



Petition No. 1540 of 2019

BEFORE

THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION

LUCKNOW

Date of Order: 20.10.2023

PRESENT:

Hon'ble Shri Arvind Kumar, Chairman

Hon'ble Shri Vinod Kumar Srivastava, Member (Law)

Hon'ble Shri Sanjay Kumar Singh, Member

IN THE MATTER OF: Petition under section 86 (1) (b) and Section 86 (1) (f) of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement dated 03.12.2015 executed between M/s T A Greentech Private Limited (a Project Company formed by M/s Technical Associates Ltd.) and Uttar Pradesh Power Corporation Limited seeking approval of Change in Law events due to promulgation of GST Laws and Safeguard Duty.

1. M/s T A Greentech Private Limited

8th km, Faizabad Road, Vijaypur, Gomti Nagar, Lucknow-226010

2. M/s Technical Associates Limited

8th Km., Faizabad Road, Vijaypur, Gomti Nagar, Lucknow, U.P. – 226010

..... **Petitioner**

Versus

1. Uttar Pradesh Power Corporation Limited (UPPCL),

Shakti Bhawan, 14 Ashok Marg, Lucknow - 226001

2. U.P. New & Renewable Energy Development Agency (UPNEDA),

Vibhuti Khand, Gomti Nagar, Lucknow - 226010

..... **Respondent (s)**

The following were present:

1. Shri Deepak Raizada, C.E., UPPCL
2. Shri Mahendra Singh, S.E., UPPCL
3. Shri Vikash Gupta, EE, UPPCL
4. Shri Amarjeet Singh Rakhra, Advocate, UPPCL
5. Shri Divyanshu Sharma, Advocate, T.A Greentech Pvt. Ltd.
6. Shri Vinamr Agarwal, Director, T.A Greentech Pvt. Ltd.

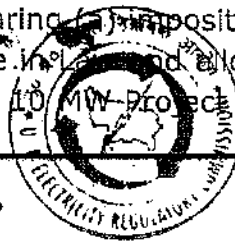
ORDER

(Date of Hearing 22.08.2023)

1. The Petition has been filed for declaring (a) non-availability of safeguard duty and (b) Introduction of GST, as Change in Law and allow consequential claim of the petitioner for its commissioned 10 MW Project awarded in a competitive

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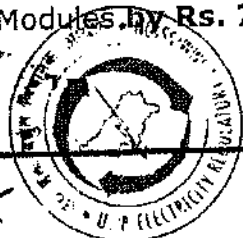


bidding invited by UPNEDA. The Petitioner, Greentech Ltd., has prayed as below:

- a. Declare imposition of **Safeguard Duty** vide notification dated 30.07.2018 and **GST** vide notification dated 12.04.2017 as 'Change in Law Events'.
- b. Allow the Petitioner to claim/recover an additional sum of **Rs. 7,25,42,954/-** along with interest @ 24% w.e.f. 11.09.2018 till the date of realisation of amount along with cost of this petition, in favour of Petitioners and against the Respondents and such other reliefs from the procurer as a result of the 'Change in Law Events' namely imposition of **Safeguard Duty** vide notification dated 30.07.2018 and **GST** vide notification dated 12.04.2017.

Brief facts of the case

2. UPNEDA vide RFP No. 01/UPNEDA/GRID Connect Rfp/2015, dated 31.1.2015 invited bids from Solar Power generators for supplying Solar Power. The Petitioner was successful bidder for 10 MW and signed PPA @ **Rs. 8.33/unit** with UPPCL on 03.12.2015 and subsequently upon adoption of tariff @ **Rs. 5.07/unit** vide the Commission's Order dated **12.02.2018**, an amendment to PPA was signed on **04.04.2018**.
3. The Commission vide its order dated **12.2.2018**, in the matter of Preliminary default notice issued to the Petitioner, allowed 5 months extension subject to completion of evacuation system by the procurers otherwise the commissioning date was to be automatically extended without any penalty. The project was completed within the scheduled period as per the agreement, however, could not be commissioned on account of non-availability of transmission lines.
4. Petitioner placed purchase order to M/s Trina Solar Energy Development Pte. Ltd. vide **Purchase Order No. TAL/2018-19/GEN/LKO/002R4 dated 5.7.2018**. UPNEDA vide order dated 29.1.2019 extended the commissioning to **28.02.2019**. The project was successfully commissioned on **19.02.2019**.
5. Subsequent to the Commission's order dated 12.02.2018, **Ministry of Finance, GoI** vide notification dated **30.7.2018** imposed a **Safeguard Duty** on certain items including the import of Solar Photovoltaic Modules. The rate of Safeguard duty imposed on Solar PV Modules was 25% for the period 30.7.2018 to 29.7.2019. Similarly vide notification dated **12.4.2017**, the Goods and Services Tax (**GST**) was introduced by the Ministry of Finance on Solar PV Modules at the rate of 5%. Both the aforesaid notifications being statutory in nature constitute 'Change in Law' events.
6. The net effect of the introduction of the Safeguard Duty and the GST on the purchase of Solar PV Modules made by the Petitioner translated in to an increase in landed cost of the Solar PV Modules by **Rs. 7.25 Cr.**





Record of Proceedings

7. The Commission during hearing dated 11.06.2020, directed to serve a copy of the Petition to respondents to file their counter affidavit in four weeks. UPNEDA and UPPCL filed their replies on 22.07.2020 and 27.07.20 respectively. The next hearings on 28.07.20, 04.09.20 and 08.10.202 were adjourned on request of the Petitioner for allowing further time to file rejoinders. The Petitioner filed rejoinders on 04.11.20. During the next hearing on 20.04.21, as Petitioner's arguing counsel was not present, the Commission fixed the next hearing date of 10.06.21 for final arguments.
8. The matter was argued during next hearing on 10.06.21 and the Commission directed the Petitioner to file details of taxes & duties prevalent at the time of bidding and their changes and detailed computations of net impact of change in law, with a copy to Respondents to file replies. The Petitioner filed affidavit dated 30.07.21. The Commission during next hearing on 03.08.21, allowed further time to respondents to file replies to the affidavit and Petitioner to file rejoinder. The matter was argued during hearing on 14.09.21 and the Commission directed the Petitioner to file its reply to the query that the claimed cost of Solar Modules including taxes and duties was lower than that considered by the Commission while adopting tariff. The Petitioner filed affidavit dated 31.01.22.
9. The Commission, during next hearing on 01.02.22, after hearing the parties, directed the Petitioner to file proof of payments of taxes and duties claimed. During next hearing on 15.03.22, there being no one present on behalf of the Petitioner, the Commission, decided to keep the matter in abeyance till placing of details sought on record of the Commission.
10. Pursuant to the hearing on 15.03.22, the Petitioner filed additional submission on 20.04.23. The Commission, during next hearing on 25.04.23, allowed UPPCL to file reply to Petitioner's submission, which was further extended during next hearing on 23.05.23. UPPCL filed its reply on 24.07.23. During next hearing on 25.07.23, the Commission, allowed time to Petitioner to file its rejoinder to UPPCL reply. The Petitioner filed rejoinder on 02.08.23. The Commission heard the parties on 22.08.2023 and reserved the Order. The Petitioner and UPPCL have filed their written submissions dated 11.09.23 and 10.10.23 respectively.


UPNEDA reply dated 22.07.20.

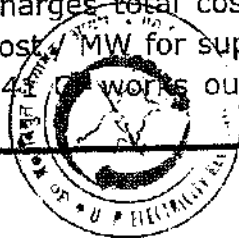
11. UPNEDA has filed its reply on 22.07.2020 and has mainly submitted the following:
 - a) The LoI to the Petitioner was issued on **8.9.2015** and as per PPA dated 03.12.2015, **SCOD of the Project was 31.12.2016.**
 - b) M/s TA Greentech Pvt Ltd had filed **Petition no. 1120/2017** to set aside the preliminary termination notice issued by UPPCL on 24.7.2017 under PPA clause 13.3.1. This Commission dealing with the said Petition passed order dated 12.2.2018.





- a) The Petitioner had not invested any amount in purchase of Solar Modules as evident from the copy of purchase order No. TAL/2018-19/GEN/LKO/002R4 dated 5.7.2018 prior to date of signing of Supplementary PPA with UPPCL. Therefore, Petitioner himself is responsible for the delay.
- c) The "effective date" is 04.04.2018, i.e., the date of signing of the Supplementary PPA. The GST was introduced vide notification dated 12.4.2017 by Ministry of Finance. Therefore, it is not an event which occurred after the "effective date" and cannot be constituted as "Change in Law" event.
- d) This Commission while adopting the tariff of Rs. 5.07/unit had already considered the prevailing cost of Solar Modules after accounting for taxes and degradation which forms 61-62% of the project cost. As the GST was prevailing at the time of adoption of Tariff and subsequently during the time of signing of Supplementary PPA, it is understood that the prevailing cost of Solar Modules as considered by the Commission, is the cost inclusive of GST. Therefore, cost incurred as claimed by the Petitioner on the account of GST cannot be considered as additional "non-Recurring expenditure to SPP".
- e) M/s TA Greentech has claimed the effect of 'Change in Law' in terms of the Article 12 of PPA with reference to imposition of Safeguard duty on the import of Solar Modules. M/s TA Greentech has agreed and signed a PPA dated 04.04.2018 to supply power at an all-inclusive tariff as adopted by this Commission tariff at Rs. 5.07/unit. This Commission in its order dated 12.2.2018 has mentioned that the cost of Modules taken into consideration while adopting tariff of Rs. 5.07/unit is **Rs. 2.65 Cr./MW**.
- f) Petitioner has claimed occurrence of additional expenditure on account of payment of Safeguard Duty on supply of Solar Modules. As documentary proof, Petitioner has submitted Duplicate Importer copy of "Bill of Entry for Home consumption" issued by the Customs department while receiving the consignment. On viewing the bill, it is found that on delivery consignment of 6112590-watt solar modules i.e., 6.112 MW, Safeguard Duty applicable is depicted as **Rs. 2.93 Cr.** whereas the consignment value shown as **Rs. 11.75 Cr.** Apart from this bill, no other documentary proof of having paid Safeguard Duty has been submitted by the Petitioner.
- g) M/s TA Greentech have submitted a self-worked sheet for Landed Cost of Modules post GST Tax Structure with imposition of Safeguard Duty and cost of supply for 12.05 MW Modules as Rs. 23.17 Cr., Applicable Safeguard Duty @ 25% on supply cost as Rs. 5.79 Cr, 5% GST on supply cost as Rs. 1.44Cr and total cost of supply of Modules as Rs. 30.41 Cr. whereas, after inclusive of freight charges and other charges total cost of Solar Modules has been depicted as Rs. 31.52Cr. The cost of supply of 12.05 MW modules on the basis of total Cost Rs. 30.41 Cr works out to be **Rs. 2.52 crore/MW**

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whereas on the basis of total cost of Rs. 31.52 Cr. shown in the worksheet after including freight charges and other works out to be **Rs. 2.615 Cr./MW** much less than considered cost of modules as Rs. 2.65 Cr./MW as indicated by this Commission in adopting tariff of Rs. 5.07/unit for Petitioner project.

UPPCL reply dated 27.07.2020.

12. UPPCL has filed its reply on 27.07.2020 has stated to adopt UPNEDA reply and has further submitted the following:

- (a) The Petitioner, in the public hearing dated 31.01.2018, had represented its plea that the GOI has proposed a safeguard duty on solar modules and a provision should be kept for allowing revision of tariff. The Commission, thereafter, passed order dated 12.02.2018, adopting tariff of Rs. 5.07 per unit and also allowed those not accepting the adopted tariff to quit from PPA with return of Bank guarantee. As such, the Order has attained finality as the same has not been challenged by the Petitioner.
- (b) The Petitioner's act is barred by doctrine of "Res-judicata" because the decision of a Court/Competent Authority is to be accepted as correct in the absence of challenge and "latches" and hence, there is no occasion for the Petitioner to re-agitate the issue of safeguard duty after a period of more than 2.5 years from the date when it was rejected by the Commission.
- (c) GST notification dated 12.04.2017 is prior to the Commission's Order dated 12.02.2018.

Rejoinders dated 04.11.20 to UPNEDA and UPPCL replies.

13. The Petitioner has mainly submitted the following:

- (a) Neither CERC, in its Order dated 23.03.2016, determining benchmark capital cost of Solar PV Projects for 2016-17, nor the Commission in its Order dated 12.02.18, factored GST while allowing tariff of Rs. 5.07 per unit.
- (b) Safeguard duty notification was introduced vide notification dated 30.07.2018 and could not have been considered by the Commission in its Order dated 12.02.18.
- (c) The Commission passed Order dated 12.02.18 for adoption of tariff as part of its Regulatory function and no judicial determination on any issue was made therein, thus, Order can't operate as Resjudicata. Further, for no adjudication having been dealt vide the Order, the principle of latches would also not be attracted.
- (d) The date of signing of the agreement dated 03.12.15 is the effective date and not date of signing of SPPA on 04.04.2018.
- (e) The SPPA dated 04.04.18, has amended Article 9.1.1 (tariff) and 3.1 (completion period) with no amendment to any other clause of the PPA dated 03.12.15.





- (f) The cost of Solar PV modules of 12.05 MW is Rs. 31.52 Cr including additional impact of Rs.7.25 Cr on account of GST and safeguard duty.
- (g) The Project has been commissioned on 19.02.2019, within time extension granted by UPNEDA until 28.02.2019.
- (h) CERC vide its Order dated 02.05.19 has allowed Imposition of safeguard duty as Change in law event.
- (i) The judgement quoted by UPPCL to support that once a person was aware of an order having adverse effect but fails to challenge the same, by his conduct, waives its right to challenge, is misplaced as its related to Service tax Law.

Petitioner's affidavit dated 30.07.21.

14. The Petitioner has submitted details of tax structure at the time of bidding, their changes due to introduction of GST, detailed calculation of the net effect of GST, invoices of Safeguard Duty and GST and proof of payments.

Petitioner's additional affidavit dated 31.01.22.

15. The Petitioner, in response to the query that procured solar module cost of Rs. 2.16/MW is less than that Rs. 2.65 Cr/MW, as considered by the Commission while adopting tariff vide Order dated 12.02.2018, has submitted that as per Change in law Clause of the PPA dated 03.12.15, any additional expenditure incurred, would qualify as change in law event. The said additional expenditure of Rs. 7.25 Cr on account of GST and Safeguard Duty has not been factored in by the Commission in its Order dated 12.02.18 as Safeguard Duty has been implemented w.e.f. 30.07.2018 and CERC order dated 23.03.2016, based on which the Commission has passed Order dated 12.02.18, does not factor GST in the project cost of Solar Power Projects.

Petitioner's additional submission dated 20.04.23.

16. The Petitioner vide additional submission dated 20.04.23 has submitted the following:
- (a) GST and SGD notifications are Change in law in terms of PPA dated 03.12.2015.
- (b) The Petitioner has submitted that in terms of National Tariff Policy, 2016, MoP directions dated 27.08.2018, MNRE letter dated 12.03.2020, DGTR recommendations dated 16.07.2018, introduction of new tax/duty post submission of bids has to be treated as Change in Law.
- (c) The Petitioner has countered the arguments of UPPCL and UPNEDA objections that tariff adoption itself was unfair & contradictory to tariff adoption principles under section 63 of EA'03. The Commission is not to go into investigation of actual costs and commercial decisions of the bidder at



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a later stage. The Petitioner has commissioned the Project within extended time limit approved by UPNEDA.

UPPCL reply dated 24.07.2023.

17. UPPCL has submitted that last effective hearing of the case was held on 01.02.2022 (Order passed on 10.02.22) and the Petitioner has filed additional affidavit in April 23, the submissions therein are much beyond the scope of the Order dated 10.02.22, therefore, should be rejected. UPPCL has reiterated its earlier objections dated 27.07.2020 and has further submitted that the Commission may first decide the issue of whether the claims of the petitioner are covered under the change in law and thereafter, the respondent may be required to verify the data submitted by the petitioner regarding financial implications.
18. UPPCL has also submitted that any impact of change in law on the Petitioner is due to its own fault and a person can't take advantage of its own wrong in terms of Hon'ble Supreme Court judgement in the case of Kusheshwar Prasad Singh Vs State of Bihar & others, 2007, 11 SCC 447.

Rejoinder dated 02.08.2023.

19. The Petitioner has submitted that:

- (a) The delay on part of the Petitioner was not deliberate and should not be the cause to turn down the plea of the Petitioner and shut the doors for the Petitioner. The Commission vide its Order dated 11.05.23 has taken Petitioner's addl. affidavit on record after Petitioner apologised for delay on its part.
- (b) The Petitioner has no objection if parties are heard afresh on the basis of the existing pleadings. However, both the issues involved, i.e., whether the events claimed by the Petitioner qualify as change in law and the calculation of financial burden arising out of change in law should be adjudged together.
- (c) The delay in commissioning of the Project was due to unavailability of the transmission lines, which cannot be attributed to the Petitioner. The Petitioner has already placed on record various letters sent to UPNEDA highlighting that the Project is ready but cannot be commissioned due to non-availability of the transmission lines. It is in due consideration of these letters and after actually verifying the status of the solar Project that, on 29.01.2019, UPNEDA extended the SCOD of the Project till 28.02.2019.
- (d) The provision of the RFP reveals that the present bidding is a case of open category bidding - where the choice of sourcing of modules was left to the developer.

CRUX OF UPPCL'S & UPNEDA'S OBJECTIONS





20. Before analysing the case further, it will be prudent to collate the major observations of above two parties and then weigh the arguments and claims of the Petitioner on the fulcrum of these objections to adumbrate the course our analysis by framing relevant issues on which the rival contentions should be juxtaposed.

21. UPPCL and UPNEDA have refused to accept the Change in Law claim of the Petitioner on following grounds:

- (a) UPPCL has contended that the issue "Change in law" was raised by the Petitioner at the time of tariff adoption by the Commission for Petitioner's Project and the same is to be accepted as correct in absence of any challenge by the Petitioner.
- (b) The Petitioner has placed the purchase order dated 5.7.18, after signing of SPPA on 04.04.18. Therefore, Petitioner himself is responsible for the delay.
- (c) The "effective date" for the purpose of Change in Law claim is 04.04.18, therefore, GST introduced vide notification dated 12.4.2017 by Ministry of Finance, is not an event which occurred after the "effective date" and cannot be constituted as "Change in Law" event. Moreover, the GST was prevailing at the time of adoption of Tariff by the Commission for the Petitioner's Project, thus, Petitioner's claim on account of GST cannot be considered as additional "non-Recurring expenditure to SPP".
- (d) The cost/MW for supply of 12.05 MW modules basis the total cost of Rs. 31.52 Cr works out to be **Rs. 2.615 Cr./MW, which is** much less than considered cost of modules as Rs. 2.65 Cr./MW by this Commission in adopting tariff of Rs. 5.07/unit for Petitioner project.
- (e) The Petitioner's act is barred by doctrine of "Resjudicata" because the decision of a Court/Competent Authority is to be accepted as correct in the absence of challenge and "latches" as there is no occasion for the Petitioner to re-agitate the issue of safeguard duty after a period of more than 2.5 years from the date when it was rejected by the Commission.

Commission's Analysis and decision

22. The Commission has framed following issues while adjudicating the dispute and dealt with each of them in succeeding paras of this Order:

- A. Whether Petitioner's claim is barred by Doctrine of "Resjudicata".**
- B. Whether effective date of the PPA is 04.04.18 i.e., the date of signing SPPA.**
- C. Whether the Petitioner is eligible to claim consequential impact of Change in Law.**





A. Whether Petitioner's claim is barred by Doctrine of "Resjudicata".

23. The principle of "res judicata", under Section 11 of the Civil Procedure Code, 1908, is reproduced as under for ready reference:

"Section 11. Res Judicate- No Court shall try any suit or issue in which the matter 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."

In this regard, the Commission has gone through the Hon'ble Supreme Court judgement in the matter of **Sheodan Singh Vs Smt. Daryao Kunwar** reported as AIR 1966 SC 1332, the Hon'ble Supreme Court has observed the following:

".....A plain reading of section 11 shows that to constitute a matter res judicata, the following conditions must be satisfied, namely:

- (a) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit;*
- (b) The former suit must have been a suit between the same parties or between, parties under whom they or any of them claim;*
- (c) The parties must have litigated under the same title in the former suit;*
- (d) The Court which decided the former suit must be competent to try the subsequent suit or suit in which such issue is subsequently raised;*
- (e) The matter must directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit."*

24. The Commission, in the present case, has noted that the Petitioner had raised a concern to keep a provision for allowing revision of tariff on account of safeguard duty, during the public hearing on 31.01.2018, relevant part of the Commission's Order dated 12.02.2018 is reproduced below:

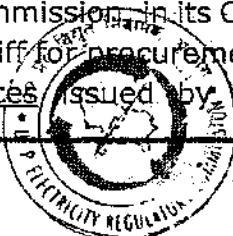
"After the above, the concerned promoters were asked to appraise the Commission about their views. The representatives of bidders raised the following points:

M/s Technical Associates Ltd.

..... He further stated that Govt. of India has proposed a safeguard duty on solar modules and if the promoter has to pay safeguard duty, then a provision should be kept for allowing the revision of tariff on account of safeguard duty."

However, the Commission, in its Order dated 12.02.2018, issued in the matter of adoption of tariff for procurement of 215 MW power & in the matter of PPA termination notices issued by UPPCL, has clarified that the Petitioners

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(including Greentech Ltd.) had filed petitions under Section 86(1)(f) for adjudication. The relevant excerpt is as below:

"Regarding observations of Sri R.S. Awasthi, the Commission would like to clarify that the Commission has not finally disposed of the petition no.1110/2016 so far. While adopting the tariff for 9 bidders, the Commission had categorically stated that the decision regarding remaining six PPAs would be taken later. Therefore, the contention of Sri Awasthi that Petition No.1110/2016 cannot be heard by the Commission is totally misplaced. The Commission has worked out the approximate capital cost of these six bidders at the CERC benchmark of FY 2016-17, as the benchmark capital cost was not available for FY 2017-18. CERC is the apex regulatory institution and takes into account the national perspective in consideration, while benchmarking the capital cost, whereas the states do it on the basis of state specific input. The Commission has relied on CERC benchmark of FY2016-17 in order to have the realistic estimate of cost. Regarding forcing UPPCL to buy power from these generators **it is to be clarified that in these cases the petitioners have filed petitions under Section 86(1)(f) for adjudication against termination notice** and the Commission has to consider the fact that these bidders were issued LOI and PPA were also signed before coming to Commission. The Commission cannot allow UPPCL to terminate the PPAs at their sweet will after the developers have made sizable investment in the project. Therefore, the contention of Mr. Awasthi is not based on principle of natural justice."

25. The Commission thus notes that the then Proceedings didn't involve the issue of declaration of Change in Law or consequential relief of Change in Law. The Change in Law was not even "fact in issue" in the then proceedings as the Petitioner had expressed only its concern about an event of safeguard duty. **Therefore, the Petitioner's claim is not barred by Doctrine of Res Judicata.**

B. Whether effective date of the PPA is 04.04.18 i.e., the date of signing SPPA.

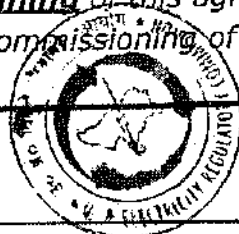
26. As reiterated above, the term 'Effective Date' has been defined under Article of the PPA as follows-

"Effective Date shall have the same meaning ascribed thereto in Article 2 of this Agreement"

"2.1 Effective Date

2.1.1 This Agreement shall be deemed to have come into force with effect from the **date of signing** of this agreement and shall remain in force from the date of commissioning of the last unit of the Solar

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PV Plant from which solar power is committed to be supplied under this Agreement and such date shall be referred to as the Effective Date."

27. The Supplementary Power Purchase Agreement was executed between the parties on 04.04.2018, wherein, only 3 aspects were amended, namely -
- (i) Tariff mentioned at Clause 9.1.1 of the PPA dated 03.12.2015
 - (ii) The time period for fulfilment of conditions subsequent under Article 3.1 of the PPA as well as COD of the plant.
 - (iii) Bank Guarantee

It has been clearly specified in SPPA that all other terms of the PPA dated 03.12.2015 shall remain unaltered. Thus, it is clear from the above that 'Effective Date' has not been amended by way of SPPA.

28. In this regard, the Hon'ble Supreme Court in ***Haryana Power Purchase Centre v. Sasan Power Ltd. & Ors.***, 2023 SCC OnLine SC 577 upheld the supremacy of the contractual understanding between the parties, holding that in the purported exercise of its regulatory powers, the Commission/Tribunal is not entitled to rewrite the terms of the PPA. The relevant extracts are reproduced herein below for ready reference-

"90. We are not dealing with a case where the exercise of power of the Commission under Section 63 is under review. In a case where, however, the rates are approved under Section 63 and PPA is entered into, the question would undoubtedly arise as to whether there is a power which can be described in a manner of speaking to be plenary power with the Commission under Section 79? Can there be a power which can be christened as omnibus? Can the Tribunal, in other words, disregard the express words of the contract? Can it discover a new change in law which the parties have not contemplated as change in law? In short, can the Tribunal rewrite the contract and create a new bargain?

91. We are of the view that the Tribunal cannot indeed make a new bargain for the parties. The Tribunal cannot rewrite a contract solemnly entered into. It cannot ink a new agreement. Such residuary powers to act which varies the written contract cannot be located in the power to regulate. The power cannot, at any rate, be exercised in the teeth of express provisions of the contract."

Applying the above ratio in the context of the present case, it is clear that the Effective Date under the PPA i.e., 03.12.2015 remains unaltered even after signing of the SPPA on 04.04.2018





C. Whether the Petitioner is eligible to claim consequential impact of Change in Law.

29. Contractual relationship between the parties is governed by the Power Purchase Agreement ("PPA") dated 03.12.2015 read with Supplementary Agreement ("SPPA") dated 04.04.2018.

30. In terms of the PPA, for an event to qualify as 'Change in Law' it must pass the muster of Article 12 of the PPA. The said Article 12 is extracted herein below for ready reference-

"Article 12 : Change in Law

12.1 Definitions

In this Article 12, the following terms shall have the following meanings:

12.1.1 "Change in Law" means the occurrence of any of the following events after the Effective Date resulting into any additional recurring/ non-recurring expenditure by the SPP or any income to the SPP:

- a. The enactment, coming into effect, adoption, promulgation, amendment modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;
- b. A change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;
- c. The imposition of a requirement for obtaining nay Consents, Clearances and Permits which was not required earlier;
- d. A change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the SPP;
- e. Any change in tax or introduction of any tax made applicable for supply of power by the SPP as per the terms of this Agreement.

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the SPP, or (ii) any change on account of regulatory measures by the Appropriate Commission including calculation of Availability.

12.2 Relief for Change in Law

12.2.1 The aggrieved Party shall be required to approach the State Commission for seeking approval of Change in Law.



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12.2.2 *The decision of the Appropriate (State) Commission to **acknowledge a Change in Law and provide relief** for the same shall be final and governing on both the Parties."*

31. As evident from above, as per the PPA, the necessary ingredients or qualification for constituting an event of Change in Law are:

- (i) Such event must have occurred after the Effective Date of PPA i.e., after 03.12.2015.
- (ii) Such event must qualify under one or more of the bullet points mentioned under Article 12.1.1.
- (iii) Such event must result in any additional recurring/ non-recurring expenditure by the Solar Power Developer (SPP) or any income to the SPP.

32. In relation to GST and Safeguard Duty, it is pertinent to note that-

- a. GST rates were notified on 28.06.2017, after effective date of PPA (3.12.2105), and were levied with effect from 01.07.2017. GST Laws have been enacted by the Act of Parliament and the State Legislative Assemblies.
- b. In exercise of the powers conferred by Sub-section (1) of Section 8B of the Customs Tariff Act read with Rules 12 and 14 of the Safeguard Duty Rules, the Department of Revenue, Ministry of Finance, by way of its notification dated 30.07.2018, after effective date of PPA (3.12.2105), introduced/imposed safeguard duty on the import of solar cells (whether or not assembled in modules or panels).

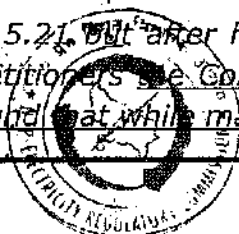
Thus, both the GST and Safeguard Duty qualify as 'Law' as per the PPA and have been introduced by "Indian Government Instrumentalities". **However, whether both these laws have resulted into additional recurring/non-recurring expenditure to the Petitioner and there has been impact due to introduction of these laws, needs to be examined under the facts and circumstances of the matter at hand in terms of benchmark cost of solar modules considered by the Commission while adopting tariff.**

33. The Commission's Order dated 12.02.2018, issued in the matter of adoption of tariff for procurement of 215 MW power & in the matter of PPA termination notices issued by UPPCL, has held the following:

"8. *The Commission has considered the cost of RS. 4.80 crore per MW while proposing the tariff of Rs. 5.21. But after hearing views of the public representatives and the petitioners the Commission has re-examined the capital cost and has found that while making an estimate of capital*

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cost the Commission has considered module cost at Rs. 2.80 crore per MW after accounting for taxes and degradation but on revisiting these rates the Commission would like to revise the module cost at Rs. 2.65 crore per MW. After considering rest of the costs as per CERC benchmark of 2016-17 the total cost works out to Rs. 4.65 crore per MW. On this cost the levelized tariff works out to Rs. 5.07 per unit.

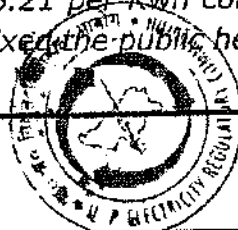
9. In view of above the Commission adopts the tariff of Rs. 5.07 per unit for a period of 12 years and for remaining 13 years APPC with a ceiling of Rs. 5.07 will be applicable as per the terms of the PPA already signed. The PPAs of these six bidders shall be amended to give effect to the adopted tariff. Those bidders who are not willing to accept this adopted tariff shall be allowed to quit from the PPA and their bank guarantees would be returned."

34. Subsequently, the Petitioner, upon failing to fulfil conditions subsequent as per PPA dated 03.12.2015, has executed SPPA, two months after the Commission's Order dated 12.02.2018, and the Preamble of the SPPA dated 04.04.2018, specifies the facts and the circumstances under which the SPPA was signed, and it reads as follows:

- c. That in accordance with Article 3.1 under satisfaction of conditions subsequent by SPP /Seller of aforesaid PPA, the seller was required to perform and complete various prescribed activities within stipulated timeframe from effective date of PPA. The PPA for 10 MW solar power was signed by M/s TA Greentech Pvt. Ltd. on 3.12.15, which has provision in Cl. (5.1.5) that plant shall be commissioned within 13 months from the date of signing of PPA i.e., but the SPP fails to meet condition subsequent.
- d. That as M/s TA Greentech Pvt. Ltd. failed to meet condition subsequent, a procurer's preliminary default notice for termination of PPA dated 3.12.15 was given to the seller on dated 24.7.17 by invoking Article 13.1 of aforesaid PPA, which provides: "SPP event of default as failure to commence supply of power to procurers up to the contracted capacity, relevant to scheduled commissioning date, by the end of 18 months". Against the pre-termination notice, the seller filed a petition (1220/2017) before UPERC for quashing the pre-termination notice issued by UPPCL.
- e. That UPERC passed an order on dated 23.1.2018 proposing to adopt tariff of Rs.5.21 / unit for seller for a period of 12 years and after that for next 13 years the APPC will be applicable as per provisions in PPA, subject to a ceiling of Rs.5.21 per Kwh considering the capital cost of Rs.4.80 Cr./MW and also fixed the public hearing on the proposed tariff

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on 31.1.18. After public hearing, views of public representatives and petitioners the Commission re-examined the capital cost and found that while making an estimate of capital cost the Commission has considered module cost at Rs.2.80 Cr/MW after accounting for taxes and degradation, but on revisiting these rates the Commission revised the module cost at Rs.2.65 Cr./MW. After considering rest of the costs as per CERC benchmark of 2016-17 the total cost worked out to be Rs.4.65Cr./MW. On this cost the levelized tariff worked out to Rs.5.07 /unit.

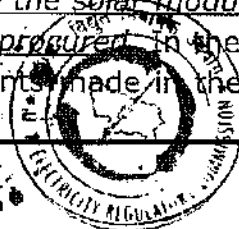
- f. that in compliance to UPERC order dated 12.2.18 (a copy of which is annexed hereto as Annexure-I) the SPP shall now be entitled to receive a tariff of Rs.5.07/Kwh instead of quoted tariff Rs.8.33/Kwh for energy supplied at metering point during a contract year pertaining to the contracted capacity.
- g. The UPPCL on behalf of procurers and the seller have mutually agreed to this amended agreement in respect of generating plant being set up and the same has been duly consented to by TA Greentech Pvt. Ltd. (a copy of which is annexed hereto as Annexure-II).
- h. Now, therefore, in consideration of foregoing and respective covenants and agreement set forth in this PPA and other consideration, the receipt sufficiency and adequacy of which is hereby acknowledged, and intending to be legally bound hereby, the party agrees as follows:.....

35.The Petitioner's submission during the public hearing dated 12.01.2018, are recorded in the Commission's Order dated 23.01.2018, issued in the matter of adoption of tariff for procurement of 215 MW power & in the matter of PPA termination notices issued by UPPCL, as below:

"11.....

M/s Technical Associates Limited

The Petitioner has filed the petition against the pre termination notice dated 24.7.2017. In this petition the petitioner stated that they have purchased approx. 20-hectare land in District Behraich for setting up of 10MW capacity solar plant and have made an investment of about Rs.20 crore towards ensuring the timely completion of the project but the transmission line for evacuation of power, which was the responsibility of the procurer, has not been constructed so far. They have mentioned that they have done the required civil and electrical work. Only the installation of solar panels is pending. They have also opened a letter of credit (LOC) for procurement of solar panels but did not procure the solar modules as they did not know the rate at which the power will be procured. In the absence of final adoption of tariff, the recovery of investments made in the project remained uncertain





and it hampered the progress of the project. They have showed their inclination to implement the project and have stated that their PPA should not be terminated. In the hearing on 12.01.2018, the Petitioner has stated that they are geared up to complete the project in next 5-6 months after the tariff is decided by the Commission.

36. Therefore, the Petitioner's case is such that it had opened Letter of credit for procurement of solar panels prior to adoption of tariff rate by the Commission, but it did not procure solar modules because it didn't know the rate at which tariff would be procured. However, after fully knowing the Module cost /MW considered by the Commission while adopting tariff of Rs. 5.07 per unit, the Petitioner took about two months' time to sign the SPPA, from the tariff adoption order dated 12.02.18 and bound itself to supply power at the adopted tariff.

37. Subsequently, after signing the SPPA dated 04.04.2018, after two months from tariff adoption order dated 12.02.18, it has placed order for solar modules, only on 05.07.2018, i.e., after about five months from the tariff adoption order dated 12.02.18, as per its own submission recorded in the order dated 23.01.18 that it required only 5 months to Commission the Project after the tariff is decided by the Commission. It is thus evident that the Petitioner being fully aware that Govt. of India has proposed a safeguard duty on solar modules, was exploring to procure solar modules at a more economical rate than that considered by the Commission, under the guise of transmission line readiness.

38. M/s TA Greentech have submitted a self-worked sheet for Landed Cost of Modules post GST Tax Structure with imposition of Safeguard Duty. The cost of supply for 12.05 MW Modules is shown as Rs. 23.17 Cr i.e., **Rs. 1.92 Cr /MW.** Applicable Safeguard Duty @ 25% on supply cost is mentioned as Rs. 5.79 Cr, 5% GST on supply cost is shown as Rs. 1.44Cr and total cost of supply of Modules has been shown as Rs. 30.41 Cr and inclusive of freight and other charges, total cost of Solar Modules has been depicted as Rs. 31.52Cr.

39. The cost / MW for supply of 12.05 MW modules based on total Cost Rs. 30.41 Cr works out to be **Rs. 2.52 crore** whereas on the basis of total cost of Rs. 31.52 Cr. shown in the worksheet after including freight charges and other works out to be **Rs. 2.615 Cr./MW** much less than considered cost of modules as **Rs. 2.65 Cr/MW** by this Commission in adopting tariff of Rs. 5.07/unit for Petitioner project.

40. It is thus clear from the above that total landed cost of solar modules,





Rs. 2.615 / MW is much less than considered cost of modules as Rs. 2.65 Cr/MW by this Commission in adopting tariff of Rs. 5.07/unit for Petitioner project and there is no additional recurring / non-recurring expenditure to claim under the Change in Law. Therefore, the Commission disallows Change in Law relief to the Petitioner though both GST and Safeguard Duty stand the test of time, having been issued after effective date; 03.12.15, and test of Statutes as both the GST and Safeguard Duty qualify as 'Law' as per the PPA, having been introduced by "Indian Government Instrumentalities".

Summary of our decisions:

41. The summary of Commission's decisions, in the present matter, are as follows:

- (a) The Petitioner's claim is not barred by Doctrine of Res Judicata.
- (b) Effective Date under the PPA i.e., 03.12.2015 remains unaltered even after signing of the SPPA on 04.04.2018.
- (c) The Commission disallows Change in Law relief to the Petitioner though both GST and Safeguard Duty stand the test of time, having been issued after effective date 03.12.15, and test of Statutes as both the GST and Safeguard Duty qualify as "Law" as per the PPA, having been introduced by "Indian Government Instrumentalities".

42. Accordingly, the petition is disposed of in above terms.

(Sanjay Kumar Singh)
Member

(Vinod Kumar Srivastava)
Member (Law)

(Arvind Kumar)
Chairman

Place: Lucknow

Dated: 20.10.2023



