and GSTR 2A on the purchase side from the date of registration under GST Law. GST Laws have no

retrospective aspect. GSTR 2A is not the tax liability return. Since the Petitioner was not registered under the GST Act during the period 01.07.2017 to 04.06.2018, therefore no GSTR 2A could have filed under the GST Laws. However, the fact remains that the purchases were made, the cost was incurred during the period 01.07.2017 to 04.06.2018 and the proper declarations have been obtained from the vendors and placed on records. Since it had made the requisite payments to its vendors for the GST claimed by them the same may be considered for repayment. The GST payments to vendors are reflecting in Auditor's certificate provided by Petitioner to the Respondents. The Respondents can establish clear one to one correlation for the transactions from the declarations. DMRC has specifically submitted that the Petitioner may submit GST returns on the sale sides of the vendors for establishing the correlation. The vendors sales side return reflects that the GST received and can establish the chain of the purchase *vis-a-vis* product which had gone in the project. The Petitioner submitted that they have already given the statutory auditor certificates, copies of GSTR-1 and GSTR-3B of the vendors Conformation certificates from the vendors etc. to the Respondents. After the hearing the Commission directed the Petitioner to file the relevant extract of GST Returns of its vendors for GST claims to the tune of Rs. 10.41 crore concerning the period prior to the Petitioner's GST registration w.e.f. 05.06.2018. We note that the Petitioner has submitted the relevant documents.

36. In our view the issue before us for adjudication is that whether the invoices for the period 01.07.2017 to 04.06.2018 (during which Petitioner was not registered) should be allowed to be considered for payment by the Respondents as Change in law under Article 12 of the PPA.
37. We observe that Appellate Tribunal for electricity vide its decision dated 27.04.2021 in the case titled *Coastal Gujarat Power Limited Vs. CERC & Others (Appeal No.172 of 2017)* has held as under:

"95. ...Once it is established that levy of a tax on services availed by CGPL has an impact on the cost of or revenue from business of generation and sale of electricity whether directly or indirectly –compensation must follow."

38. In view of the above, we are of the view that any payments made on account of enactment of GST Laws qualify as the event of 'Change in Law' as contained in Article 12 of PPA. Hence, in the interest of justice we hold that such invoices which are identifiable with the project of the Petitioner and substantiated by the Auditors that the actual payments have been made

towards GST can be considered.

39. In view of the above, the contracting parties are directed to reconcile and process only those invoices for compensation on which the Petitioner had paid GST to its registered vendors and the vendors have deposited the GST with the appropriate Government, irrespective of the fact whether the Petitioner was registered under GST Act or not. Needless to say, that the reconciliation by the contracting parties should be strictly in accordance with the directions given in Order dated 09.10.2018 in Petition No. 33/MP/2018 and Order dated 24.01.2021 passed in Review Petition No. 6/RP/2020.
40. The Issue No. 1 is disposed of accordingly.

Issue No. 2: Whether the Respondents should be directed to compensate the Petitioner by considering pre-GST tax rate of 11% on 40% value of services and 15% tax rate on balance 60% value of services which increase to 18% post GST?

41. The Petitioner has submitted that MPPMCL has wrongly considered tax in pre-GST regime as Rs. 15,71,45,809/-, however as per the Statutory Auditor Certificate dated 24.10.2019, the tax in Pre-GST regime is Rs. 14,33,68,756 (details as in the letter dated 06.01.2020). Therefore, an additional deduction of Rs. 1,37,77,053/- (15,71,45,809 –14,33,68,756) has been wrongfully made by MPPMCL and thus required for the balance payment. The Petitioner has submitted works contract under the pre-GST framework, out of the total quantum of Services, attracted the tax-rate as under:
- (i) 40% value of Services attracted tax of 11% (i.e. 5% VAT and 6% CST); and
 - (ii) 60% value of Services attracted 15% tax.

However, the Respondent has wrongly considered that the tax rate on Civil and General works (Services) during pre-GST regime was 15%.

42. *Per contra*, the Respondents have submitted the difference of Rs. 1,37,77,053/- is due to applicability of pre-GST Tax rates on invoices raised by M/s ACME Solar Holding Company Ltd. (EPC Service Contractor) to the Petitioner which was considered at the rate of 13.40%. The Petitioner entered into a Service EPC contract with M/s ACME Solar Holding Company Ltd. to avail the services for Installation, Testing and Commissioning of all the Equipment for the Project. In the Statutory Auditor Certificate dated 24.10.2019 also, these invoices are shown under expense head 'Services' and the Service tax rate was 15% at the time of

enactment of GST. The Petitioner has not submitted any ground to substantiate his claim for considering 11% tax for 40% value of services and 15% tax for balance 60% value being available during pre-GST regime. In case of a service contract, between Petitioner and EPC service provider service tax @ 15 % has been correctly considered. DMRC has further submitted that the adjudication of the subject issue i.e. whether the Petitioner is legally entitled to reimbursement of the Service Tax @11% or @15% for pre-GST period, under the peculiar facts of the case should be adjudicated by the GST authorities and as such, the subject issue should therefore, be referred for adjudication or arbitration having specific knowledge and expertise in the field. The Commission, being a statutory authority, cannot legally rule on the subject issue of legal entitlement of the Petitioner to claim deduction of tax @11% or @15% for the pre-GST period, as the same involves detailed examination of subject law, the terms and conditions of the Service contracts executed by the Petitioner and its consequent effect on the claims raised by the Petitioner.

43. With regard to the alleged claim of MPPMCL qua Statutory Auditor's Certificate dated 24.10.2019 that the same incorporates Service Tax @ 15% at the time of enactment of GST, the Petitioner has further submitted that MPPMCL is partially reading the said Auditor's Certificate since the tax rate against the same service entry, which MPPMCL is relying on mentions Pre-GST regime tax of 13.4% (break-up of 13.4% set out above).
44. Before proceeding it is pertinent to mention here that the Commission vide Order dated 09.10.2018 in Petition No. 33/MP/2018, has, inter-alia held that "*The Commission has jurisdiction to adjudicate in the matter.*" Further, the instant petition is about reconciliation of GST claims that were raised by the Petitioner in pursuant with the Order dated 09.10.2018 and is not about framing of new Rules and Regulations. The dispute between the parties is of contractual nature and application of existing Service Tax presently being dealt under GST tax framework. Hence, we feel there is no legal hurdle in proceeding for adjudication in the matter.
45. We observe that Petitioner has not placed any Agreement on record. Only one Agreement dated 05.04.2018 has been placed on record by DMRC. The recital of Agreement dated 05.04.2018 between the contracting parties stipulates as under:

WHEREAS

A.

B. *The Owner desires to avail the services for “installation, Testing and Commissioning” of all the Equipments i.e. Photovoltaic Modules, Inverters, Power and Distribution Transformers, Junction Boxes, Transmission Line including Civil Works, (hereinafter referred to as “Works”) for the Project.*

C. *The Contractor is desirous to provide such services in relation to the Works and pursuant to the tender issued by the Owner, was selected to perform the Works and all actions reasonably, necessary for delivery of the Works/Facilities in terms of this Contract.”*

46. We observe that the Petitioner has claimed that tax was payable at 13.40% (weighted average of 11% on 40% and 15% of remaining 60%) in Pre-GST regime. However, the Respondents herein have considered a flat 15% tax rate for entire 100% value of services.
47. We observe that one *RFE Solar Private Limited* (the applicant before the Authority of Advance Ruling, Rajasthan (AAR Rajasthan) raised the question, “*whether contract for Erection, Procurement and Commissioning of Solar Power Plant shall be classifiable as Supply of Goods or Supply of Services under the provisions of the CGST Act, 2017 and Rajasthan SGST Act, 2017?*” The Authority (AAR Rajasthan) held that “*the solar power plant is a big project and has a permanent location for onward sale of power to the consumer. Such plant would therefore have an inherent element of permanency and it cannot be shifted to any other place without dismantling the same. Further, it is a tailor-made system which cannot be sold as it is to the other person. Therefore, the contract for Erection, Procurement and Commissioning of Solar Power Plant falls under the ambit “works contract services” (SAC 9954) of Notification No. 11/2017 Central Tax (Rate) dated 28th June, 2017 and attracts 18% rate of tax under IGST Act, or 9% each under the CGST and SGST Acts, aggregating to 18%.*”
48. The Commission observes that the referral “*Work Contracts in GST*” has been prepared by *National Academy of Customs, Indirect Taxes & Narcotics*, for the *Directorate General of Taxpayer Services, Central Board of Excise & Customs* and the same is available on the official website of the Central Board of Excise & Customs (www.cbec.gov.in) for reference. It gives various insights of treatment of Work Contracts under GST.

What is a works contract?

Simply put, a works contract is essentially a contract of service which may also

involve supply of goods in the execution of the contract. It is basically a composite supply of both services and goods, with the service element being dominant in the contract between parties. In a general sense, a contract of works, may relate to both immovable and immovable property. E.g. if a sub-contractor, undertakes a sub-contract for the building work, it would be a works contract in relation to immovable property. Similarly, if a composite supply in relation to movable property such as fabrication/painting/annual maintenance contracts etc. is undertaken, the same would come within the ambit of the broad definition of a works contract.

Works Contract – the position in VAT & Service Tax

A works contract has elements of both provision of services and sale of goods, and was therefore taxable under both laws.

VAT

In the case of Gannon Dunkerly, the Hon'ble Apex Court had held that in case of a works contract, the dominant intention of the contract is the execution of works, which is a service and there is no element of sale of goods (as per Sale of Goods Act). The contract being one indivisible contract, it cannot be broken up to levy VAT on sale of goods involved in the execution of works contract. This decision led the Government to amend the Constitution of India and insert Article 366(29A) (b) which enabled the State Governments to levy tax (VAT) on transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract.

SERVICE TAX

Works contract has been defined in section 65B of the Finance Act, 1994 as a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any moveable or immoveable property or for carrying out any other similar activity or a part thereof in relation to such property.

By virtue of Section 66E of Finance Act, 1994, the service portion involved in the execution of works contract was a declared service. Hence Service Tax could be levied only on the service element of the works contract. The principles of segregation of the value of goods were provided in Rule 2A of the Service Tax (Determination of Value) Rules, 2006.

Position under GST

Under GST laws, the definition of "Works Contract" has been restricted to any work undertaken for an "Immovable Property" unlike the existing VAT and Service Tax provisions where works contracts for movable properties were also considered.

The Works Contracts has been defined in Section 2(119) of the CGST Act, 2017 as

"works contract" means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any

immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract.”

Thus, from the above it can be seen that the term works contract has been restricted to contract for building construction, fabrication etc of any immovable property only. Any such composite supply undertaken on goods say for example a fabrication or paint job done in automotive body shop will not fall within the definition of term works contract per se under GST. Such contracts would continue to remain composite supplies, but will not be treated as a Works Contract for the purposes of GST.

As per Para 6 (a) of Schedule II to the CGST Act, 2017, works contracts as defined in section 2(119) of the CGST Act, 2017 shall be treated as a supply of services. Thus, there is a clear demarcation of a works contract as a supply of service under GST.

As per section 17(5) (c) of the CGST Act, 2017, input tax credit shall not be available in respect of the works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service. Thus, ITC for works contract can be availed only by one who is in the same line of business and is using such services received for further supply of works contract service. For example a building developer may engage services of a sub-contractor for certain portion of the whole work. The sub-contractor will charge GST in the tax invoice raised on the main contractor. The main contractor will be entitled to take ITC on the tax invoice raised by his subcontractor as his output is works contract service. However, if the main contractor provides works contract service (other than for plant and machinery) to a company say in the IT business, the ITC of GST paid on the invoice raised by the works contractor will not be available to the IT Company.

Plant and Machinery in certain cases when affixed permanently to the earth would constitute immovable property. When a works contract is for the construction of plant and machinery, the ITC of the tax paid to the works contractor would be available to the recipient, whatever is the business of the recipient. This is because works contract in respect of plant and machinery comes within the exclusion clause of the negative list and ITC would be available when used in the course or furtherance of business.

....

....

Conclusion

A works contract is treated as supply of services under GST. Under the previous indirect taxes dispensation, there were issues in tax treatment of works contract. Both the Central Government (on the services component of a works contract) & the State Governments (on the sale of goods portion involved in the execution of a works contract) used to levy tax. Thus the same contract was subject to taxation by both Central and State Government. GST aims to put at rest the controversy by defining what will constitute a works contract (applicable for immovable property only), by stating that a works contract will constitute a supply of service and specifying a uniform rate of tax applicable on same value across India. Thus, under GST, taxation of works contract will be simpler and easier to administer.

49. We observe that Clause 2 A (ii)A of the Service Tax (Determination of Value) Rules, 2006, stipulates as under:

“2A. Determination of value of service portion in the execution of a works contract.- Subject to the provisions of section 67, the value of service portion in the execution of a works contract , referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely:-

(ii) Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable in the following manner, namely:-

(A) in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent of the total amount charged for the works contract;

(B) in case of works contract entered into for maintenance or repair or reconditioning or restoration or servicing of any goods, service tax shall be payable on seventy percent of the total amount charged for the works contract;

(C) in case of other works contracts, not covered under sub-clauses (A) and (B), including maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property , service tax shall be payable on sixty per cent. of the total amount charged for the works contract;

Explanation 1. - For the purposes of this rule-

(a) “original works” means-

(i) all new constructions;

(ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;

(iii) erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise;

50. We observe that Notification No. 26/2012- Service Tax Dated: 20th June, 2012 G.S.R. 468 (E) stipulates as under:

*In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act), and in supersession of notification number 13/2012- Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 211 (E), dated the 17th March, 2012, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby **exempts the taxable service of the description specified in column (2) of the Table below, from so much of the service tax leviable thereon under section 66B of the said Act, as is in excess of the service tax calculated on a value which is equivalent to a percentage specified in the corresponding entry in column (3) of the said Table, of the amount charged by such***

service provider for providing the said taxable service, unless specified otherwise, subject to the relevant conditions specified in the corresponding entry in column (4) of the said Table,...

51. We note that the Petitioner has submitted Abatement Rate Chart (under Service Tax) as under:

16	<i>Works contracts entered into for execution of original works</i>	40%	<i>Cenvat credit on inputs not availed</i>
17	<i>Works contracts entered into for maintenance or repair or reconditioning or restoration or servicing of any goods</i>	70%	<i>Cenvat credit on inputs not availed</i>
18	<i>For other works contracts, not covered under sr. no. 16 and 17 , including maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property</i>	60%	<i>Cenvat credit on inputs not availed</i>

52. From the preceding paragraphs, we observe that ‘works contract’ is treated as supply of services under GST and is taxed at 18%. In pre-GST era ‘works contract’ had elements of both services and sale of goods, and was therefore taxable under both laws viz. VAT & Service Tax. The Central Government used to levy tax on the services component of a works contract & the State Governments used to levy tax on the sale of goods portion of a works contract.
53. We note that as per Section 66E of Finance Act, 1994, the service portion involved in the execution of works contract was a declared service. Hence, Service Tax could be levied only on the service element of the works contract. Further, the principles of segregation of the value of goods were provided in Rule 2A of the Service Tax (Determination of Value) Rules, 2006. Also, the principle of abatement has been enshrined in Notification No. 26/2012-Service Tax dated 20.06. 2012 G.S.R. 468 (E). Accordingly, in the instant case the Statutory Auditor has certified that the effective tax rate payable in the works contract, where the value of service portion has not been determined, comes to 13.4%, which is in line with the taxation of works contracts in pre-GST period. .
54. We are of the view that for *eligible agreement(s)* [being works contract(s) in nature], the contracting parties should reconcile and process the invoices considering the actual tax paid in GST period and tax payable in Pre-GST period as per methodology based on applicable

valuation Rules issued by the Central Board of Indirect Taxes and Customs (CBIC) discussed above and duly certified by the Statutory Auditors. As a matter of course, the contracting parties must conduct the reconciliation strictly in accordance with the instructions given in the Order dated 09.10.2018 in Petition No. 33/MP/2018, and the Order passed in the Review Petition No. 6/RP/2020 on 24.01.2021

55. Further, regarding application of 18% post GST, MPPMCL has submitted on record that they have already complied with the Order dated 24.01.2021 passed in Review Petition No. 6/RP/2020 to the Petitioner and the issue stands resolved. As DMRC has not filed any submission on the same, DMRC is directed to comply with our Order dated 24.01.2021 passed in Review Petition No. 6/RP/2020 in case the same has not been complied so far.
56. The Issue No. 2 is disposed of accordingly.

Issue No. 3: Whether the Respondents should be directed to compensate Petitioner the balance GST claims along with LPS as applicable under PPA?

57. In view of the findings of the Commission on Issue No. 1 and Issue No.2, MPPMCL & DMRC are directed to process the due claims to the Petitioner against the invoices already raised and is also entitled to late payment surcharge as provided under PPA.

Sd/-

पी. के. सिंह
(सदस्य)

Sd/-

अरुण गोयल
(सदस्य)

Sd/-

आई. एस. झा
(सदस्य)