



*relief granted on the basis that outsourcing of O&M activity was purely a commercial decision taken by the SPPDs, it not being the requirement under the PPA. The reasoning is set out in the impugned orders on the following lines (quoted from Order dated 27.03.2020 which is subject matter of appeal no. 131 of 2022);*

*"The Commission is of the view that the recurring expenses referred to in Article 12 of the PPAs includes activities like salary, tax expenses, estimated maintenance costs, and monthly income from leases etc. The Commission notes, based on the records submitted in the context of the petitions, that outsourcing of 'Operation and Maintenance' services is not the requirement of the PPAs/ bidding documents. The concept of outsourcing is neither included expressly in the PPAs nor is it included implicitly in Article 12 of the PPAs. The Commission is of the view that in the Competitive Bidding Scenario, the SPDs bid levelled tariff without disclosing the details of the calculations of the project cost. It has already been held by the Commission in its earlier Orders that it is a pure commercial decision of the Petitioners taken for its own advantage. In the event the Petitioners choose to employ the services of other agencies, it cannot increase the liability for the Respondents. Therefore, the Commission holds that claim of the Petitioners on account of additional tax burden on operation and maintenance expenses (if any), is not maintainable. This view is in consonance with the view taken by the Commission in Order dated 09.10.2018 in Petition No. 188/MP/2017 & Ors. case titled Acme Bhiwadi Solar Power Private Limited -v- Solar Energy Corporation of India and Ors. The Commission does not find merit in the argument of the Petitioners that compensation on O&M expenses should be allowed on lines of the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012. The present Petition relates to section 63 of the Electricity Act, 2003 and as such drawing reference to cost plus tariff fixation principles, is misplaced."*

104. **There can be no two views as to the fact that O&M expenses form part of the recurring expenditure within the meaning of change in law clause contained in Article 12.** *Concededly, the appellant SPPDs have availed of O&M services by outsourcing them, statedly following standard industry practice.*

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105. Questions as to the correctness, propriety and legality of similar view taken by the Central Commission in another matter **had come up before this tribunal, decided by judgment dated 27.04.2021 reported as Coastal Gujarat Power Limited v. CERC & Ors. 2021 SCC Online APTEL 10.** We had held in the said case as under:

"67. It is argued that the operation and maintenance of the plant is the responsibility of the appellant and if the appellant seeks to employ services of other agencies, the same cannot increase the liability of the Procurers; this was a commercial decision and choice of the appellant; and that if the appellant had not employed services of outside agencies, there would have been no impact of the alleged changes of tax rates.

68. We find no substance in the above submissions. The work contractors are engaged by the appellant within its discretion and there is no inhibition in PPA in such regard. In fact, it is pointed out by the appellant, and rightly so, that Article 7 of the Model PPA which was a part of the RFQ documents had envisaged that the generator (Seller) alone shall be liable to operate and maintain the power station at its own cost but, in the final PPA that was executed between the parties, the clause to such effect was removed, this clearly indicative of the common understanding of the parties that the generator (CGPL) would not be solely responsible for O&M, the definition of 'Project Documents' read with 'O&M contracts' contemplating that a third-party O&M contractor might be appointed by it (CGPL).

69. It is wrong to argue that because the appellant stands in the capacity of the Principal in relation to the work contractors engaged by it, it is responsible for the action (or inaction) on their part in such matters as have financial implication for the Procurers because the option exercised by the contractor is not a change in law but part of the commercial and business decision and has to be dealt inter se the former two.

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91. It is not disputed that the appellant (CGPL) is a project specific Special Purpose Vehicle (SPV) set up solely for the purpose of generating and supplying electricity exclusively to the Procurers in accordance with the PPA. It engages in no other business

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undertaking. All services availed by CGPL are undoubtedly used for its sole objective of generating electricity for supply to the Procurers under the PPA. The increased cost towards Krishi Kalyan Cess and Swachh Bharat Cess affects the cost of the business of the appellant for generation and sale of electricity. The twenty services left out by CERC also are connected to the commercial activities of the appellant adding to its cost of production and supply. In this view, there was no justification for disallowance of the claim for additional financial burden on other services covered under Swachh Bharat Cess and Krishi Kalyan Cess contrary to Article 13 of the PPA.

92. We agree with the submission that CERC erred to introduce an extraneous qualification or filter which is not borne out from the PPA. The qualifying factor under Article 13 of the PPA is whether or not a CIL event has an impact on the cost of, or revenue from, the business of generation and sale of electricity by the seller (CGPL). In this view, the test applied by CERC that taxable service should have a "direct relation to the input cost of generation" is extraneous to the provisions of the PPA and must be rejected. It is trite that explicit terms of a contract (PPA) bind and it is not open for the adjudicating forums to substitute their own view on the presumed understanding of the commercial terms by the parties [Nabha Power Limited v. PSPCL & Anr. (2018) 11 SCC 508]. 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."

106. **The above view has been followed by this tribunal in at least two subsequent decisions reported as Azure Solar Private Limited v. CERC & Ors. 2022 SCC OnLine APTEL 24 and Azure Power Eris Private Limited v. BERC & Ors. 2022 SCC OnLine APTEL 8,**

107. The above decision applies on all fours. **We adopt the view taken in case of Costal Gujarat Power Limited (supra) and disapprove the decision of the Central Commission on the subject as quoted above and hold that the appellant SPPDs are entitled to compensation for additional expenditure (recurring /non-recurring) towards O&M**

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activities as well, notwithstanding the fact that they were outsourced."

21. **It is noted that the reliance has been placed upon** the judgment dated 27.04.2021 passed by the Hon'ble Appellate Tribunal for Electricity ("**APTEL**") in *Coastal Gujarat Power Limited v. CERC*, Appeal No. 172 of 2017 and batch ("**CGPL Judgment**"). The Petitioner has also highlighted the following excerpts from the CGPL Judgment:

**"67. It is argued that the operation and maintenance of the plant is the responsibility of the appellant and if the appellant seeks to employ services of other agencies, the same cannot increase the liability of the Procurers; this was a commercial decision and choice of the appellant; and that if the appellant had not employed services of outside agencies, there would have been no impact of the alleged changes of tax rates.**

**68. We find no substance in the above submissions. The work contractors are engaged by the appellant within its discretion and there is no inhibition in PPA in such regard.** In fact, it is pointed out by the appellant, and rightly so, that Article 7 of the Model PPA which was a part of the RFQ documents had envisaged that the generator (Seller) alone shall be liable to operate and maintain the power station at its own cost but, in the final PPA that was executed between the parties, the clause to such effect was removed, this clearly is indicative of the common understanding of the parties that the generator (CGPL) would not be solely responsible for O&M, the definition of 'Project Documents' read with 'O&M contracts' contemplating that a third-party O&M contractor might be appointed by it (CGPL).

**69. It is wrong to argue that because the appellant stands in the capacity of the Principal in relation to the work contractors engaged by it, it is responsible for the action (or inaction) on their part in such matters as have financial implication for the Procurers because the option exercised by the contractor is not a change in law but part of the commercial and business decision and has to be dealt inter se the former two. We reject this plea against the claim under consideration here for the simple reason**

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***the doctrine of agency cannot be invoked in this context. It is not shown that in matters of State revenue, the choices made by the contractors could have been controlled by the appellant."***

22. In the aforementioned judgement, Hon'ble Tribunal has considered the legitimacy of the existence of a separate O&M agreement. In paragraph 68 of the said judgement, Hon'ble Tribunal has pointed out that in the RFQ (which also had a model PPA) floated in the cited case, it was mentioned that the generator alone shall be responsible for the operation and maintenance of the plant. However, in the PPA entered between CGPL and parties, no such clause was present. Therefore, it was clear in the said case that the generator shall not be solely responsible for O&M of the plant.

"68. We find no substance in the above submissions. The work contractors are engaged by the appellant within its discretion and there is no inhibition in PPA in such regard. In fact, it is pointed out by the appellant, and rightly so, that Article 7 of the model PPA which was a part of the RFQ documents had envisaged that the generator (Seller) alone shall be liable to operate and maintain the power station at its own cost but, in the final PPA that was executed between the parties, the clause to such effect was removed, **this clearly indicative of the common understanding of the parties that the generator (CGPL) would not be solely responsible for 'O&M contracts' contemplating that a third-party O&M contractor might be appointed by it (CGPL).**"

23. From the above CGPL judgement, it is crucial that in the aforementioned judgement, deletion of a specific clause (saying that the seller alone shall be liable for the O&M of the plant) from the RFQ which contained the model PPA, indicates that the parties to the case had a mutual understanding with respect to the outsourcing of the O&M of the Project.

24. However, in the instant case, there had been no specific clause with respect to outsourcing of the O&M of the Project either in the PPA or in the RFP. ***Rather the PPA dated 27.12.2013 holds in the Preamble itself that the Petitioner has been selected for construction and operation & maintenance and supply of power from the Project.***