TELANGANA STATE ELECTRICITY REGULATORY COMMISSION

5th Floor, Singareni Bhavan, Red Hills, Lakdi-ka-pul, Hyderabad 500 004

O. P. No. 22 of 2020
&
I. A. No. 3 of 2021

Dated 04.10.2021

Present

Sri T. Sriranga Rao, Chairman
Sri M. D. Manohar Raju, Member (Technical)
Sri Bandaru Krishnaiah, Member (Finance)

Between:

M/s ACME Dayakara Solar Power Private Limited,
Plot No.152, Sector–44, Gurugram,
Haryana – 122 002. … Petitioner.

AND

Southern Power Distribution Company of Telangana Limited,
Corporate Office, # 6-1-50, Mint Compound,
Hyderabad – 500 063. ... Respondent.

The petition came up for hearing on 09.10.2020, 09.11.2020, 14.12.2020, 07.01.2021, 18.01.2021, 11.02.2021 and 15.03.2021. Sri Aditya K.Singh, Advocate along with Smt. Jyotsna Khatri and Sri Tushar Goyal, Advocates for petitioner and Sri Mohammad Bande Ali, Law Attaché for respondent on 09.10.2020, Smt. Jyotsna Khatri, Advocate for petitioner and Sri Mohammad Bande Ali, Law Attaché along with Sri K.Satish Kumar, DE TSSPDCL for respondent on 09.11.2020, Smt. Jyotsna Khatri, Advocate for petitioner and Sri Mohammad Bande Ali, Law Attaché for respondent on 14.12.2020, Sri Hemant Sahai, Senior Advocate for petitioner and Sri Mohammad Bande Ali, Law Attaché for respondent on 07.01.2021, 11.02.2021 and 15.03.2021, Sri Shresth Sharma, Advocate representing Sri Hemant Sahai, Senior Advocate for petitioner and Sri Mohammad Bande Ali, Law Attaché for respondent on 18.01.2021

have appeared through video conference, having been heard and having stood over for consideration to this day, the Commission passed the following:

ORDER

The petitioner has filed the present petition under section 86 (1) (b) and (f) of the Electricity Act, 2003 (Act, 2003) read with Article 11.4 of the power purchase agreement (PPA) dated 03.03.2015 executed between the parties, seeking declaration that the payment of entry tax be treated as change in law and for reimbursement of the amount to the petitioner and the pleading of the petition are as below:

a. The petitioner stated that the Commission has been vested with jurisdiction to adjudicate the issues arising in the present petition. Article 11.4 of the PPA states that the petitioner can approach this Commission to resolve the dispute under section 86 (1) (f) of the Act, 2003. Further, provision of section 86 (1) (f) of the Act, 2003 in itself empowers the State Commission to adjudicate upon the disputes between the licensees i.e., the respondent and the petitioner. The Commission has regulatory jurisdiction under section 86 (1) (b) of the Act, 2003 over regulatory purchase and procurement process of the distribution companies of the State of Telangana.

b. The petitioner stated that A. P. Tax on Entry of Goods into Local Areas Act, 2001 was enacted with the objective to levy and collect tax on entry on certain goods into the local areas in the erstwhile State of A.P. By virtue of the Telangana Adaptation of Laws Order, 2016 dated 01.06.2016, the Entry Tax Act came into effect into the State of Telangana as Telangana Tax on Entry of Goods into Local Areas Act, 2001 (Entry Tax Act).

c. The petitioner stated that section 3 of the Entry Tax Act is a charging section as per which, tax is levied and collected. Sections 3 (1) (a) and 3 (2) reads as follows:

> Section 3(1) (a):“There shall be tax levied and collected on the entry of notified goods into any local area for sale, consumption or use therein … …”

Section 3(2): “No tax shall be levied on the notified goods imported by the dealer registered under the Andhra Pradesh Value Added Tax Act, 2005, who brings such goods into local area for the purpose of resale or using them as inputs for manufacture of other goods in the State of Andhra Pradesh or during the course of inter-state trade or commerce.”

d. The petitioner stated that the constitutional validity of sections 3 and 4 of the A. P. Entry Tax Act was challenged before the Hon’ble High Court of Andhra Pradesh in the matter titled “*Sree Rayalseema Alkalies and Allied Chemicals Limited v. State of Andhra Pradesh and Ors.*” (W.P.No.615 of 2002) and the Hon’ble High Court vide its order dated 31.12.2007 declared levy of Entry Tax as unconstitutional (AP High Court Order dated 31.12.2007).

e. The petitioner stated that A.P. High Court order dated 31.12.2007 was challenged before the Hon’ble Supreme Court in *“State of A.P. vs M/s. Rayalaseema Alkalies, SLP (C) No. 8053-8077/2008”*. Vide the said petition, entry tax of various states were under challenge and all matters were tagged and titled as *‘Jindal Stainless Ltd & Anr vs State of Haryana and Ors.’*

f. The petitioner stated that Government of Telangana (GoTS) vide its letter dated 18.07.2014 directed Transmission Corporation of Telangana Ltd. (TSTransco) and Telangana State Power Coordination Committee (TSPCC) to initiate a bidding process for purchase of 500 MW solar power through competitive bidding route.

g. The petitioner stated that TSTransco and TSPCC by way of letter dated 25.07.2014 directed TSSPDCL to initiate the competitive bidding process on behalf of Telangana State electricity distribution companies for purchase of 500 MW of solar power.

h. The petitioner stated that pursuant thereto, TSSPDCL issued 'Request for Selection' (RfS) document on 27.08.2014 for selection of solar PV developers in the State of Telangana for procuring 500 MW in terms of the provisions of the guidelines and a copy of the PPA was attached to the RfS as bidding document made available to the participating bidders.

i. The petitioner stated that in furtherance of the RfS, it submitted its bid on 27.08.2014. It may be noted that the petitioner, after taking into consideration, *inter alia*, the prevailing taxes, duties and exemptions etc. submitted a levelised tariff of Rs.6.848 per unit.

j. The petitioner stated that upon conclusion of the e-reverse auction, the ACME Solar Energy Private Ltd. (ASEPL) was declared as one of the successful bidders by the respondent for the development of 30 MW capacity solar power project near 132/33 kV Maddur SS, Mahabubnagar District, Telangana (project) for sale to TSSPDCL in accordance with the policy announced by GoTS vide letter No.50/Budget/2014-2 dated 18.07.2014 including the erstwhile G.O.Ms.No.46 dated 27.11.2012 of Government of Andhra Pradesh. In this regard, the TSSPDCL issued Letter of Intent (LoI) dated 23.01.2015 to ASEPL for implementation of the project.

k. The petitioner stated that pursuant to the issuance of the above LoI, the ASEPL formed special purpose vehicle i.e., the petitioner for development, generation and sale of solar power. Thereafter, it entered into PPA with TSSPDCL on 03.03.2015 to set up solar PV power project based on photo-voltaic technology of 30 MW capacity in the State of Telangana and supply it to the respondent.

l. The petitioner stated that for setting up solar power plant Inter-State movement of various products including but not limited to solar PV module, string and array, array junction box/string combiner box, DC cable, inverter, inverter duty transformer, medium voltage switch gear, earthing & lighting protection system, pooling end substation, power transformer, SCADA, WMS and PPC system etc., are required. It is stated that without the usage of the equipment and technical components which are essential for setting up of power plant and thereafter generation, as stated supra, power cannot be generated from solar power project and cannot be supplied to the distribution licensee for consumption by the end consumer.

m. The petitioner stated that in order to procure components to set up its solar power plant in Telangana, it filed C-Forms prescribed under the

Central Sales Tax Act providing the detailed report for system descriptions and specifications of components / equipment.

n. The petitioner stated that subsequently the Hon'ble Supreme Court of India vide its order dated 11.11.2016 in the case of *"Jindal Stainless Steel Ltd. v State of Haryana 2017 (12) SCC 1 (Jindal Stainless Steel Case)"* declared that the levy of the Entry tax is constitutional.

o. The petitioner stated that in view of the said order, the Chief Tax Officer (CTO) issued show cause notice dated 02.01.2020 to the petitioner informing liability of an amount of Rs.5,84,83,022/- (Five Crores Eighty Four Lakhs Eighty Three Thousand and Twenty Two) for the period from April, 2016 to February, 2017 as an Entry tax for importing notified goods into the State of Telangana. However, the notice was issued with certain errors. CTO erred in stating that the demand for entry tax is for FY 2015-2016 while the said notice provided details for recovering entry tax amount for FY 2016-17. It is pertinent to note that the said error was addressed by the petitioner vide its reply to the notice dated 30.01.2020 and also contested the allegations as made out by CTO in show cause notice dated 02.01.2020. Pursuant thereto, CTO passed separate Assessment Orders dated 11.02.2020 (Assessment Orders) for both the financial years, confirming the demand of the proposed entry tax of Rs.77,59,769/- and Rs.5,84,83,022/- on goods for the financial year 2015-16 and 2016-17 respectively to be paid on notified goods imported into the State of Telangana.

p. The petitioner stated that aggrieved by the said Assessment Orders had filed petitions being W.P.No.4921 of 2020 and 4922 of 2020, titled as *"Dayakara Solar Power Pvt. Ltd. v. State of Telangana and Ors."*, on 03.03.2020 before the Hon'ble High Court of Telangana at Hyderabad. The said petitions were listed on 04.03.2020 whereby the Hon'ble High Court directed interim stay on the recovery amount subject to the payment of 25% Entry tax as demanded by the CTO within 6 weeks from the date of order dated 04.03.2020. The Hon'ble High Court has further passed orders on 27.04.2020 vide which the timelines to pay such 25% amounts have been extended till 06.06.2020.

q. The petitioner stated that due to imposition of the Entry tax it has been compelled to incur additional expenditure. Thereafter, it by way of communication dated 03.04.2020 duly furnished Change in Law notice upon the respondent highlighting the judgment dated 11.11.2016 passed by the Hon'ble Supreme Court, show cause notice dated 02.01.2020 issued by Commercial Taxes Department, GoTS and Assessment Order dated 11.02.2020 pronounced by CTO read with Hon'ble Telangana High Court Order dated 04.03.2020 as Change in Law events.

r. The petitioner stated that it approached Hon'ble Supreme Court against the Telangana High Court Order dated 04.03.2020 (SLP Diary No.11445 of 2020) challenging the payment of 25% entry tax amount. The Hon'ble Supreme Court vide its order dated 03.06.2020 directed Hon'ble High Court of Telangana to pass a reasoned order. Time period to pay the Entry tax was extended, however the Hon'ble Supreme Court did not grant stay on the payment of 25% of the Entry tax amount.

s. The petitioner stated that in view of the foregoing facts and circumstances and the significant increase in the capital cost of the project owing to the implementation of Entry tax and aggrieved by the action of TSSPDCL for not compensating for the costs incurred, the petitioner is filing the instant petition before the Commission to declare the aforesaid events as Change in Law and seek approval of the following grounds, which are being raised in the alternate and the petitioner reserves its right to make further or other grounds with the leave of the Commission as and when the need arises:

t. The petitioner stated that because the implementation of the Entry tax is squarely covered by the definition of 'Change in Law' under Article 1.12 of the PPA. The relevant excerpts of Article 1.12 of the PPA is set out herein below:

> **"ARTICLE 1: DEFINITONS**
>
> 1.12 "**Change in Law**" means any change or amendment to the provisions of electricity law in force, regulations, directions, notifications issued by the competent authorities and Government of Indian (GoI), Government of Telangana State (GoTS) including

the erstwhile Government of Andhra Pradesh (GoAP) from time to time.

Liability to pay Entry Tax by virtue of the Supreme Court Judgment in Jindal Stainless Steel Case qualifies as a change in law event in terms of Article 1.12.

u. The petitioner stated that because the PPA is a commercial contract which should be understood in commercial sense. The courts of law have consistently recognised that commercial contracts and their construction stand on a separate footing. Such contracts are to be construed in a manner so as not to invalidate them but rather to make them workable and to lend business efficacy. In doing so, a court of law will imply into the contract a term or language if so necessary, to arrive at a construction and interpretation which will lend business efficacy to the contract, validate it and make it workable.

v. The petitioner stated that because changes in the tax regime are uncontrollable expenses and a generating company cannot reasonably be forced to assume or absorb such risks. The intention while tying up long term capacity under the PPA could never have been to denude the generating company of an opportunity to be compensated for risks/changes which are beyond its' control. Moreover, it is a settled principle that if the contract does not provide for a particular eventuality, the parties shall be governed by the provisions of the Indian Contract Act, 1872 (Indian Contract Act) in respect of that eventuality. Section 70 of the Indian Contract Act is extracted hereunder:

> "70. **Obligation of person enjoying of non-gratuitous act**:- Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered".

As per the above provision, where a person does an act, not intending to act gratuitously and the other person derives any benefit of such act, then the person enjoying the benefit is liable to compensate the other to the extent of the benefit received. In the present case, the Petitioner is

now being made liable to incur additional expenditure for generation and supply of power on account of change in law due to judgment of the Hon'ble Supreme Court in Jindal Stainless Steel Case. In such a situation, the petitioner has the right to be compensated by TSSPDCL for the non-gratuitous act incurring additional expenditure on account of validation of Entry tax statue for supply of power to TSSPDCL in terms of the PPA.

w. The petitioner stated that because the electricity sector is a regulated sector and the provisions of the Act, 2003 specifically prescribe to ensure that the generation is conducted on commercial principles and that the tariff is cost reflective. It is further stated that it should be compensated for the losses suffered by it, basis settled principles of contract law, including 'Quantum Meruit'. Under the law, this theory can be employed where another party has received an unfair benefit and, thus, must provide restitution to the party who provided that benefit.

x. The petitioner stated that while submitting its bid on 27.08.2014, could not have factored in the impact of Entry tax on the cost of equipment and accordingly, could not have quoted a tariff which could cater to such a change in the tax structure of the country as the same was not applicable at the time of bid submission. The same could only have been done if the Hon'ble High Court had not made the levy of Entry tax as unconstitutional. Since the relevant provisions of Entry tax did not exist at the time of bidding, the petitioner could not factor the same in its quoted tariff. In view thereof, it is stated that the adverse financial impact of application of Entry tax, which occurred after the submission of bid is squarely covered within the ambit of 'Change in Law'.

y. The petitioner stated that because the levy of entry tax was declared unconstitutional vide order dated 31.12.2007 passed by the Hon'ble High Court and accordingly, the petitioner participated in the bid and won the same by quoting the levelised tariff @ Rs. 6.848/- per unit which does not include the calculations of entry tax. However, subsequently, directions of enforceability of entry tax passed by the Hon'ble Supreme Court has changed the dynamics upon which it had submitted its bid.

z. The petitioner stated that because the levy of Entry tax has adversely affected the capital cost of the project as the rate of taxation on the import of notified goods from outside the State for the purpose of using them as inputs for manufacture was nil. Such steep increase in tax amount from zero to Rs.6,62,42,791/ - (Rs.77,59,769/- + Rs.5,84,83,022/-) on goods for financial years 2015-16 and 2016-17 has increased the capital cost of the petitioner significantly, resulting into additional expenditure/costs.

aa. The petitioner stated that because the Central Electricity Regulatory Commission (CERC) has itself held on earlier occasions that introduction of a new tax which was not in existence at the time of submission of bid would be covered within the definition of 'Change in Law'. In this regard, reference is made to order dated 30.03.2015 issued by the Hon'ble CERC in Petition No.6 / MP / 2013 while dealing with the introduction of clean energy cess held as follows:

> "33. … … Since there was no clean energy cess on the date of submission of the bid, the petitioner could not be expected to factor in the impact of such cess in the bid. Moreover, clean energy cess adds to the input cost of production of electricity. Therefore, the claim is covered under Article 13.1.1.(i) of the PPA and consequently the liabilities shall be borne by the procurers."

In view thereof, it is abundantly clear that at the time of submission of bids, bidders are only required to factor in taxes / levies prevailing under the extant laws and submit their bid accordingly. A bidder cannot be expected to factor in the impact of a tax which was not even in existence at the time when it submitted its bid.

ab. The petitioner stated that because in the instant case, at the time of submission of the bid, the relevant provisions of entry tax was declared unconstitutional by the Hon'ble High Court of Andhra Pradesh. It was only after the execution of the PPA that is 03.03.2015, imposition of the entry tax was validated by the Hon'ble Supreme Court in Jindal Stainless Case. Therefore, the petitioner had stated its bid taking into account the rates of taxes prevalent at that point in time. Any subsequent change in the structure of tax or reintroduction of a tax, which increases the cost of procurement of equipment, adversely affecting the cost of business of

generation and sale of electricity, has to clearly fall within the ambit of Article 9.1 read with Article 1.12 of the PPA in terms of the aforementioned principles.

ac. The petitioner stated that because in terms of section 86(4) of the Act, 2003, the Commission while discharging its functions under the Act has to be guided by the provisions of National Tariff Policy, 2016 (NTP). Clause 6.2 (4) of the NTP clearly states that any change in taxes imposed by the Central/State Government after the award of bids has to be treated as 'Change in Law' unless otherwise provided for in the PPA. The relevant provisions of the NTP are reproduced herein below:

> *"6.2 **Tariff structuring and associated issues***
>
> *… …*
>
> *(4) After the award of bids, if there is any change in domestic duties, levies, cess and taxes imposed by Central Government, State Governments/Union Territories or by any Government Instrumentality leading to corresponding changes in the cost, the same may be treated as "Change in Law" and may unless provided otherwise in the PPA, be allowed as pass through subject to approval of Appropriate Commission."*

As already elaborated earlier, the PPA executed by it with the respondent clearly stipulate that any change in the directions by the competent authorities shall be treated as 'Change in Law' under Article 1.12. Therefore, the PPA executed by the petitioner with the respondent is in line with the provisions of the NTP which clearly envisages that any change in the taxes imposed by the Central Government which result in a corresponding impact on the cost have to be treated as a 'Change in Law' event.

ad. The petitioner stated that the instant petition is made bona-fide and in the interest of justice. It is stated that the respondent has an obligation to make payments in the spirit of the PPAs dated 03.03.2015. It is further submitted that unless remedial steps are taken, the interests of the petitioner will be severely prejudiced. Therefore, it by this petition seeks the intervention / approval of the Commission to resolve issues

herein raised and also pass such directions as it deems appropriate to ensure that the interest of the petitioner is protected.

ae. The petitioner stated that unless the prayers made herein below are granted in favour of the petitioner, the petitioner shall suffer irreparable loss and harm to its business which also affects the viability and feasibility of its project.

af. The petition has filed writ petitions, being W.P.Nos.4921 of 2020 and 4922 of 2020, before the Hon'ble High Court of Telangana challenging the wrongful application of Entry Tax Act and passage of the final Assessment Orders dated 11.01.2020 passed by CTO under Entry Tax Act as being illegal, arbitrary and violative of Article 14, Article 19(1)(g) of the Constitution of India. It is imperative to note herein that the Hon'ble High Court has passed an order dated 04.03.2020 and granted interim stay on the payment of entry tax by the petitioner subject to the payment of 25% of the Entry tax as demanded by CTO. The Hon'ble High Court has further passed an order dated 27.04.2020 vide which the timelines to pay such 25% amounts has been extended till 06.06.2020. Hon'ble Supreme Court further extended timelines of payment by 2 weeks.

ag. The petitioner has sought the following relief in the petition.

"i. Hold and Declare that imposition of Entry Tax for entry of Goods in the State of Telangana through Telangana Tax on Entry of Goods into Local Areas Act, 2001 read with Judgment dated 11.11.2016 titled "Jindal Stainless Limited and Anr. v. State of Haryana & Ors and Batch (Civil Appeal No.3453 of 2002) read with Show Cause Notices dated 02.01.2020 issued by Commercial Taxes Department, Government of Telangana and Assessment Orders dated 11.02.2020 pronounced by Commercial Tax Officer, Mahboobnager Circle, Nalgonda Division, Telangana read with Hon'ble Telangana High Court Orders dated 04.03.2020 qualify as a Change in Law Event as per Article 12 of the PPA; and

ii. Direct the respondent to reimburse the petitioner for the corresponding increase in the project cost on account of

imposition of the entry tax as and when paid by the petitioner no later than seven (7) days of claim(s), as one time lump amount.

2. The respondent has filed counter affidavit and stated as below:

a. The respondent stated that the petition under reply seeking approval of Change in Law events due to enactment of Entry Tax Act read with Judgment dated 11.11.2016 titled *"Jindal Stainless Limited and Anr Vs State of Haryana & Ors., and Batch (Civil Appeal No.3453 of 2002)"* read with show cause notice dated 02.01.2020 issued by Commercial Taxes Department, GoTS and Assessment Order dated 11.02.2020 made by Commercial Tax Officer, (CTO) Mahabubnagar Circle, Nalgonda Division, Telangana read with Hon'ble Telangana High Court order dated 04.03.2020 is not maintainable and the same is liable to be dismissed.

b. The respondent stated that TSSPDCL issued request for selection (RfS) Bid No.TSSPDCL / 02 / LTSPP / 2014 dated 27.08.2014 for selection of solar power developers for purchase of 500 MW solar power. Pursuant to the aforesaid bid process, the petitioner was selected as successful bidder in the competitive bidding 2014.

c. The respondent stated that accordingly the petitioner entered into PPA with TSSPDCL on 03.03.2015 for supply of 30 MW power from their solar power project connecting at interconnection point 132 / 33 kV Maddur SS, Mahabubnagar with a tariff of Rs.6.848 per unit for a period of 25 years. The SCOD of the petitioner's project is 02.06.2016. The petitioner did not commission the project with stipulated time that is 02.06.2016.

d. The respondent stated that the GoTS vide letter No.4543 / Budget. A2 / 2015-1, dated 26.07.2016 has given extension of SCOD upto 31.12.2016 as last chance for SCOD to the solar power projects in the State who have concluded PPAs under (i) competitive bidding-2012 & open offer route-2013 and (ii) competitive bidding-2014.

e. The respondent stated that the Commission vide letter dated 14.10.2016, has given its consent for extension of SCOD timelines upto 31.12.2016 subject to the certain conditions.

f. The respondent stated that as per consent/approval of TSERC, the amendment to the PPA was entered with petitioner on 29.10.2016 for extension of SCOD timeline upto 31.12.2016 at tariff of Rs.6.848 per unit

for a period of 25 years. The Commercial Operation Date (COD) of the petitioner's project was declared on 23.07.2016.

g. The respondent stated that it is pertinent to note that clause 2 of the RfS document issued by TSSPDCL for grid connected solar PV projects in the State of Telangana, lays down that the petitioner was required to quote tariff for the entire term of the project i.e., 25 years:

> **Clause 2 of RfS reads thus:**
>
> "**Quoted Tariff** shall mean
>
> In case the Bidder has opted for Tariff Option-l as specified in Financial Bid Format 6.10 (B), **the tariff quoted by the Bidder which shall be applicable for entire term of the PPA.**"

h. The respondent stated that clause 3.2 and 6.1(iv) of PPA are extracted below which stipulates the obligation of the petitioner:

> "3.2 The Solar Power Developer shall own, operate and maintain Interconnection Facilities from Project to grid sub-station from time to time and shall bear the necessary expenditure.
>
> … …"
>
> "6.1 **The Solar Power Developer shall be responsible**:
>
> … …
>
> iv) **for making all payments on account of any taxes, cess, duties or levies or any statutory obligation imposed by any government or competent statutory authority on the land, equipment, material or works of the Project or on the energy generated or consumed by the Project or the Solar Power Developer or on the income or assets of the Solar Power Developer.**"

i. The respondent stated that as could be seen from the provisions of clause 3.2 & 6.1, it is the obligation of the SPD to construct & commission the solar project at its own risk and cost till the commencement of supply of power which means that the petitioner was required to bear the entire cost of the solar project including all taxes & duties, cess etc., during the construction period till the commissioning of the project and further also, in order to fulfil its obligation to supply power to TSSPDCL and TSSPDCL's obligation for payment of tariff starts only after

commencement of supply at the interconnection point at the tariff agreed. PPA provisions indicate that the petitioner is obligated to Commission the solar project and supply power to TSSPDCL upto the contracted capacity.

j. The respondent stated that the PPA provides for payment of tariff to petitioner only after commissioning of the project. The relevant clause is extracted as below:

> "2.2 The DISCOM shall pay Tariff of Rs.6.848 per unit to the Solar Power Developer as per the tariff quoted by the solar power developer in the Bid.
>
> i. The bidder has opted for Tariff Option-I as specified in the Financial Bid Format 6.10(B) of RfS, then Tariff for all Tariff Years for the entire term of the Agreement shall be the Quoted Tariff;
>
> 2.3 **The Tariff payable by the DISCOM shall be inclusive of all taxes, duties and levies or any other statutory liability, as applicable from time to time.**"

k. The respondent stated that the contention of the petitioner that the impact of entry tax on the cost of equipment not being included in the quoted tariff is not tenable since the Tax on Entry of Goods into local area was in force from the year 2001, which was much prior to submission of its bid dated 27.08.2014.

l. The respondent stated that as per RfS document, all the bidders are required to submit their financial bid taking the prevailing cost parameters, taxes, duties etc., into account and once such bid is placed on record and the bidder is selected basing on the lowest bid, he/it is not supposed to come forward at a later point of time with a contention that he/it did not take certain law or tax into account. In case any bidder fails to take into account certain law or tax into account and submits his/its bid, it would be obviously lower bid than the other bidders who calculated the bid amount taking all aspects into consideration. As a result of which the right and interest of the competent bidder to get himself selected would get defeated and this attitude of the bidder would amount to getting himself selected in the competitive bidding based on the lowest tariff

quoted by suppressing and misrepresenting the material facts. In such view of the matter, had the petitioner quoted his/its bid taking all the laws and taxes etc. into account, its bid would not have been lowest and some other bidder would have got opportunity of being selected basing on its bid which would have been lesser than the bid of the petitioner.

m. The respondent stated that being selected in the competitive bidding based on the lowest tariff quoted by the petitioner/solar power developer and having entered into PPA with it at the quoted tariff and after getting approval of the same from the Commission for adoption of the tariff under section 63 of the Act, 2003, It is liable to pay the quoted tariff (agreed tariff) as per the PPA, which is inclusive of all taxes, levies and duties as per clause 2.3 of the PPA for a period of 25 years. Reimbursement of the amount as claimed by the petitioner on account of the impact of tax on entry of goods into local area, Act 2001, which was in force from the year 2001 itself, which was much prior to submission of its bid dated 27.08.2014 would amount to indirectly increasing the tariff. Hence the claim of the petitioner seeking reimbursement of the amount of the tax payable by it becomes untenable and hence deserves no consideration. It will not pay any amount other than the tariff mentioned in the PPA for the energy purchased from the petitioner for the PPA term.

Section 63 of Act, 2003 is extracted hereunder:

"63. Determination of tariff by bidding process: Notwithstanding anything contained in section 62, the appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government."

n. The respondent stated that the order dated 30.03.2015 issued by CERC in Petition No.6 / MP / 2013 was referred by petitioner in the matter of introduction of clean energy cess, which was upheld by CERC since there is a separate Change in Law clause in the that contended PPA wherein it is clearly stipulated in the PPA between M/s Sasan Power Limited versus M P Power Management Company Limited & Ors. The extract of Change in Law clause in that PPA is as below:

"13.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:

(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or

(ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or

(iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the seller, which results in any change in any cost of or revenue from the business of selling electricity by the seller to the procurer under the terms of this agreement or

(iv) any change in the

(a) the declared price of land for the projector; or

(b) the cost of implementation of the resettlement and rehabilitation package of the land for the project mentioned in the RfP; or

(c) the cost of implementing Environmental Management Plan for the Power Station mentioned in the RfP; or

(d) the cost of implementing compensatory afforestation for the Coal Mine, indicated under the RFP and the PPA; but shall not include;

(i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or

(ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission.

Provided that if Government of India does not extend the income tax holiday for power generation projects under Section 80 IA of the Income Tax Act,

upto the Scheduled Commercial Date of the Power Station, such non-extension shall be deemed to be a Change in Law."

Article of the SBD of grid connected solar plants is given below:

"**Relief for Change in Law**

The aggrieved party shall be required to approach the appropriate Commission for seeking approval of Change in Law.

The decision of the appropriate Commission to acknowledge a Change in Law and the date from which it will become effective, provide relief for the same, shall be final and governing on the both parties."

o. The respondent stated that as there is no separate Change in Law clause in the PPA entered with petitioner, the petitioner shall bear and pay all the statutory taxes, duties, levies and cess on land, equipment material or woks of the project or on the energy generated or consumed by the project or the solar power developer or on the income or asset of the solar power developer as per clause 6.1 of the PPA. More so, even if such clauses mentioned supra would have been there in the PPA entered by the petitioner, the petitioner could not have taken aid of it to claim the reimbursement for the reason that the said law relating to entry tax was in force from the year 2001 i.e., much prior to the bid submitted by the petitioner.

p. The respondent stated that it is the duty of the petitioner to take all aspects touching its bid into account. The petitioner was bound to take note of pendency of SLPs No.8053-8077 of 2008 which were filed challenging the order of Hon'ble High Court of A.P. in W P.No.615 of 2002 holding the particular law regarding the entry tax unconstitutional.

q. The respondent stated that the petitioner having failed to take the aforementioned aspects into account is estopped from contending that, it did not take the said law into account while submitting its bid. In any view of the matter the contention of the petitioner regarding Change in Law cannot be considered.

r. The respondent stated that section 70 of Indian Contract Act is not applicable to the facts and circumstance of the present case.

s. The respondent prayed that the Commission may reject / dismiss the petition at the stage of admission.

3. The petitioner has filed an Interlocutory Application (I. A.) seeking amendment in the petition which is as below.

a. The applicant / petitioner has filed the instant petition under section 86 (1) (f) and section 86 (1) (b) of the Act, 2003 read with Article 11.4 of the PPA dated 03.03.2015 executed between the parties in this petition seeking approval of Change in Law events due to enactment of Entry Tax Act read with judgment dated 11.11.2016 titled *"Jindal Stainless Limited & Anr. v. State of Haryana & Ors. and Bat*ch (Civil Appeal Nos. 3453 of 2002)" read with show cause notice dated 02.01.2020 issued by Commercial Taxes Department, GoTS and Assessment Order dated 11.02.2020 pronounced by CTO, Mahboobnagar Circle, Nalgonda Division, Telangana read with Hon'ble Telangana High Court Order dated 04.03.2020.

b. The applicant / petitioner stated that CTO unlawfully and arbitrarily issued separate Assessment Orders dated 11.02.2020 (Assessment Orders) demanding entry tax of Rs.77,59,769/- and Rs.5,84,83,022/- on goods for the financial year 2015-2016 and 2016-2017 respectively to be paid on notified goods imported into the State of Telangana. The said orders were issued pursuant to the judgment dated 11.11.2016 titled *"Jindal Stainless Limited & Anr. v. State of Haryana & Ors. and Batch (Civil Appeal No.3453 of 2002)"* whereby the Hon'ble Supreme Court of India declared Entry tax law as constitutional and further granted liberty to parties to apply to High Courts to raise the issue of constitutionality of respective state's Entry tax legislation.

c. The applicant / petitioner stated that the issue of the constitutionality of Entry Tax Act emerged before the Hon'ble High Court of Andhra Pradesh in the matter titled *"Sree Rayalseema Alkalies and Allied Chemicals Limited v. State of Andhra Pradesh and Ors. (W. P. No. 615 of 2002)"* whereby the Hon'ble High Court vide its order dated 31.12.2007 declared levy of entry tax under Entry Tax Act as unconstitutional. The said order was then challenged before the Hon'ble Supreme Court in '*State of A. P.*

v. M/s Rayalaseema Alkalies', SLP (C) No.8053-8077 / 2008 which was tagged along with Jindal steel case to decide on the constitutionality of entry tax law. The Hon'ble Supreme Court in judgment dated 11.11.2016 passed by nine judges bench declared the Entry tax law as valid and further propounded the principles vide which the respective High Courts have to adjudicate as to whether the tax imposed by a particular statute is valid or not.

d. The applicant / petitioner stated that in furtherance to the directions issued by nine judges bench of the Hon'ble Supreme Court vide its order dated 11.11.2016, the Hon'ble Supreme Court passed an order dated 29.03.2017 in Civil Appeal Nos. 8036-8060 of 2017 (arising out of SLP (C) Nos.8053-8077 of 2008) and declared that the issues pertaining to, *inter alia*, validity of levy of entry tax on the goods imported from other countries is not decided in Jindal Steel case. The requirement of levy of entry tax is reliant on factual foundation which was not discussed before the Hon'ble High Court in respective writ petitions. In view thereof, the Hon'ble Supreme Court granted liberty to parties to approach respective High Courts raising the issues pertaining to levy of entry tax with necessary factual background or any other constitutional/statutory issue which arises for consideration. Notably, the adjudication on legality of Entry Tax Act, (adapted by the State of Telangana as Telangana Tax on Entry of Goods into Local Areas Act, 2001 by virtue of Telangana Adaptation of Laws Order, 2016 dated 01.06.2016) is still pending before the Hon'ble High Court of Telangana.

e. The applicant / petitioner stated that CTO issued show cause notices by erroneously interpreting Jindal Steel case judgment assuming that the Hon'ble Supreme Court has declared Entry Tax Act constitutional and the petitioner is liable to pay entry tax retrospectively on the goods imported into the State from other countries for the development of project.

f. The applicant / petitioner stated that aggrieved by unlawful actions of the CTO, the petitioner approached the Hon'ble High Court of Telangana challenging the legality of the Assessment Orders dated 11.02.2020 whereby vide orders dated 04.03.2020, 27.04.2020 and 22.06.2020, the

Hon'ble High Court granted interim stay on the recovery amount subject to the payment of 25% of Entry tax amount. In compliance of the Hon'ble High Court order dated 22.06.2020, the petitioner, on 19.08.2020, paid a sum to the tune of Rs.19,39,942/- (25% of Rs.77,59,769/-) for FY 2015-16 vide challan No.2000497328 and Rs.1,46,20,755/- (25% of Rs.5,84,83,022/-) for FY 2016-17 vide challan No.2000497341 towards Entry tax which has been brought on record by the petitioner vide its additional affidavit dated 08.10.2020.

g. The applicant/petitioner stated that while the matter is pending adjudication before the Hon'ble High Court of Telangana, the petitioner has already paid significant amount towards entry tax. It is stated that as per the Change in Law definition stipulated under Article 1.12 of the PPA, such reimposition of entry tax levy constitutes as a Force Majeure event. Therefore, it is the duty of the respondent to compensate for the amount accrued and going to accrue to the petitioner on account of the Change in Law as per the terms of the PPA dated 03.03.2015. The impact of the cost over and above the initial envisaged project cost has imposed severe hardship to the petitioner and loss of economic value.

h. The applicant / petitioner stated that in the instant petition, the petitioner sought for following reliefs from this Commission.

a) Admit the instant Petition:

b) Hold and declare that imposition of Entry Tax for Entry of Goods in the State of Telangana through Telangana Tax on Entry of Goods into Local Areas Act, 2001 read with Judgment dated 11.11.2016 titled "Jindal Stainless Limited & Anr. v. State of Haryana & Ors and Batch (Civil Appeal Nos. 3453 of 2002) read with Show Cause Notices dated 02.01.2020 issued by Commercial Taxes Department, Government of Telangana and Assessment Orders dated 11.02.2020 pronounced by Commercial Tax Officer, Mahboobnager Circle, Nalgonda Division, Telangana read with Hon'ble Telangana High Court Orders dated 04.03.2020 qualify as a Change in Law Event as per Article 12 of the PPA; and

c) Direct the Respondent to reimburse the petitioner for the corresponding increase in the project cost on account of imposition of the entry tax as and when paid by the petitioner no later than seven (7) days of claim(s), as one time lump amount, submitted by the petitioner.

d) Allow legal and administrative costs incurred by the petitioner in pursuing the instant petition"

i. The applicant / petitioner stated that on 08.10.2020, the petitioner filed Additional Affidavit bringing on record the payment of 25% tax amount as directed by the Hon'ble High Court of Telangana vide its order dated 22.06.2020 and sought for additional prayers being:

a) "Direct Respondent" Southern Power Distribution Company of Telangana Limited to reimburse the payments as made by the petitioner towards Entry tax;

b) Declare that petitioner is entitled for reimbursement of payment made towards entry tax in the future and direct respondent to reimburse the same upon petitioner furnishing proof of the payment;"

j. The applicant / petitioner stated that considering the additional burden being imposed on the petitioner towards payment of entry tax and in order to compensate the petitioner for the time value of money, the applicant is filing the instant application for the purpose of amending the petition filed by the petitioner so as to seek payment of carrying cost / interest incurred by the petitioner in furtherance to the Change in Law Event as detailed in the petition.

k. The applicant / petitioner stated that the facts and circumstances giving rise to filing of the captioned petition have been stated in detail therein and the petitioner / applicant, for the sake of brevity, is not repeating the detailed facts herein and craves leave of the Commission to refer to and rely upon the same at the time of hearing.

l. The applicant / petitioner stated that the petitioner is entitled to claim carrying cost on the amount due and payable by the respondent. It is settled position of law that whenever payments are deferred or delayed, then carrying cost is payable along with such deferred payments.

Carrying cost is nothing but compensation for time value of money or monies denied at the appropriate time. The reference herein is to be made to the Hon'ble Supreme Court's judgment dated 13.10.2003 in *"South Eastern Coalfields Ltd. v. State of Madhya Pradesh and Ors., (2003) 8 SCC 648"* whereby the Hon'ble Supreme Court has held that interest is payable in equity in certain circumstances. Relevant portion of the judgment is stipulated herein under.

> "24. We are, therefore, of the opinion that in the absence of there being a prohibition either in law or in the contract entered into between the two parties, there is no reason why the Coalfields should not be compensated by payment of interest for the period for which the consumers/purchasers did not pay the amount of enhanced royalty which is a constituent part of the price of the mineral for the period for which it remained unpaid. The justification for award of interest stands fortified by the weighty factor that the Coalfields themselves are obliged to pay interest to the State on such amount. It will be a travesty of justice to hold that though the Coalfields must pay the amount of interest to the State but the consumers / purchasers in whose hands the money was actually withheld be exonerated from liability to pay the interest."

Moreover, the principle of carrying cost and restitutive relief has been well established in:-

(i) Yadava Kumar v. Divisional Manager, National Insurance Company Limited and Anr. – 2010 (10) SCC 341 (para 17).

(ii) Indian Council for Enviro-Legal Action v. Union of India and Ors. 2011 (8) SCC 161 (para 167).

m. The applicant / petitioner stated that the "economic position", which is sought to be restored in terms of the Change in Law clause does not limit itself to a simple correlation of increased expenditure and a corresponding compensation amount but ought to also include compensation in terms of carrying costs incurred with respect to the said Change in Law Events. It is settled law that as per the dictionary meaning

'compensation' means anything given to make things equal in value i.e., anything given as an equivalent, to make amends for loss or damage.

n. The applicant / petitioner stated that the Hon'ble Appellate Tribunal for Electricity (Hon'ble ATE) has held that the rationale behind allowance of carrying cost is to compensate the affected party for the time value of money or the monies denied at the appropriate time and paid after a lapse of time. In view thereof, the petitioner is entitled to interest on the differential amount due to it as a consequence of additional expenditure incurred by it on account of the Change in Law Event.

o. The applicant / petitioner stated that while the petitioner has already incurred a significant additional expenditure on account of Entry tax, it is yet to receive the said additional expenditure from respondent. Accordingly, in addition to the compensation for the additional expenditure incurred by the petitioner as a result of re-imposition of Entry tax law, the petitioner also ought to be compensated for the cost of financing the said additional expenditure till the time the petitioner is compensated by respondent for incurring of the said expenditure.

p. The applicant / petitioner stated that in case carrying cost is not payable, it will amount to unjust enrichment of the respondent at the cost of the petitioner as the project has commenced supply of power from 23.07.2016. The petitioner cannot be made obligated to pay for something for which it has not agreed at the time of execution of the contract. The reference herein is made to the Hon'ble Supreme Court order in *"K.S.Satyanarayan v. V.R.Narayana Rao (1996) 6 SCC 104"* held:

> "9. … … So where a claim for compensation is made by one person against another under Section 70 it is not on the basis of any subsisting contract between the parties but on a different kind of obligation. The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi contract or restitution.
>
> This Court quoted with approval two decisions of the English Courts, which are quite illuminating and which we reproduce as under:

1. “In Fibrosa v. Fairbairn (1943) AC 32 Lord Wright has stated the legal position as follows:

… … any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English Law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi contract or restitution.”

q. The applicant / petitioner stated that the carrying cost is required to be allowed to the petitioner on account of the fact that there is a time lag between the happening of a certain Change in Law event that is re-imposition of entry tax law in the instant case and approval of the same by the Commission.

r. The applicant / petitioner stated that in view of the submissions made above, the petitioner vide the instant applicant is seeking additional prayer in the petition in order to make an express claim qua carrying costs incurred by the petitioner with respect to the Change in Law Event detailed in the petition.

Additional Prayer

“Grant carrying cost from the date of impact till reimbursement by the respondent”

s. The applicant / petitioner prays the Commission to:

“(a) permit the additional prayer(s) as submitted in the present application and affidavit dated 08.10.2020 to be read as part of the petition dated 25.06.2020.”

4. The petitioner has filed Additional Affidavit to bring on record additional documents and stated as below.

a. That it has filed the instant petition under section 86 (1) (f) and section 86 (1) (b) of the Act, 2003 read with Article 11.4 of the PPA dated 03.03.2015 executed between the parties, seeking approval of Change in Law events due to enactment of Entry Tax Act read with Judgment

dated 11.11.2016 titled *"Jindal Stainless Limited & Anr. v. State of Haryana & Ors. and batch (Civil Appeal Nos.3453 of 2002)*" read with show cause notice dated 02.01.2020 issued by Commercial Taxes Department, GoTS and Assessment Order dated 11.02.2020 pronounced by CTO, Mahboobnager Circle, Nalgonda Division, Telangana read with Hon'ble Telangana High Court Order dated 04.03.2020. Notably, CTO issued separate Assessment Orders dated 11.02.2020 (Assessment Orders) to the petitioner for FY 2015-16 and 2016-17, confirming the demand of the proposed entry tax of Rs.77,59,769/- and Rs.5,84,83,022/- on goods for the financial year 2015-16 and 2016-17 respectively to be paid on notified goods imported into the State of Telangana.

b. That the present petition was filed before the Commission on 25.06.2020 seeking afore-stated relief in terms of the facts and circumstances prevailing at the time of filing of the Petition. The petition is listed before the Commission on 09.10.2020 for admission.

c. That the present affidavit is being filed to bring on record following facts and document which would be essential for adjudication of issues raised in the instant petition:

(i) It is stated that it challenged the Assessment Orders dated 11.02.2020 and filed petitions being W.P.Nos.4921 of 2020 and 4922 of 2020, titled as "Dayakara Solar Power Pvt. Ltd., v. State of Telangana and Ors." on 03.03.2020 before the Hon'ble High Court of Telangana at Hyderabad. The Hon'ble High Court vide is reasoned order dated 22.06.2020 directed interim stay on the recovery amount subject to the payment of 25% Entry tax as demanded by the CTO within 6 weeks from the date of order dated 22.06.2020.

(ii) In compliance of the Hon'ble High Court odder dated 22.06.2020, on 19.08.2020 it paid a sum to the tune of Rs.19,39,942/- (25% of Rs.77,59,769/) for FY 20150-16 vide Challan No.2000497328 and Rs.1,46,20,755/- (25% of Rs.5,84,83,022/-) for FY 2016-17 vide Challan No.2000497341 towards Entry tax.

d. It is stated that it is imperative to bring on record the aforesaid document as the petitioner is aggrieved with the additional financial burden imposed by payment of Entry tax amount on account of Change in Law event which was completely beyond the control of it. As per the settled principles of Change in Law set out by the Commission and appellate forums that it has right to claim consequential reliefs arising out of the Change in Law event. It is further stated that it herein made payments of entry tax to the concerned tax authorities which is required to be compensated by the Respondent and any future payment made by it towards the said Entry tax is also required to be reimbursed by the respondent upon furnishing proof of the payment.

e. In view of the above, it humbly request the Commission to allow the present affidavit along with the additional documents as the same are essential to be taken on record while deciding the subject petition in the interest of justice and equity.

f. That it sought for additional reliefs:

(i) Direct Respondent – Southern Power Distribution Company of Telangana Limited to reimburse the payments as made by the petitioner towards Entry tax;

(ii) Declare that petitioner is entitled for reimbursement of payment made towards entry tax in the future and direct respondent to reimburse the same upon petitioner furnishing proof of the payment.

5. Further, the petitioner has filed Memo to bring on record the following additional documents.

a. The Andhra Pradesh Tax on Entry of Goods in Local Areas Act, 2001 dated 02.05.2001 enacted by the Legislative Assembly of the State of Andhra Pradesh.

b. Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees dated 19.01.2005 issued by the Ministry of Power.

c. Order dated 31.12.2007 passed in W.P.No.615 of 2007 and batch matters titled as *"Sree Rayalaseema Alkalies and Allied Chemicals Ltd.*

v. State of Andhra Pradesh & Ors." by the Hon'ble High Court of Andhra Pradesh.

d. Interim Order dated 09.05.2008 passed in SLP (C) No.8053-8077/2008 titled as *"State of A.P. & Ors. v. Sree Rayalaseema Alkalies and Allied Chemicals Ltd. & Ors."* passed by the Hon'ble Supreme Court of India granting "stay on refund".

e. The National Tariff Policy dated 28.01.2016 issued by the Ministry of Power.

f. The Telangana Adoption of Laws Order, 2015 dated 01.06.2016 issued by the Governor of Telangana.

g. Amended Power Purchase Agreement dated 29.10.2016 executed between ACME Dayakara Solar Power Private Limited and Southern Power Distribution Company of Telangana Limited.

h. Order dated 29.03.2017 read with order dated 24.07.2017 passed in CA No.8036-8060 of 2017 (arising out of SLP (C) No.8053-8077/2008) titled as *"State of A.P. & Ors. v. M/s Shree Rayalseeka Alkalies Ltd. And Allied Chemicals Ltd., & Ors."* passed by the Hon'ble Supreme Court of India.

i. Order dated 15.04.2020 and Order dated 22.06.2020 in W.P.No.4921 of 2020 titled as *"M/s Dayakar Solar Power Pvt. Ltd. v. State of Telangana & Ors."* passed by the Hon'ble High Court of Telangana.

6. The petitioner has filed Additional Affidavit to submit the rate of carrying cost on the compensation payable for Change in Law event and stated as below.

a. The petitioner stated that instant petition is filed under section 86 (1) (f) and section 86 (1) (b) of the Act, 2003 read with Article 11.4 of the PPA dated 03.03.2015 executed between the parties, seeking approval of Change in Law events due to enactment of Entry Tax Act read with Judgment dated 11.11.2016 titled *"Jindal Stainless Limited & Anr. v. State of Haryana & Ors. and batch (Civil Appeal Nos. 3453 of 2002)*" read with judgment dated 29.03.2017 and 24.07.2017 titled "*State of A.P. & Ors. v. M/s Sree Rayalaseema Alkalies & Ors. (C.A.No.8036-8060 of 2017)*" read with show cause notice dated 02.01.2020 issued by Commercial Taxes Department, GoTS and Assessment Order dated 11.02.2020 pronounced by CTO, Mahboobnager Circle, Nalgonda

Division, Telangana read with Hon'ble Telangana High Court Order dated 04.03.2020. Notably, CTO issued separate Assessment Orders dated 11.02.2020 (Assessment Orders) to the petitioner for FY 2015-16 and 2016-17, confirming the demand of the proposed entry tax of Rs.77,59,769/- and Rs.5,84,83,022/- on goods for the financial year 2015-16 and 2016-17 respectively to be paid on notified goods imported into the State of Telangana.

b. The applicant / petitioner stated that on 14.01.2021, the petitioner filed the instant application for the purpose of amending the petition so as to seek payment of carrying cost/interest incurred by it in furtherance to the Change in Law Event as detailed in the petition. Further it is stated that on 18.01.2021, the Commission issued notice in the said I.A.

c. The applicant / petitioner stated that it has sought liberty from the Commission, the petitioner is hereby filing the instant affidavit to submit the rate of carrying cost. The facts and circumstances giving rise to filing of the captioned petition and facts leading to filing of said I.A. for amendment of prayers are not repeated herein for the sake of brevity. The petitioner craves leave of the Commission to refer to any reply upon the same during the course of hearing.

d. The applicant / petitioner stated that the petitioner is entitled to be compensated and restituted to the same economic position as that prior to occurrence of Change in Law event. It has been held in plethora of judgments by the Hon'ble Supreme Court that restitution is an integral part of compensation granted for Change in Law. Therefore, the petitioner is entitled to recover interest/carrying cost on the differential amount due to it as a consequence of additional expenditure incurred on account of Change in Law event.

e. The applicant / petitioner stated that in terms of the facts, circumstances and governing framework, the petitioner is to be compensated for Change in Law event through a one-time lump sum payments along with carrying cost @ 18.71% (pre-tax) per annum. The carrying cost shall be calculated for the period from the date of the financial liability till the amounts are paid by the respondents.

f. The applicant / respondent stated that in view of the above, the petitioner request the Commission to take the contents of this affidavit on record as part of the application filed for amendment of the petition for the same being in the interest of justice, equity and adjudication of above captioned petition.

7. The respondent has filed Counter Affidavit in the Interlocutory Application filed by the petitioner and stated as below.

a. The respondent stated that the petitioner has filed the present I.A.No.3 of 2021 in O. P. No. 22 of 2020, seeking permission of this Commission to present the affidavit and petition under reply and to read the contents of the same as part and parcel of petition dated 25.06.2020 i.e., O. P. No. 22 of 2020. In other words the petitioner wants to amend the petition in O. P. No. 22 of 2020 by adding the averments of affidavit under reply and the relief for '*grant of carrying cost from the date of impact till reimbursement by the respondent*.'

b. It is stated that as per clause 6.1(iv) of PPA, the tariff being paid to the petitioner is inclusive of all taxes, cess, duties or levies or any statutory obligation imposed by any Government or competent statutory authority, on the land, equipment, material or works on the project or on the energy generated or consumed by the project or the solar developer or on the income or assets of the solar developer. Therefore, the respondent is not liable to pay any amount other than the tariff mentioned in the PPA for the energy being supplied by the petitioner.

c. It is stated that in such view of the matter, the tax imposed on entry of Good into local area by CTO to the petitioner cannot be separated from the definition of tariff and consequently the same cannot be claimed from the respondent. More so as stated in the counter affidavit of this respondent the PPA entered with the petitioner does not contain any clause of change in law and its consequences. Therefore, the petitioner has no locus standi to urge before this Commission that imposition of entry tax levy by the department of Commercial Tax is change in law and the same constitutes a Force Majeure event.

d. It is stated that the imposition of entry tax at any cost does not amount to Force Majeure event.

e. It is stated that any omission on the part of the respondent to deal with any specific contention of averment of petitioner should not be construed as an admission of the same by the respondent. Further, the respondent cannot be made obligated to pay for something for which it has not agreed to at the time of execution of agreement.

f. It is stated that the petitioner is not entitled to the relief sought in the main petition itself i.e., to declare that imposing of Entry tax for entry of goods in the State of Telangana is a Change in Law Event and the consequential relief of reimbursement. Therefore, the question of seeking grant of carrying cost from the date of alleged impact till reimbursement by the respondent does not arise.

g. It is stated that it is very clear from the affidavit under reply that the petitioner is trying to create confusion by filing the present unwarranted petition for the addition of relief of carrying cost.

h. It is prayed the Commission to dismiss the petition under reply.

8. The petitioner has filed Rejoinder to the Counter Affidavit filed by the respondent, stating as below.

a. The petitioner stated that instant petition is filed under section 86 (1) (f) and section 86 (1) (b) of the Act, 2003 read with Article 11.4 of the PPA dated 03.03.2015 executed between the parties, seeking approval of change in law events due to enactment of Entry Tax Act read with judgment dated 11.11.2016 titled *"Jindal Stainless Limited & Anr. v. State of Haryana & Ors. and batch' (Civil Appeal No.3453 of 2002)"* read with judgment dated 29.03.2017 and 24.07.2017 titled *"State of A.P. & Ors. v. M/s. Sree Rayalaseema Alkalies & Ors. (C.A.No.8036-8060 of 2017)"* read with show cause notice dated 02.01.2020 issued by Commercial Taxes Department, GoTS and Assessment Order dated 11.02.2020 pronounced by CTO, Mahboobnager Circle, Nalgonda Division, Telangana read with Hon'ble Telangana High Court Order dated 04.03.2020. Notably, CTO issued separate Assessment Orders dated 11.02.2020 (Assessment Orders) to the petitioner for FY 2015-16

and 2016-17, confirming the demand of the proposed entry tax of Rs.77,59,769/- and Rs.5,84,83,022/- on goods for the financial year 2015-2016 and 2016-2017 respectively to be paid on notified goods imported into the State of Telangana.

b. The petitioner stated that on 08.10.2020, the petitioner filed affidavit bringing on record the proof of partial payments made towards Entry tax as directed by the Hon'ble Telangana High Court in its order dated 22.06.2020. vide the said affidavit, the petitioner sought for additional reliefs:

(i) Direct Respondent to reimburse the payments as made by the petitioner towards Entry tax;

(ii) Declare that petitioner is entitled for reimbursement of payment made towards entry tax in the future and direct respondent to reimburse the same upon petitioner furnishing proof of the payment;

c. The petitioner stated that thereafter on 14.01.2021, the petitioner filed the instant application for the purpose of amending the petition so as to seek payment of carrying cost/interest incurred by it in furtherance to the Change in Law Event as detailed in the petition. Further on 18.01.2021, as sought liberty from the Commission, the petitioner filed additional affidavit to submit the rate of carrying cost as prayed by the petitioner vide the instant application.

d. The petitioner stated that the respondent has filed its reply to the instant I. A. on 08.02.2021. At the outset it is stated that all contentions and averments in the counter are wrong and denied and are liable to be rejected. The averments / contents of the reply including the grounds therein are rejected for being legally untenable, devoid of merit and misconceived and unless otherwise specifically traversed and admitted herein, are denied. In the present reply to the I. A., the respondent has failed to raise any cogent reasons as to why the said I. A. and its contents should not be accepted in terms of the relief prayed.

e. The petitioner stated that while the petitioner is responding to the submissions made by the respondent, any omission on the part of the

petitioner to deal with any specific contention or averment of respondent should not be construed as an admission of the same by it. The petitioner reiterates that the contents of the petition and I.A. and the same may be read as part and parcel of this rejoinder, which is not being reproduced herein for the sake of brevity. Further, all the submissions made herein are without prejudice to one another and are to be treated in alternate to one another in case of conflict or contradiction.

Preliminary submission

f. The petitioner stated that through the reply to the captioned petition, respondent has put forth certain unsustainable and unjustifiable grounds including that of:

(i) Tariff quoted is inclusive of all taxes including Entry tax;

(ii) Petitioner, since is not entitled to change in law relief within the contractual construct of the PPA, is therefore not entitled for any carrying cost.

g. The petitioner stated that the averments / contents as relied upon by the respondent in this regard are unsustainable in law, devoid of any merit and are liable to be set aside. The respondent has irrationally and unreasonably submitted that it has no locus standi to plead before this Commission that imposition of entry tax levy by the Department of Commercial Tax is a change in law. Further, the contention of the respondent that it is not liable to pay any amount other than the tariff mentioned in the PPA is based on an erroneous interpretation of law and the PPA.

Re: Tariff quoted in inclusive of all taxes including Entry Tax

h. The petitioner stated that tariff quoted at the time of bidding was as per the then prevalent taxes and duties. The introduction of Entry tax after the submission of bid and signing of PPA cannot be considered the part of Quoted Tariff as it was not applicable during bid submission. Therefore, the adverse financial impact of application of Entry tax, which occurred after the submission of bid is squarely covered within the ambit of 'Change in Law' under Article 1.12 of the PPA. The relevant excerpts of Article 1.12 of the PPA is set out herein below:

"**ARTICLE 1: DEFINITONS**

1.12 "**Change in Law**" means any change or amendment to the provisions of electricity law in force, regulations, directions, notifications issued by the competent authorities and Government of Indian (GoI), Government of Telangana State (GoTS) including the erstwhile Government of Andhra Pradesh (GoAP) from time to time.

i. The petitioner stated that moreover, the change in law event is included as one of the events of Force Majeure under Article 9.1 (b) (iii) of the PPA, the occurrence of which was beyond the control of the petitioner. It is pertinent to mention herein that changes in the tax regime are uncontrollable expenses and a generating company cannot reasonably be forced to assume or absorb such risks. The intention while tying up long term capacity under the PPA could never have been to denude the generating company of an opportunity to be compensated for risks / changes which are beyond its' control.

j. The petitioner stated that further, in terms of section 70 of the Indian Contract Act 1872, if a person lawfully does anything for another person and does not do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. In view thereof, since it has not incurred additional capital cost on account of Entry tax gratuitously, it is entitled to be compensated for the same and such compensation has to be for all reasonable costs.

k. The petitioner stated that moreover, definition of Change in Law under Article 1.12, does not specifically exclude events of changes in taxes, duties and levies. Therefore, in the absence of any words or expressions in the agreement indicating prohibition on inclusion of change in taxes as Change in Law event, an implied prohibition cannot be read into the definition of Change in Law.

l. The petitioner stated that imposition of Entry tax law clearly qualifies as a Change in Law event as its imposition has occurred after the submission of bid and execution of PPA. As on the date of submission of bid, there was no Entry tax in force. Accordingly, imposition of Entry

tax being an event after the bid submission squarely qualifies as a Change in Law event and thereby entitling the petitioner for carrying cost.

m. The petitioner stated that with this regard, reliance to be placed on the judgment dated 19.04.2017 passed in *"Sasan Power Ltd. v. Central Electricity Regulatory Commission & Ors."*, Appeal No.161 of 2016, by the Hon'ble ATE whereby the Hon'ble ATE has held that if the payment of tax has caused an impact on the cost of or revenue from the business of generation and sale of electricity, the same constitutes a change in law event:

> 41. We must now go to Reduction in Merit Rate of Excise Duty, Reduction in rate of Central Sales Tax and increase in Value Added Tax. … …
>
> 42. … … We must first consider the nature of these taxes and whether any changes in them result in any change in cost or revenue from the business of selling electricity so that they can qualify to be categorised as "Change in Law" events. In this connection, we may again refer to Kerala High Court's judgment in A.V.Thomas & Co. Ltd. which was upheld by the Supreme Court in Smithkline & French (India) Ltd. While holding that Income Tax is not an expenditure laid out for the purpose of the business, the Kerala High Court held that taxes such as sales tax or excise duty are expenditures incurred for the purpose of carrying on the trade. Following are the relevant observations of the Kerala High Court:
>
> "On the other hand, where taxes such as sales tax or excise duty have been paid, or liability incurred therefor, courts have held that they are not cases of application of the income, but expenditure incurred for the purpose of carrying on the trade and, therefore, deductible in computing the profits and gains of business: Kedarnath Jute Mfg. Co. Ltd. v. CIT [1971] 82 ITR 363 (SC) and Pope the King Match Factory v. CIT [1963] 50 ITR 495 (Mad). **Liability to pay sales tax or excise duty or like taxes does not depend upon whether profits are made or not. It is a payment**

which the assessee is compelled to make if he has to carry on his trade. The fundamental distinction is that such payment, unlike in the case of income-tax or similar charge on income, is not an application of the income, but a cost or expenditure incurred before earning the income. Such taxes are paid to ensure that the trade is allowed to continue. They are paid wholly and exclusively for the purposes of the business and are, therefore, allowable as deduction in computing the profits and gains, This was the position in Harrods (Buenos Aires) Ltd. v. Taylor-Gooby [1964] 41 TC 450 (cited with approval by the Supreme Court in Indian Aluminium co. Ltd. v. CIT [1972] 84 ITR 735). It is true that the expression "for the purposes of the business" in Section 37, as stated in CIT v. Malayalam Plantations Ltd. [1964] 53 ITR 140 (SC), is wider than the expression "for the purpose of earning the profits" (per Lord Davey, Strong & Co. of Romsey Ltd. v. Woodifield [1906] 5 TC 215), but that makes no difference to this fundamental distinction."

The above observations make it clear that Sales Tax and Excise Duty are expenditure incurred for the purpose of carrying on the trade. The CERC is, therefore, not right in disallowing the said expense and it clearly falls in the category of Change in Law event as defined in the PPA.

… …

46. Having regard to the nature of Excise Duty and Central Sales Tax and VAT which have an impact on the cost of or revenue from the business of generation and sale of electricity, in our opinion, the same should be allowed as Change in Law event."

Re: Petitioner cannot claim relief including carrying cost on account of change in law as there is no separate Change in Law clause in the PPA

n. The petitioner stated that with regard to the respondent's contention that it cannot seek relief under Change in Law due to the absence of Change in Law clause in the PPA, it is respectfully submitted that as per the

settled principles of Change in Law set out by this Commission and the Hon'ble ATE, it has a right to claim consequential reliefs arising out of the Change in Law event. It is submitted that PPA is a commercial contract which should be understood in commercial sense. The courts of law have consistently recognised that commercial contracts and their construction stand on a separate footing. Such contracts are to be construed in a manner so as not to invalidate them but rather to make them workable and to lend business efficacy. In doing so, a court of law will imply into the contract a term or language if so necessary, to arrive at a construction and interpretation which will lend business efficacy to the contract, validate it and make it workable.

o. The petitioner stated that at the time of submission of bid, the entry tax was declared unconstitutional and non-existent, therefore the same cannot be either contemplated or factored in the bid tariff. In this regard, it is pertinent to mention Clause 7 of the PPA which clearly stipulates that:

> "WHEREAS, it has been agreed that the Project shall be designed, engineered and constructed and operated by or on behalf of the Solar Power Developer or its successors with reasonable diligence **subject to all applicable Indian laws, rules, regulations and orders having the force of law from time to time**."

It is stated that the aforesaid provision clearly mandates that the project is to be established in terms of applicable Indian laws having the force of law. Since the Entry tax at the time of submission of bid did not have any force of law, the understanding of Respondent herein is unsustainable to this effect. It is only by virtue of the Assessment Orders that the imposition has been levied upon it and payments made therein, based on which it has approached the Commission.

p. The petitioner stated that due to the imposition of Entry tax after the execution of PPA, it has made payments towards Entry tax to the Commercial Tax Department and is therefore required to be compensated by the respondent including future payments towards such imposition.

q. The petitioner stated that it is further imperative to place reliance on the order dated 05.11.2018 passed by the CERC in Petition No.159 / MP / 2017, holding that if a contract does not cover a particular eventuality then the parties shall be governed by the provisions of Indian Contract Act, 1872. The relevant portion of the order is referred herein below:

> "34. Where the contract does not provide for a particular eventuality, the parties shall be governed by the provisions of the Indian Contract Act, 1872 (Indian Contract Act) in respect of that eventuality. Section 70 of the Indian Contract Act is extracted hereunder:
>
> > "70. Obligation of person enjoying of non-gratuitous act:- Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered".
>
> As per the above provision, where a person does a thing, not intending to act gratuitously and the other person derives any benefit of such act, then the person enjoying the benefit is liable to compensate the other to the extent of the benefit received."

r. The petitioner stated that moreover, it is its case that the contractual construct of an agreement (in the present case being PPA) should be read in accordance to the principle of 'business efficacy' wherein the explicit terms of the contract are final with regard to the intention of the parties to the contract. In this regard, the petitioner is placing reliance on the Hon'ble Supreme Court's judgment dated 02.07.2019 passed in *"Adani Power (Mundra) Ltd. v. Gujarat Electricity Regulatory Commission (2019) 19 SCC 9"*:

> "24. … … the principle of business efficacy could be invoked only if by a plain literal interpretation of the term in the agreement or the contract, it is not possible to achieve the result or the consequence intended by the parties acting as prudent businessmen. This test requires that a term can only be implied,

if it is necessary to give business efficacy to the contract, to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended."

s. The petitioner stated that the petitioner is entitled to be compensated and restituted to the same economic position as that prior to occurrence of Change in Law event. It has been held in plethora of judgments by the Hon'ble Supreme Court that restitution is an integral part of compensation granted for Change in Law. Therefore, it is entitled to recover interest / carrying cost on the differential amount due to it as a consequence of additional expenditure incurred on account of Change in Law event.

t. The petitioner prayed the Commission to reject the Counter Affidavit and the contents therein and grant the petitioner prayers as prayed in the instant petition.

9. The petitioner has filed written submissions and stated as under:

a. The present petition has been filed under section 86 (1) (f) and section 86 (1) (b) of the Act, 2003 read with Article 11.4 of the PPA dated 03.03.2015 executed between Dayakara Solar Power Private Limited and Southern Power Distribution Company of Telangana Limited for seeking approval of change in law events arising from show cause notice dated 02.01.2020 issued by Commercial Taxes Department, GoTS and Assessment Order dated 11.02.2020 pronounced by CTO, Mahboobnagar Circle, Nalgonda Division, Telangana.

b. The said Assessment Order dated 11.02.2020 has been issued in terms of Entry Tax Act read with judgment dated 11.11.2016 titled *"Jindal Stainless Limited & Anr. v. State of Haryana & Ors. and batch (Civil Appeal Nos. 3453 of 2002)"* read with judgment dated 29.03.2017 and 24.07.2017 titled *"State of A.P. & Ors. v. M/s Sree Rayalaseema Alkalies & Ors. (C.A. No.8036-8060 of 2017)"*, Further, it has also sought for the reimbursement of additional cost incurred/deposited on account of the said Change in Law events and also the carrying cost associated therewith in terms of Hon'ble Telangana High Court order dated 04.03.2020. Being aggrieved with the imposition/deposit of entry tax as

demanded by the State of Telangana, the petitioner is seeking declaration of the show cause notice dated 02.01.2020, Assessment Order dated 11.02.2020 and the directions of the Hon'ble High Court of Telangana vide order dated 04.03.2020 as Change in Law events and also seeking compensation in terms of applicable law and PPA dated 03.03.2015. While it has briefly put forth the conspectus of its case above, it is the case of respondent that:

a) Tax on entry of goods was in-force through Telangana Entry Tax Act 2001 at the time/prior to bid submission;

b) Petitioner ought to have factored in impact of Entry tax at the time of bid; and

c) Tariff quoted is inclusive of all taxes and since PPA does not provision a separate Change in Law clause, it is not entitled for such relief.

The petitioner in terms of its submissions/oral arguments made during the course of hearing on 15.03.2021 is placing a brief gist herein below for the convenience of Commission.

Re: Telangana Entry Tax Act 2001 not in-force at the time/prior to bid submission

c. It is stated that it is the case of the petitioner that imposition of Entry tax has occurred pursuant to the said Assessment Order dated 11.02.2020. A brief list of dates leading to filing of the present petition and substantiating the case of the petitioner that the imposition has in-fact occurred after the submission of the bid and execution of the PPA and was in no case prior to the submission of the bid is as follows:

Date	Event
16.10.2001	Andhra Pradesh Tax on Entry of Goods into Local Areas Act, 2001 (A.P. Entry Tax Act) was enacted in the State of Andhra Pradesh
2007	Constitutional Validity of A.P. Entry Tax Act was challenged before the Hon'ble High Court of Andhra Pradesh in *"Sree Rayalaseema Alkalies vs State Of Andhra Pradesh And Ors, Appeal No.615 of 2006 and batch matters"*

Date	Event
31.12.2007	Judgment was passed by the Hon'ble Andhra Pradesh High Court in Appeal No.615 of 2006 and batch matters whereby the Hon'ble High Court declared the charging provision of the A.P. Entry Tax Act as unconstitutional.
	State of Andhra Pradesh challenged the order dated 31.12.2007 before the Hon'ble Supreme Court of India. Similar issues had arisen with various states and diverse orders were passed by the Hon'ble High Courts. Such orders were also challenged and tagged in *"Jindal Stainless Ltd. & Anr vs State of Haryana & Ors."*, to decide on the issue, *inter alia*, of constitutional validity of the entry tax law
27.08.2014	RfS document was issued by for Northern Power Distribution Company of Telangana Limited (TSNPDCL) to procure 500 MW through tariff based competitive bidding.
13.10.2014	Petitioner submitted the financial bid.
23.01.2015	TSSPDCL issued Letter of Intent to ACME Solar Energy Pvt. Ltd., for implementation of the Project.
03.03.2015	Petitioner entered into Power Purchase Agreement with TSSPDCL to set up 30 MW solar power project.
01.06.2016	Telangana Adaptation of Laws Order came into force whereby the A.P Entry Tax Act was allocated under First Schedule to the State of Telangana.
11.11.2016	Constitutional Bench in Jindal Stainless Ltd. & Anr vs State of Haryana & Ors passed common judgment in the batch matters upholding the validity of Entry tax law as it being in public interest.
02.01.2020	Chief Tax Officer (CTO) issued Show Cause Notice under Telangana Tax on Entry of Goods into Local Areas Act, 2001 to the Petitioner for levy of Entry tax.
11.02.2020	CTO passed separate Assessment Orders dated 11.02.2020 imposing entry tax amount of Rs.77,59,769/- and

Date	Event
	Rs.5,84,83,022/- on goods for the financial year 2015-16 and 2016-17.
	Petitioner filed petitions being W.P.Nos.4921 of 2020 and 4922 of 2020, titled as "*Dayakara Solar Power Pvt. Ltd. v. State of Telangana and Ors*.", before the Hon'ble High Court of Telangana at Hyderabad
04.03.2020	Hon'ble High Court directed interim stay on the recovery amount subject to the payment of 25% Entry tax as demanded by the CTO.
19.08.2020	Petitioner paid 25% of the entry tax amount for FY 2015-16 and 2016-17.

Hence, it is unequivocally clear from the above that events of issuance of RfS and LOI and execution of PPA had occurred when constitutional validity of the Entry Tax Act was pending before the Hon'ble Supreme Court. Further, since the imposition of entry tax has occurred only on 11.11.2016 and 29.03.2017 and 24.07.2017, when the show cause notices have been issued being pursuant to judgment dated 11.11.2016 and 29.03.2017 read with 24.07.2017 issued by the Hon'ble Supreme Court. It is stated that with the RfS, LoI and PPA being executed prior to the constitutional validity of Entry Tax Act the petitioner is legally entitled to be compensated for such Change in Law events which have led to adverse financial imposition.

d. It is stated that it is important to point out that pursuant to the issuance of Assessment Order dated 11.02.2020, petitioner challenged the same before the Hon'ble High Court through W.P.No.4921 of 2020 and the Hon'ble High Court was pleased to instruct the petitioner to submit 25% of the amounts as claimed through the Assessment Order(s) dated 11.02.2020. It has hence deposited Rs. 19,39,942/- and Rs. 1,46,20,755/-, total being Rs. 1,65,60,697/- being 25% of Rs. 77,59,769/- and Rs. 5,84,83,022/- (total being Rs. 6,62,42,791/-) respectively. Hence, having paid the above-mentioned monies it is

entitled to be compensated for the said amounts along with the prayers as sought.

Re: Petitioner ought to have factored in impact of Entry Tax at the time of bid

e. It is stated that undeniably at the time of submission of bid, the Entry Tax Act was legally invalid and unconstitutional / non-existent by virtue of judgment dated 31.12.2007 passed by the Hon'ble High Court of Andhra Pradesh. Therefore, the same cannot be either contemplated or factored in the bid tariff. Due to the imposition of Entry tax after the execution of PPA, it has made payments towards Entry tax to the CTO and is therefore required to be compensated by the respondent including future payments towards such imposition.

f. It is stated further noteworthy to point out that the Assessment Order dated 11.02.2020 itself acknowledges that the Hon'ble Supreme Court upheld the validity of Entry Tax Act and resultantly Entry Tax Act came into force. The said assessment order(s) clearly/unambiguously hold that:

> "… … The contention put forth by assese is examined carefully. The Hon'ble Supreme Court upheld the validity of the Entry Tax on Good Act 2005. **Once, the Hon'ble Supreme Court upheld the validity of the Act, the Entry Tax on Goods 2001 Act came into force and therefore, the State Government has to assess the liability of entry tax on the importers within the stipulated time to avoid limitation of time**.
>
> The liberty given to the respondents to approach the Hon'ble High Court on any issue other than validity. This liberty given to respondents does not mean that the State Government does not levy entry tax. … …"

It is its case that when the competent authority which has imposed the said entry tax through the Assessment Order is unequivocally echoing that the Entry Tax Act came into force only upon the decision of the Hon'ble Supreme Court, the objection as raised by the respondent further runs contra to the facts and circumstances of the present case.

g. It is stated that it is also entitled to be compensated and restituted to the same economic position as that prior to occurrence of Change in Law event. It has been held in plethora of judgments by the Hon'ble Supreme Court that restitution is an integral part of compensation granted for Change in Law. Therefore, the petitioner is entitled to recover interest / carrying cost on the differential amount due to it as a consequence of additional expenditure incurred on account of Change in Law event.

h. It is stated that Entry Tax Act was enacted in the State of Andhra Pradesh on 16.10.2001. In 2007, constitutional validity of Entry Tax Act was challenged before the Hon'ble High Court of Andhra Pradesh in *"Sree Rayalaseema Alkalies Vs State of Andhra Pradesh And Ors."* On 31.12.2007, Hon'ble Andhra Pradesh High Court passed the judgment declaring the charging provision of the Entry Tax Act as unconstitutional.

i. It is stated that the State of Andhra Pradesh challenged the order dated 31.12.2007 before the Hon'ble Supreme Court of India. It is pertinent to note that there were several other states concurrently where similar issue had arisen and as a result of diverse orders across various High Courts, the matters were consolidated and tagged in *"Jindal Stainless Ltd. & Anr v. State of Haryana & Ors."* to decide on the issue, inter alia, of constitutional validity of the Entry tax law.

j. It is stated that meanwhile the State of Andhra Pradesh was bifurcated and on 01.06.2016, Telangana Adaptation of Laws Order came into force whereby the Entry Tax Act was allocated under First Schedule to the State of Telangana and the same came into effect as Telangana Tax on Entry of Goods into Local Areas Act, 2001 (Entry Tax Act).

k. It is stated that on 11.11.2016, the constitutional bench in *"Jindal Stainless Ltd. & Anr Vs State of Haryana & Ors."* passed common judgment in the batch matters upholding the validity of Entry tax law as it being in public interest. The Hon'ble Supreme Court also directed each of the petitioners to challenge state specific legislations in their respective High Courts.

l. It is stated that while the constitutional validity of the Entry tax law was pending before the Hon'ble Supreme Court, on 27.08.2014, the respondent issued RfS document to procure 500 MW solar power

through tariff based competitive bidding. Thereafter, on 03.03.2015, it executed PPA for development of 30 MW capacity solar power project in the State of Telangana and supply it to the respondent.

m. It is stated that it is pertinent to note that at the time of the submission of the financial bid on 13.10.2014 and execution of the PPA, there was no levy of Entry tax on the importers as the charging provision of the Entry Tax Act was declared unconstitutional by the Hon'ble Andhra Pradesh High Court.

n. It is stated that on 02.01.2020, CTO issued Show Cause Notice to it for levy of Entry tax on entry of goods and on 11.02.2020, CTO confirmed the demand of the proposed Entry tax of Rs. 77,59,769/- and Rs. 5,84,83,022/- for the financial year 2015-16 and 2016-17 respectively.

Re: Tariff quoted is inclusive of all taxes and since PPA does not provision a separate Change in Law clause, petitioner not entitled for such relief

o. It is stated that before proceeding with the submissions on the above issue, it is imperative to first refer to the relevant clauses of RfS and PPA to analyse and identify the origin and purpose of the provision of Change in Law.

PROVISIONS OF THE RfS

1. **Definitions**

"**Quoted Tariff**" shall mean

1. In case the Bidder has opted for Tariff Option-1 as specified in Financial Bid Format 6.10(B), the tariff quoted by the Bidder which shall be applicable for entire term of the PPA
2. In case the Bidder has opted for Tariff Option-2 as specified in Financial Bid Format 6.10(B), the Quoted Tariff specified by the Bidder for the first Tariff Year. Under Tariff Option-2 the Bidder shall quote Escalation percentage (Esc %) to be applied on Quoted Tariff for determining the Tariff from Tariff Year 2 till Tariff Year 10. Tariff for Tariff Year 11 till Tariff Year 25 shall be the same as Tariff for

Tariff Year 10. Escalation percentage shall be greater than zero.

… …

3.6 **Details of Financial bid**

3.6.1. Bidders shall quote tariff for Offered Capacity as per cause 3.6.2. Such Quoted Tariff shall be applicable for all Projects the Bidder intends to develop under such Offered Capacity. Furthermore, each Project shall be separated by a distinct boundary. … …

3.6.2. Bidder(s) shall submit their Financial Bid(s) as per Format 6.10 A and B of this RfS. More than one Financial Bid can be submitted by the Bidder, provided that not more than one Financial Bid corresponds to the same Offered Capacity and the same List of Preferred Interconnection Substations."

PROVISIONS OF PPA

"**Article 1: Definitions**

1.12 "**Change in Law**" means any change or amendment to the provisions of electricity law in force, regulations, directions, notifications issued by the competent authorities and Government of Indian (GoI), Government of Telangana State (GoTS) including the erstwhile Government of Andhra Pradesh (GoAP) from time to time.

1.39. **Quoted Tariff'** means charges for each year of supply of power as per the terms of the Agreement, quoted by the SPD as a part of the Financial Bid submitted on 13th October 2014 in response to the RfS TSSPDCL / 02 / LTSPP / 2014 issued by TSSPDCL on 27/08/2014.

Article 2 Purchase of Delivered Energy and Tariff

2.2 The DISCOM shall pay Tariff of Rs.6.848 per unit to the Solar Power Developer as per the tariff quoted by the Solar Power Developer in the Bid.

i. The Bidder has opted for Tariff Option-I as specified in the Financial Bid Format 6.10(B) of RfS, then

Tariff for all Tariff Years for the entire term of the Agreement shall be the Quoted Tariff;

2.3 The Tariff payable by the DISCOM shall be inclusive of all taxes, duties and levies or any other statutory liability, as applicable from time to time.

Article 9 Force Majeure

(a) "**Force majeure**" shall mean … …

(b) Force Majeure circumstances and events shall include the following events to the extent, that they or their consequences satisfy the above requirements:

… …

(iii) Direct Political Events such as any Government Agencies' or the DISCOM's unlawful or discriminatory delay, modification, denial or refusal to grant or renew, or any revocation of any required permit or Change in Law (Direct Political Events)."

Re: Principles of Business efficacy and common-sense approach essential for interpreting a contract

p. It is stated that it is the case of respondent that the entire future risk and burden of any change in law and taxes duties and levies or any statutory liability is entirely on the generator. It is stated that this issue is no longer *res integra* in terms of the judgments passed by the Hon'ble Supreme Court in similar set of issues, although in case of thermal power projects. Therefore, by applying settled principles of law and economics passed by the Hon'ble Supreme Court, squarely applicable to the facts and circumstances of the instant case, the petitioner is liable to be compensated for the entry tax amounts.

q. It is stated that the respondent has contended that there is no separate Change in Law clause in the PPA as per which the petitioner can claim compensation for the levy of entry tax. Before responding to the said submission of the respondent, it is pertinent to understand the purpose of entering into a contractual arrangement. It is submitted that contracts have to be interpreted to give effect to the intent of the parties and not to frustrate it which is known as the purposive interpretation. The purpose of PPA is to develop project and supply electricity at a fixed tariff rate, a factor of capital cost. The process of bidding is based on the known capital cost, therefore while submitting the bid, developer takes risk to

manage and mitigate capital cost as it is under control of the developer. However, if the capital cost increases for the reasons beyond the control of the developer such as an increase in the imposition of tax, then the developer cannot be held accountable to bear the risk as the same was not foreseeable at the time of computing the capital cost. It is in this regard only proper and justifiable to submit that it cannot be subjected to risks unknown/untaken and hence it is only essential that while interpreting the PPA, a common sense and business efficacy test is applied. This broad principle is captured in various judgments of the Hon'ble Supreme Court. In this regard it relies on the following:

Union of India v. D N Revri & Co. and Ors. 1976 (4) SCC 147

r. It is stated that the instant judgment explains two concepts of the interpretation of contract i.e., business efficacy and adoption of common sense approach. The Hon'ble Supreme Court observed that while interpreting the provisions of contract, it is important to apply law and economics as the same are intertwined and are integral part to apply in case of any contractual arrangement. The relevant portion of the judgment is mentioned herein below:

> 6. There were thus, after integration, two Secretaries in the Ministry of Food and Agriculture and the argument of the respondents was - and that argument found favour with the High Court - that this event rendered the arbitration agreement vague and uncertain, inasmuch as it did not specify which of the two Secretaries was to nominate the arbitrator "in his absolute discretion". Though this argument appears attractive at first sight, a little scrutiny will reveal that it is unsound. It is based on a highly technical and doctrinaire approach and is opposed to plain common sense.
>
> 7. It must be remembered that a contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by

adopting a common sense approach and it must not be allowed to be thwarted by a narrow pedantic and legalistic interpretation."

s. It is stated that in the present case, the bid is submitted on the basis of RfS documents. While legally the contracts can provide for limitation of liability, the issue herein is pertaining to the allocation of risk and uncertainty. An entity cannot be made to absorb risk which is beyond its control. Herein, the obvious objective of the RfS is to only allocate risk on the generator that it is able to absorb. This is the basic economic principle of project development. In this scenario, the balancing of risk in a project is important specially when there is a monopoly buyer and the developer does not have an ability / option to sell the power to another buyer if the cost of the project becomes unviable in future.

t. It is stated that the developer recovers the capital cost of the project by way of tariff over the life of the PPA. In case of any force majeure or change in law events that can add to the capital cost and disrupt its revenue stream, the developer cannot be forced to carry on such risk. The efficiency in development and execution of the project lies on generator. Any additional cost by way of imposition of taxes, levies and other unforeseen events which are beyond the control of the developer, the petitioner is entitled to recover such additional cost.

Shivashakti Sugars Ltd. v. Shree Renuka Sugar Ltd. (2017) (7) SCC 729

u. It is stated that through the above judgment, the Hon'ble Supreme Court sets out the need for business efficacy and the importance of applying both law and economics while adjudicating/examining various contractual facts. It is bounden duty of court to consider economic analysis and economic impact of the judicial decisions. Applying this principle to the instant case, it is pertinent to envisage the financial impact on it in case the Commission denies the compensation towards the additional cost incurred on account of Change in Law event. The relevant portion of the judgment is extracted herein below:

"42. We have already highlighted the factors which weigh in favour of continuing the operations of the appellant's factory. Apart from equitable considerations on the side of the appellant, there are certain economic factors as well which tilt the balance

totally in favour of the appellant herein. These include expenditure of approximately Rs.300 crores by the appellant in establishing the factory (including expenditure on land and building to the tune of Rs.142.26 crores); loans raised to the tune of Rs.237 crores; operational cost of Rs.150 crores; generation of employment of 377 persons on regular basis and indirect employment of more than 7000 persons; and setting up of cogeneration plant for production of electricity which is giving supply of 37 MW of electricity. These factors, particularly, bank loans, employment, generation and production at the factory serve useful public purpose and such economic considerations cannot be overlooked, in the context where there is hardly any statutory violation.

43. It has been recognised for quite some time now that law is an interdisciplinary subject where interface between law and other sciences (social sciences as well as natural/physical sciences) come into play and the impact of other disciplines of Law is to be necessarily kept in mind while taking a decision (of course, within the parameters of legal provisions). Interface between Law and Economics is much more relevant in today's time when the country has ushered into the era of economic liberalization, which is also termed as "globalisation" of economy. India is on the road of economic growth. It has been a developing economy for number of decades and all efforts are made, at all levels, to ensure that it becomes a fully developed economy. Various measures are taken in this behalf by the policy-makers. The judicial wing, while undertaking the task of performing its judicial function, is also required to perform its role in this direction. It calls for an economic analysis of law approach, most commonly referred to as "Law and Economics" … ...

44. We may hasten to add that it is by no means suggested that while taking into account these considerations specific provisions of law are to be ignored. First duty of the Court is to decide the case by applying the statutory provisions. However, on

the application of law and while interpreting a particular provision, economic impact/effect of a decision, wherever warranted, has to be kept in mind. Likewise, in a situation where two views are possible or wherever there is a discretion given to the Court by law, the Court needs to lean in favour of a particular view which subserves the economic interest of the nation. Conversely, the Court needs to avoid that particular outcome which has a potential to create an adverse effect on employment, growth of infrastructure or economy or the revenue of the State. It is in this context that economic analysis of the impact of the decision becomes imperative.

… …

46. Even in those cases where economic interest competes with the rights of other persons, need is to strike a balance between the two competing interests and have a balanced approach. That is the aspect which has been duly taken care of in the instant case, as would be discernible from the concluding paragraph of this judgment.

47. Although Law and Economics traces back to the period of Jeremy Bentham, i.e. the 18th century, in the last few decades, interplay between Law and Economics has gained momentum throughout the world. Indian judiciary has resorted to economic analysis of law on ad hoc basis. Time has come to consider the interdiscipline between Law and Economics as a profound movement on sustainable basis. These are the additional relevant considerations which have weighed in our mind in adopting a particular course of action in the instant case.

48. Even if we find some technical violation, the aforesaid factors demand this Court to exercise its power under Article 142 of the Constitution of India. This Court would be inclined to do so in the instant case which is a fit case for exercise of such powers keeping in view the equitable considerations and moulding the relief."

v. It is stated that it has established 30 MW solar power project by deploying significant capital via debt and equity. In case the Commission denies the compensation to it, it will have cascading effect on the servicing of debt which can potentially lead to increase in the cost, making the project financially unviable.

w. It is stated that the tariff of the solar power project was discovered through transparent competitive bidding process and the tariff quoted was lowest at that point of time. The benefit of lower tariffs has been passed on to consumers which is in economic interest of nation. By way of Shiv Shakti judgement, the Hon'ble Supreme Court has settled a principle that economic interest of nation should take precedence over technical violation of law. In the instant case, there is not even a technical violation of law, it is merely a situation wherein the clauses of contract are not well defined. Therefore, penalizing petitioner for the cost imposed by the State Government by way of taxes in absence of clear provisions in the PPA is not only absurd but also against the economic principles as settled by the Hon'ble Supreme Court.

x. It is stated that it is seeking for balancing of interest that requires the consideration of the Commission. It is pertinent to understand whether at the time of submission of bid, the entry tax amount was applicable. There have been instances wherein Goods and Services Tax (GST) law was discussed for 2 years till the time it was imposed. In such cases, it has been observed that one cannot take into account GST, till the same is notified by the law. The same principle applies in the instant case.

y. It is stated that in 2007, the Hon'ble High Court of Andhra Pradesh had quashed the charging provision of Entry Tax Act, therefore the entry tax law was not in force at the time of submission of bid in 2014. It was only in 2016 that entry tax act was made applicable that is after the submission of bid, issuance of LOI and execution of PPA. Considering the said fact, the Commission is required to balance the interest of the parties.

Nabha Power Ltd. v. Punjab State Power Corporation Ltd. and Ors. 2018 (11) SCC 508

z. It is stated that in the instant judgment, the Hon'ble Supreme Court has discussed the principle of 'business efficacy' and 'officious bystander test'. Business efficacy means that the courts are required to make the contract efficacious and practicable and officious bystander test is applied by the courts to determine whether a term should be implied into a contract for it being so obvious, even though that term was not written into the contract expressly.

aa. It is stated that in this case, the coal used for the generating plant was a washed coal and the cost of washing was denied by the State of Punjab. The generating company in this case was asking for the reimbursement of the transportation cost on account of carriage of unwashed coal from the mine to washery, and carriage of coal from the nearest railway station to the Project. The issues involved in the Nabha case is analogous to the contentions being raised in the instant case by the respondent as the petitioner is also seeking for reimbursement of the additional cost incurred which was not foreseeable at the time of bid submission. The relevant portion of the judgment is being referred herein below:

> **"**48. Lastly in Satya Jain (Dead) Through LRs.and Ors. v. Anis Ahmed Rushdie (Dead) Through LRs. and Ors. 13, Ranjan Gogoi, J., elucidated the well-established principles of the classic test of business efficacy to achieve the result of consequences intended by the parties acting as prudent businessmen. It was opined as under:
>
> "33. <u>The principle of business efficacy is normally invoked to read a term in an agreement or contract so as to achieve the result or the consequence intended by the parties acting as prudent businessmen. Business efficacy means the power to produce intended results. The classic test of business efficacy was proposed by Bowen, L.J. in Moorcock [(1889) LR 14 PD 64 (CA)]. This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such</u>

a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied - the bare minimum to achieve this goal. If the contract makes business sense without the term, the courts will not imply the same. The following passage from the opinion of Bowen, L.J. in Moorcock [(1889) LR 14 PD 64 (CA)] sums up the position: (PD p. 68)

> "… … In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.'

34. Though in an entirely different context, this Court in United India Insurance Co. Ltd. v. Manubhai Dharmasinhbhai Gajera had considered the circumstances when reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by and between the parties thereto. Certain observations in this regard expressed by courts in some foreign jurisdictions were noticed by this Court in para 51 of the Report. As the same may have application to the present case it would be useful to notice the said observations: (SCC p. 434)

> "51. … … Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander, were to suggest some express provision for it in their agreement, they would testily suppress him with a

common 'Oh, of course!' Shirlaw v. Southern Foundries (1926) Ltd, KB p. 227"

'… … An expressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves. Trollope and Colls Ltd. v. North West Metropolitan Regl. Hospital Board, WLR p. 601 : (1973) 2 All ER p. 286a-b.'

35. The business efficacy test, therefore, should be applied only in cases where the term that is sought to be read as implied is such which could have been clearly intended by the parties at the time of making of the agreement. … …"

"Our View:

49. We now proceed to apply the aforesaid principles which have evolved for interpreting the terms of a commercial contract in question. Parties indulging in commerce act in a commercial sense. It is this ground rule which is the basis of The Moorcock test of giving 'business efficacy' to the transaction, as must have been intended at all events by both business parties. The development of law saw the 'five condition test' for an implied condition to be read into the contract including the 'business efficacy' test. It also sought to incorporate 'The Officious Bystander Test' [Shirlaw v. Southern Foundries (1926) Ltd.]. This test has been set out in B.P. Refinery (Westernport) Proprietary Limited v. Shire of Hastings requiring the requisite conditions to be satisfied: (1) reasonable and equitable: (2) necessary to give business efficacy to the contract: (3) it goes without saying, i.e., The Officious Bystander Test; (4) capable of clear expression; and clear expression: and (5) must not contradict any express term of the contract. The same penta-principles find reference also in Investors Compensation Scheme Ltd. v. West

Bromwich Building Society [supra) and Attorney General of Belize and Ors. v. Belize Telecom Ltd. and Anr. (supra). Needless to say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regards to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract."

50. The pricing of the coal is, if one may say, the crux of the problem. It is no doubt true, as contended by the first respondent, that while submitting the financial bid, clause 2.7.1.4 (3) of the RFP required the tariff to be quoted in Format-I of Annexure 4 to be an 'all inclusive tariff' and provided that no exclusion shall be allowed. This clause has already been extracted aforesaid. The bidder/ appellant was, thus, required to take into account all costs, including capital and operational costs, statutory taxes, etc. The same clause also provides that the availability of inputs necessary for generation of power should be ensured by the seller at the 'Project Site', which must be reflected in the quoted tariff. The significant aspect is that the working of the contract is on the basis of 'Project Site'. It has to be, however, simultaneously kept in mind that the present project is in the nature of a Case-2 project which provides for a fuel specific procurement, having a pre-identified site.

51. The contract did not provide for a fixed energy charge, or a periodic revision of that charge, as the formula for energy charge was designed in such a manner that it would be influenced by the actual cost of coal. Thus, the basis is the actual cost incurred with regard to the coal.

… …

67. On behalf of the first respondent an endeavour has been made to make a distinction between 'at the site' and 'to the project' in the definition of F^{COAL}_n and PCV_n. However, this is not of much assistance to the first respondent, in our view, as delivery 'to the project' could only mean 'at the site of the project'. It cannot be at the mine site. In fact, this is a

fundamental issue where the first respondent seems to be altering the basic concept of the formula by seeking to replace the wordings in the formula relatable to the project-site to the mine site.

68. In view of our discussion we have no hesitation in concluding that the point at which the Calorific Value of the coal is to be measured is at the project-site. The plea of the first respondent that there is no such methodology of measuring the Calorific Value at the project-site is belied by the sample reports of different financial years filed by the appellant along with the synopsis, which itself referred to the joint sampling and testing of the coal received and is duly signed by both sides. It is surprising how such a bald denial was made despite the position existing at the site. These sample reports are for years 2014, 2015, 2016 and 2017."

ab. It is stated that the proposition advanced by the respondent that all future risks on new taxes and levies has to be borne by the petitioner is completely fallacious. The respondent has failed to comprehend that the petitioner herein has entered into a regulated PPA wherein it is not selling power in open market. The power generating from the petitioner's project is being sold to a single monopoly consumer that is the respondent. Therefore, it is not even capable to absorb such a risk which is beyond its control.

ac. It is stated that as identified in the Nabha judgment that it's case also squarely qualifies the five conditions of Officious Bystander Test:

i) It should be compensated for any cost as a result of change in law. The said request to the Commission is reasonable and equitable as the contract was entered without the intention of gratuitously benefitting the other party.

(ii) In a situation as that of instant case, it is necessary to give business efficacy to the contract as the purpose of entering into the contractual arrangement is to achieve the result of consequences intended by the parties acting as prudent businessmen.

(iii) Further, it goes without saying that all future costs which could not have been foreseeable by the petitioner in a regulated PPA will obviously be borne by the buyer.

(iv) The intention of the execution of PPA is capable of clear expression that the petitioner cannot be expected to absorb the risk which is not under its control.

(v) It cannot be denied that the reliefs sought by it is not contradicting any terms of the contract as there is no express provision of the consequences of change in law in the PPA. Accordingly, there is no conflict because the Change in Law clause only provides for extension of the scheduled commercial operation date, the provisions of the contract does not deny the petitioner from claiming consequential monetary relief arising out of such Change in Law event.

ad. It is stated that the fact that there is no express clause in the PPA as to the consequences of the introduction of new tax does not mean that the parties did not contemplate it. It could not have been the contemplation of the parties that all the future taxes will be borne by the petitioner as the same is not economically viable and feasible. It has to supply power at a fixed tariff for 25 years and has a locked PPA, it cannot possibly foresee or take risk of all the costs that can be introduced in future. Therefore, a business efficacy test to a transaction must have been intended by both the parties at the time of entering into the agreement. A prudent businessman would always believe that the future uncertain costs would obviously be borne by the buyer. The absence of the compensation clause in the PPA does not take away it's right from seeking reimbursement.

Re: Petitioner is entitled for compensation under the provisions of section 70 of the Indian Contract Act, 1872

ae. It is stated that along with the law of economics, it is also entitled for compensation under section 70 of the Indian Contract Act, 1872. It is a settled proposition of law that when the parties indulge in commerce, there are no gratuitous acts. It is entitled for any amount that has been spent for the benefit of the other party. Moreover, if the contract does not

provide for a particular eventuality, the parties shall be governed by the provisions of the Indian Contract Act, 1872 in respect of that eventuality. Therefore, although there is no clause of compensation on account of Change in Law in the PPA, it is well within its rights under law to claim reimbursement of the additional cost incurred for non-gratuitous act. In this reference, it relies upon following judicial pronouncements which have exhaustively discussed the application of section 70 of the Indian Contract Act, 1872.

Piloo Dhunjishaw Sidhwa vs Municipal Corporation of The City–AIR 1970 SC 1201

> "9. The plaintiff is not entitled to maintain a suit for price of the goods relying upon any contractual obligation of the Corporation. But the plaintiff may still maintain his claim for compensation under Section. 70 of the Contract Act which provides:
>
> "Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore, the thing so done or delivered."
>
> … …
>
> 10. In our view the High Court was in error in holding that the plaintiff is entitled not to the invoice value of the goods, but only to "the fair price" of the goods. Under Section 70 of the Contract Act, a person lawfully delivering goods to another, and not intending to do so gratuitously, is entitled to demand that the goods delivered shall be returned, or that compensation for the goods shall be made. Compensation would normally be the market price of the goods. By refusing to return the goods, the person to whom the goods have been delivered cannot improve his position and seek to pay less than the market-value of the goods. The High Court of Lahore in Secretary of State and Another v. G.T. Sarin and Company held that a person without an enforceable contract in his favour supplying goods to a Government Department is entitled to a money equivalent of the

goods delivered assessed at the market rate prevailing on the date on which the supplies were made.

CERC judgment titled "Tata Power Trading Company Limited & Anr. v. The Brihan Mumbai Electric Supply & Transport Undertaking" – Petition No.159 / MP / 2017

"31. The Petitioners have submitted that the provision of Change in law has been inserted in the Lol to enable the generator to recover costs which could not have been foreseen at the time of participating in the bid for sale of power. They have submitted that the change in law provision has been introduced under the Force majeure clause of the Lol to ensure that the parameters based on which the Petitioner had bid for supplying power, it modified or changed in times to come, would not have any adverse effect upon the performance of the generator. Accordingly, in return for bidders quoting the lowest possible price and bearing the commercial risk, the quid pro quo is that the procurer agrees under the PPA to bear the regulatory risk of compensating them for changes in the law, which is beyond the control of the bidder. The Petitioners have argued that BEST having induced the Petitioners to believe that any such event necessitating invocation of change in law event shall be adequately addressed within the confines of the Lol, cannot subsequently refuse to provide the relief otherwise admissible under the provisions of change in law. In addition, the Petitioners have contended that the intent of the parties as can be gathered from the overall construction of the terms of the Lol is that although the event may be a change in law event, the same shall be treated as Force majeure if it qualifies the additional criteria of "adversely affects, prevents or delays any party in performance of its obligations … …." Further, an event shall nonetheless constitute a change in law event even though it may not qualify as a force majeure in terms of the Lol, if it otherwise meets the requirements of change in law. The Respondent BEST has submitted that the Lol does not provide for an independent and

substantive clause for ‘Change in Law’ but merely includes "change in law" as a force majeure event in the limited and specific context of force majeure.

32. The submissions have been considered. It is evident from clause 17 of LoI as quoted in para 30 above that "force majeure" can be invoked where "any event or circumstances or combination of events or circumstances adversely affects, prevents or delays any party in the performance of its obligations". Further, Clause 17 provides an inclusive definition of Force Majeure. Clause 17(E) recognizes "change in law" as an event of force majeure. Unlike in the case of standard PPAs, Change in Law in Clause 17 (E) is neither defined nor has its scope been clearly delineated. In our view, an event would constitute a change in law, even though it may not qualify as a force majeure in terms of the LoI, if it meets the requirements of change in law in standard PPA. In the standard model PPA issued by Ministry of Power Government of India under Section 63 of the 2003 Act, the term "Law" inter alia includes any statute, ordinance, regulation, notification or code, rule or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law. The term "Change in Law" includes any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal of any law occurrence of any of the events mentioned therein if the same has occurred after the cut-off date (which is seven days before the bid deadline) and has the effect of incurring of recurring or non-recurring expenditure by the Seller (Generating Company). In the present case, the Petitioners have claimed compensation for additional expenditure incurred by Petitioner No.1 due to increase rate of Clean Energy Cess on coal, after the cut-off date (31.12.2015) based on MOF, GOI notification dated 29.2.2016. Thus, the increase in levy of Clean Energy Cess, in our view, qualifies as a "change in law" event in terms of clause 17 (E) of the LoI. It is pertinent to note that the Model PPA provides for the award of compensation for Change

in Law which occurred during the Construction Period and Operating Period. In the absence of any such provision for award of compensation for change in law in the LoI, it needs to be considered as to what relief should be admissible for Change in Law on account of change in rate of Clean Energy Cess.

33. The Petitioners have submitted that the increase in levy of Clean Energy Cess qualifies as a change in law event under clause 17 of the LoI and hence they ought to be compensated in terms of clause 17 and restored back to the same economic position as if such change in law has not occurred. It is to be noted that compensations under a contract has to be governed as per the provisions of the contract. The LoI dated 14.1.2016 does not contain any provision for payment of compensation on the occurrence of events of change in law. Further, Change in Law has been shown under "force majeure". The compensation for force majeure under the LoI is in terms of the following:

"Neither party shall be in breach of its obligations pursuant to this understanding to the extent that the performance of its obligation was prevented, hindered or delayed due to force majeure event, and without in any way prejudicing the obligation of either party to make payments of amounts accrued due prior to the occurrence of the event of force majeure, which shall be payable on the original due date."

Since "Change in Law" is a sub-sect of force majeure, the above provisions will be applicable for Change in Law also. In terms of the above provision, neither party will be in breach of its obligations to the extent the performance of its obligation was prevented or hindered or delayed due to force majeure event. Change in rates of Clean Energy Cess which is covered under change in law and is a force majeure event in terms of the LoI will certainly hinder JITPL/TPTCL from discharging their obligations under the LoI and for such hindrance JITPL / TPTCL would not have been in breach of their obligation under the LoI. However, JITPL/TPTCL despite being affected by force majeure arising out

of change in law have supplied power by incurring additional expenditure. In our view, JITPL/TPTCL needs to be considered for compensation for the additional expenditure incurred by them on account of charge in rate of Clean Energy Cess on coal which was used for supply of power to BEST.

34. Where the contract does not provide for a particular eventuality, the parties shall be governed by the provisions of the Indian Contract Act, 1872 (Indian Contract Act) in respect of that eventuality, Section 70 the Indian Contract Act is extracted hereunder:

"70. **Obligation of person enjoying of non-gratuitous act**:- Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered".

As per the above provision where a person does a thing, not intending to act gratuitously and the other person derives any benefit of such act, then the person enjoying the benefit is liable to compensate the other to the extent of the benefit received."

af. It is stated that the Change in Law and Force Majeure clauses of the PPA in the CERC judgment are *pari materia* identical to the clauses of the instant PPA. As in the CERC judgment whereby the developer is compelled to bear clean energy cess in the absence of Change in Law clause, similarly in the present case, no express provisions are stipulated in the PPA which allow compensation towards entry tax under change in law. The Respondent herein has benefitted from the power supplied to the consumers and is making return on the investment. Hence, it most humbly submits that CERC having adjudicated an issue being similar on facts and legal questions, the Petitioner is justifiable in praying for the present relief.

ag. It is stated that in terms of section 70 of the Indian Contract Act, it is required to be restituted even if the change in law provision in the PPA

does not provide for compensation towards additional cost. The introduction of entry tax was after the date of the bid, issuance of LOI, execution of PPA, therefore it squarely clarifies as a change in law which has an adverse financial impact on the developer.

Re: Applicable Regulatory framework

ah. It is stated that in terms of section 86(4) of the Act, 2003, the Commission while discharging its functions under the Act has to be guided by the provisions of National Tariff Policy, 2016 (NTP). Clause 6.2 (4) of the NTP clearly states that any change in taxes imposed by the Central/State Government after the award of bids has to be treated as 'Change in Law' unless otherwise provided for in the power purchase agreement. The relevant provisions of the NTP are reproduced herein below:

*"6.2 **Tariff structuring and associated issues***

… …

(4) After the award of bids, if there is any change in domestic duties, levies, cess and taxes imposed by Central Government, State Governments/Union Territories or by any Government Instrumentality leading to corresponding changes in the cost, the same may be treated as "Change in Law" and may unless provided otherwise in the PPA, be allowed as pass through subject to approval of Appropriate Commission."

As already elaborated earlier, the PPA executed by it with the Respondent clearly stipulate that any change in the directions by the competent authorities shall be treated as 'Change in Law' under Article 1.12. Therefore, the PPA executed by the Petitioner with the Respondent is in line with the provisions of the NTP, which clearly envisages that any change in the taxes imposed by the Central Government which result in a corresponding impact on the cost have to be treated as a 'Change in Law' event.

ai. It is stated that in terms of the facts, circumstances and governing framework, it is to be compensated for Change in Law event through a one-time lump sum payments along with carrying cost @ 18.71% (post-tax) per annum. The carrying cost shall be calculated for the period from

the date of the financial liability till the amounts are paid by the Respondents. The purpose of carrying cost has been well explained in the Hon'ble ATE judgment dated 20.12.2012 in *"M/s. SLS Power Ltd. v. APERC & Ors., Appeal No.150 of 2011"*. The relevant portion of the judgment is extracted herein below:

> "35.5 The principle of carrying cost has been well established in the various judgments of the Tribunal. The carrying cost is the compensation for time value of money or the monies denied at the appropriate time and paid after a lapse of time. Therefore, the developers are entitled to interest on the differential amount due to them as a consequence of re-determination of tariff by the State Commission on the principles laid down in this judgment. We do not accept the contention of the licensees that they should not be penalized with interest. The carrying cost is not a penal charge if the interest rate is fixed according to commercial principles. It is only a compensation for the money denied at the appropriate time."

aj. It is stated that further it has been making the payment of entry tax amount through promoter's fund. The equity invested by the promoter to fund the additional expenses towards entry tax has to be compensated on the basis of return on equity. It is stated that in similar cases wherein GST has been qualified as change in law, the normative parameters set in CERC renewable tariff order dated 19.03.2019 based on CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017 are made applicable which may be adopted by the Commission in the absence of specific tariff regulations of the Commission. In this regard, if the Commission requires any additional information, it undertakes to provide the same based on such instructions.

Conclusion

ak. It is stated that in the instant case, at the time of submission of the bid, the relevant provisions of Entry Tax were declared unconstitutional by the Hon'ble High Court of Andhra Pradesh. It was only after the execution of the PPA i.e., 03.03.2015, imposition of the entry tax was

validated by the Hon'ble Supreme Court in "*Jindal Stainless Case"* and resultantly Assessment Order(s) dated 11.02.2020 was issued. Therefore, it had submitted its bid taking into account the rates of taxes prevalent at that point in time. Any subsequent change in the structure of tax or imposition or introduction of tax, which can have a substantial impact on the capital cost of the project, clearly qualifies as Change in Law in terms of the aforementioned principles.

al. It is stated that it has entered into a regulated PPA with the Respondent wherein it is not selling power in open market. The accepted principles of business efficacy by the Indian judiciary reiterated in Nabha Power case, that the contract has to be interpreted considering both law and economics is to be applied in the present case as well. The changes in the tax regime are uncontrollable expenses and a generating company cannot reasonably be forced to assume or absorb such risks. The intention while tying up long term capacity under the PPA could never have been to denude the generating company of an opportunity to be compensated for risks changes which are beyond its' control. It in its support relies on all judicial precedents set out above.

am. It is stated that the incidence of entry tax has to be compensated to it on actuals. In compliance to the Hon'ble High Court's order dated 04.03.2020, it has hence deposited Rs. 19,39,942/- and Rs. 1,46,20,755/- (total being Rs.1,65,60,697/-) being 25% of Rs. 77,59,769/- and Rs. 5,84,83,022/- (total being Rs. 6,62,42,791/-) respectively, which must be compensated to it on lump sum basis. It is also entitled for carrying cost from the date of payment of amount till the date of reimbursement by the respondent. With regard to the pending writ petitions before the Hon'ble High Court, there can be two possible outcomes, either it will succeed in which case it would immediately forthwith return 25% of the entry tax amount to the respondent. In the eventuality, it's petition gets dismissed, it will be required to pay balance 75% which must be compensated on the principles as set out hereinabove.

an. It is stated that in view of the aforesaid submissions, it is prayed that the Commission may be pleased to grant the reliefs as prayed for in the

instant petition keeping in view the above made submission, settled principles of law, the squarely applicable decisions of Hon'ble Supreme Court and Hon'ble ATE among such other.

10. The Commission has heard the counsel for the petitioner and the representative of the respondent. It has examined the material available on record and arguments adduced along case law placed before it. The arguments as recorded by the Commission are extracted below:

Record of proceedings dated 09.10.2020:

"… … The counsel for the petitioner stated that the counter affidavit has been received on 08.10.2020 only and seeks three weeks time for filing rejoinder. Considering the submission made by the counsel for the petitioner, the Commission directs the counsel for the petitioner to file rejoinder on 02.11.2020 duly giving a copy of it to the respondent. … …"

Record of proceedings dated 14.12.2020:

"… … The counsel for the petitioner stated that the senior counsel is unable to attend the hearing due to personal inconvenience, hence sought adjournment. The representative of the DISCOM stated that the adjournment had been sought earlier for filing rejoinder, however the same is not yet filed. The counsel for the petitioner stated that she would ensure the filing of the same immediately with a copy to the DISCOM.

In view of the request of the parties, the matter stands adjourned to 07.01.2021. The counsel for the petitioner is directed to file the rejoinder immediately with a copy to the DISCOM."

Record of proceedings dated 07.01.2021:

"… … The counsel for the petitioner stated that the issue in this petition is with regard to levy and collection of entry tax. The then Hon'ble High Court of Andhra Pradesh had set aside the Entry Tax Act, 2000 on 31.12.2007. Subsequently, the respondents in the year 2014 have floated the RfS for establishing solar power projects in the State of Telangana and the petitioner had been awarded 30 MW. The letter of intent was issued on 23.01.2015 and PPA was signed on 03.03.2015. As on the date of RfS as also the PPA the Entry Tax Act, 2000 was not on the statute book having been struck down by the then Hon'ble High Court. However, in the year 2016, the Hon'ble Supreme Court in a batch of

appeals had restored the applicability of the Entry Tax Act, 2000 by holding it as a valid enactment.

The period in between the judgment of the Hon'ble High Court and the Supreme Court cannot be considered for application of Entry Tax Act, 2000, as it was not available on the statute book. Pursuant to the decision of the Hon'ble Supreme Court demand has been raised by the Government of Telangana for payment of amount due towards entry tax. The petitioner again approached the Hon'ble High Court for the State of Telangana and obtained orders of stay subject to payment of certain amount. Therefore, payment of entry tax made by the petitioner is required to be compensated/refunded to the petitioner.

The levy of entry tax constitutes a change in law as stated by the petitioner and the petitioner relied on paragraph 7 of the standard bid document as also the provisions in the PPA. According to the petitioner, the standard bid document constituted a valid law as has been held by the Hon'ble Supreme Court in M/s. Energy Watchdog v. CERC and others. The SBD guidelines have been notified by the Government of India under section 63 of the Act, 2003, which have been followed by the respondent. As the said documents constitute a valid law, the respondent is bound to follow the same.

The counsel for the petitioner sought permission to rely on some documents and judgments, which are not on record now. Therefore, he sought time to file the same and to make available to the respondents for their response. In view of the submissions, the matter is adjourned."

Record of proceedings dated 18.01.2021:

"… … The counsel for the petitioner stated that the petitioner has filed additional documents and also an application for amending the prayer in the petition to include the relief of payment of carrying costs of the dues payable towards entry tax. He also stated that the petition by oversight did not mention the percentage of the carrying cost or its value. He sought permission to include the same also by way of a separate paragraph to be included in the fresh application for amendment of the prayer in the original petition. The representative of the licensee, while conforming the receipt of the documents and the application by email, sought time for filing counter affidavit in the matter.

Agreeing to the request of the parties, the petition stands adjourned. The parties shall complete the filing of pleadings of the counter affidavit and rejoinder by

01.02.2021 with a copy to either side respectively without fail and the matter will be called for hearing on 11.02.2021."

Record of proceedings dated 11.02.2021:

"… … The counsel for the petitioner stated that the petitioner has filed additional documents and also an application for amending the prayer in the petition to include the relief of payment of carrying costs of the dues payable towards entry tax. He also stated that in the application by oversight did not mention the percentage of the carrying cost or its value. He stated that the additional affidavit has also been filed to bring out the additional submissions. The respondent has filed counter affidavit to the application only the other day, even though, the Commission had specifically fixed the time period for filing the same and also directed him to file rejoinder, if any by this date. As the counter affidavit did not mention or reply to the submissions in the application and additional affidavit, he needs time to file rejoinder to the submissions. The representative of the respondent stated that the application being in addition to the original petition and there being no additional submissions, the counter affidavit has been filed only objecting to the amendment of the prayer. Otherwise, the respondent is ready with the matter. The rejoinder, if any, may be filed on or before 22.02.2021 by duly serving a copy of the same to the respondent through email/physical form.

Considering the request of the counsel for the petitioner, the matter is adjourned. It is made clear that no further adjournment in the matter will be considered."

Record of proceedings dated 15.03.2021:

"… … The counsel for the petitioner stated that the petitioner has filed the present petition seeking reimbursement of the tax paid by it to the state government known as entry tax pursuant to the Assessment Orders passed by the concerned department of the state government by treating it as change in law and the carrying costs. In order to explain the issue, the counsel for petitioner referred to various provisions of the power purchase agreement, the request for selection document and the judgments applicable in the facts and circumstances of the case.

The counsel for petitioner relied extensively on the concept of commercial agreement by quoting several provisions in the PPA with regard to change of

law, force majeure and liabilities on the part of the generator. He stated that change of law has not been extensively explained in the PPA except for stating a simple definition of what constitutes change of law. He sought to link it up with force majeure events as understood in the agreement. It is the case of the petitioner that any liability including any taxes either levied or imposed by the government or any authority subsequent to the signing of the agreement would constitute change of law and thereby it is entitled to reimbursement of such amount, which it has spent in complying with such demand/obligation casted on it.

The counsel for petitioner stated that the petitioner is concerned in this case with the imposition of entry tax as demanded by the government. He stated that the entry tax was introduced by the erstwhile combined state in the year 2001. Subsequently, it came to be challenged before the Hon'ble High Court of Andhra Pradesh as it then was. The Hon'ble High Court quashed the enactment holding it to be unconstitutional. The matter was carried in appeal to the Hon'ble Supreme Court by then government in the year 2008, however, no stay was obtained. The Hon'ble Supreme Court had set aside the order of the Hon'ble High Court in the year 2016 bringing back to life the enactment on entry tax. Consequent thereof, the concerned authorities initiated proceedings for recovery of the amount due from the petitioner and passed necessary Assessment Orders. Prior to the order of the Hon'ble Supreme Court, the state government exercising the powers under the A.P. Reorganisation Act, 2014 adopted the earlier enactments including the Entry Tax Act, 2001. Therefore, the concerned authorities communicated the Assessment Orders after passing of the order of the Hon'ble Supreme Court.

He stated that the petitioner had approached the Hon'ble High Court pursuant to the Assessment Orders and obtained interim orders of stay on the demand subject to payment of 25% of the amount claimed. This amount is liable to be reimbursed by the respondents by treating it as change in law. In order to support his case, he relied on the judgments of Hon'ble Supreme Court as also the Central Electricity Regulatory Commission (CERC). The emphasis drawn from the judgments is that the agreements entered by the parties have to be treated for their interpretation on two concepts, namely, business efficacy and common man understanding. It is also his case that the petitioner cannot be

pushed to wall simply for the reason that the agreement does not contain any clauses relating to compensation for change in law. The counsel for the petitioner would endeavour to state that the petitioner is bound to pay the amount, but at the same time, any taxes or levies have to be reimbursed as provided in the RfS and agreement.

It is also stated that the principles as laid down by the Hon'ble Supreme Court as also the CERC have considered section 70 of the Indian Contract Act, 1872, which require that no activity undertaken or offered to be undertaken is treated as gratuitous. The petitioner herein had offered to establish a power project based on the proposal sought by the respondents and is undertaking supply of energy to the respondents pursuant to the award of contract through bidding route It cannot sell the project being electricity to anybody else except the respondents as it is not a product that can be sold like any other product in the market it being bound by an agreement and is a producer of electricity. Having committed to be a supplier of power for the agreement period, it cannot be put to loss on account of any liabilities including tax that has been occasioned during the period of agreement, in this case the entry tax.

The counsel for petitioner stated that the tariff in the case of the petitioner is inclusive of the capital investment made and the return on equity derived thereof apart from servicing the loans that are obtained for establishing the project. The petitioner has to incur all the expenditure within the tariff quoted by it while bidding the project. Any additional burden in the form of taxes or levies has to be invariably passed on to the procurer of power, who may or may not recover from their consumers. This happens so, because the product is not being sold in the open market where the petitioner could change the tariff and recover all the costs and liabilities as is done in respect of other products.

The levy of entry tax is a subsisting liability as on the date of RfS issued by the respondents, except that it was subjudice before the Hon'ble Supreme Court pursuant to appeal by the government. The petitioner could not have factored in the levy that may happen or may not happen as it was dependant on the decision of the Hon'ble Supreme Court. If the Entry Tax Act were to be set aside, there would not be any liability and if the same is upheld, the said liability would arise. Also it is to be stated that the Assessment Orders have been challenged before the Hon'ble High Court, which may result in two possibilities

being either the Assessment Order is set aside completely or the writ petition is rejected. The consequences of the same would be either the respondents would become liable if the petitioner fails to get the Assessment Orders set aside or there would not be any claim, if the petitioner succeeds in the writ petition. Corollary to this aspect is the cost that is incurred by the petitioner in complying with the directions of the Hon'ble High Court as also the levy of tax when the said amount towards payment of 25% of the assessed amount of entry tax. In complying with the said directions, the petitioner had to obtain funding from promoters and other sources, which would entail carrying cost of either interest or return of capital employed as the case may be. Since the respondents are liable to pay the additional cost incurred by the petitioner, they are also liable to pay the additional cost incurred thereof for the present. Ultimately, the liability of the petitioner would be pressurized only when the proceedings before the Hon'ble High Court are concluded either way.

The counsel for petitioner would plead that this liability for the present is required to be made good by the respondents and such liability in any case be available for adjustment depending on the result of the proceedings before the tax authorities as also the Hon'ble High Court.

The representative of the respondents stated that the matter involves a simple issue of liability of entry tax payable by the petitioner, which the respondents are not liable to pay in terms of the agreement between the parties. It is his endeavour to state that the clauses in the agreement are specific and clear that the taxes and duties are to be borne by the petitioner itself and nothing is payable by the respondents. The respondents are not liable to pay the tax or reimburse it for the reason that as on the date of notifying the RfS, the said tax was not in vogue and any subsequent levy would be contrary to the terms of the PPA as the PPA would clearly state that the tariff is inclusive of all taxes and duties, which was condition in the RfS document, also based on which the petitioner has bid for the project. Having clearly understood the position of tariff and having signed the agreement, which obligates the petitioner to pay all the taxes and duties, it cannot now turn round and allege that there is change in law only because a tax which was nonest in law had become liable subsequently due to operation of law as laid down by the Hon'ble Supreme Court. The representative of respondents would urge upon that the Entry Tax

Act cannot be invoked against the respondents by the petitioner as it is a new law, which has come into effect subsequent to the signing of the PPA. Thus, the respondents are not liable to pay nor are required to accede to the demand made by the petitioner. Therefore, the petition is liable to be dismissed as there is no involvement of change in law.

The counsel for petitioner drew attention to the policy of the Government of India with regard to change in law, which has been held to be a law by the Hon'ble Supreme Court. It is his case that the present claim of giving effect to the change in law and requiring the respondent to reimburse the entry tax stems from the provisions of the policy also. The Commission may consider interpreting the provisions of the PPA in terms of the decisions of the Hon'ble Supreme Court and may be persuaded to follow the decisions taken by the coordinate body being CERC.

Having heard the submissions of the parties, the matter is reserved for orders…. …"

11. In order to appreciate the factual matrix of the case, it may be appropriate to analyse the provisions of the Act, 2003, Contract Act, the RfS and PPA. There is no issue on the first foremost aspect that the project came to be established under the competitive bidding route and the DISCOM had obtained the consent for the bidding and the rate at which power is to be procured under section 63 of the Act, 2003. The bone of contention that remains for adjudication is whether the RfS and the PPA aid to the petitioner in respect of subsequent events of taxation fastened on it and if so the Contract Act comes into aid or denigrate the claim.

12. The Commission gainfully notices the provisions of the PPA with reference to 'Change in Law' and 'Tariff', which are vital to decide this case.

"ARTICLE 1: DEFINITONS

1.12 "**Change in Law**" means any change or amendment to the provisions of electricity law in force, regulations, directions, notifications issued by the competent authorities and Government of Indian (GoI),Government of Telangana State (GoTS) including the erstwhile Government of Andhra Pradesh (GoAP) from time to time."

… …

“ARTICLE 2: PURCHASE OF DELIVERED ENERGY AND TARIFF

… …

2.2 The DISCOM shall pay Tariff of Rs.6.848 per unit to the Solar Power Developer as per the tariff quoted by the Solar Power Developer in the Bid.

i. The Bidder has opted for Tariff Option-1 as specified in the Financial Bid Format 6.10(B) of RfS, then Tariff for all Tariff Years for the entire term of the Agreement shall be the Quoted Tariff;

2.3 The Tariff payable by the DISCOM shall be inclusive of all taxes, duties and levies or any other statutory liability, as applicable from time to time.”

Provisions in the RfS document on the above aspects are as below.

“**Quoted Tariff**” shall mean

1) In case the Bidder has opted for Tariff Option–1 as specified in Financial Bid Format 6.10(B), the tariff quoted by the Bidder which shall be applicable for entire term of the PPA.

2) In case the Bidder has opted for Tariff Option–2 as specified in Financial Bid Format 6.10(B), the Quoted Tariff specified by the Bidder for the first Tariff Year. Under Tariff Option -2 the Bidder shall quote Escalation percentage (Esc %) to be applied on Quoted Tariff for determining the Tariff from Tariff Year 2 till Tariff Year 10. Tariff for Tariff Year 11 till Tariff Year 25 shall be the same as Tariff for Tariff Year 10. Escalation percentage shall be greater than zero.”

FORMAT–6.10(B)

Financial Bid

Subject:- Response to RfS No._____ Dated _____

For “Selection of Solar PV developers for procuring 500 MW through tariff-based competitive bidding.”

Offered Capacity in MW	**Injection Voltage for the Offered Capacity**	**List of Preferred Interconnection Subscribers**	
		Preferrence 1	….
		Preferrence 2	….

		Preferrence 3	….
		Preferrence 4	….
		Preferrence 5	….

Table 1: Tariff Option I (Bid Parameter shall be the Quoted Tariff)

Quoted Tariff in INR/kWh (figures)	

Note: The above Table 1 shall be left blank if the Bidder choses Tariff Option 2

(OR)

Table 2: Tariff Option 2 (Bid Parameter shall be the Levelized Tariff computed as per Clause 4.1.3 (B) of the RfS

Bidder shall specify Quoted Tariff for Tariff Year 1 only. Quoted Tariff for Tariff Year 1 shall be uniformly escalated by the below specified Escalation percentage (Esc %) to determine the Quoted Tariff for Tariff Year 2 till Tariff Year 10. Quoted Tariff for Tariff Year 11 till Tariff Year 25 shall be the same as the escalated Quoted Tariff for Tariff Year 10.	
Quoted Tariff for Tariff Year 1 (TY_1)	
Escalation percentage (Esc %)	

Note: The above Table 2 shall be left blank if the Bidder choses Tariff Option 1

Note:

1. Quoted Tariff shall be quoted at Interconnection Point only in INR/kWh upto three (3) decimal places.
2. The Bidder would be required to upload Format–6.10(B) as an MS-Excel file as per section 3.10 of this RfS.
3. For a particular Financial Bid, Bidder shall choose one of Tariff Option 1 or Tariff Option 2 but NOT both. This means that Bidder shall propose to develop Offered Capacity at the Quoted Tariff corresponding to Tariff Option 1 or Tariff Option 2.
4. Bidder shall take into account provisions of this RfS and more specifically terms specified in Clause 3.6 of this RfS while submitted Financial Bid."

It is seen from the PPA that the petitioner opted for Tariff Option 1 and therefore, the clauses extracted above would be applicable to the petitioner.

13. The petitioner also referred to clause 6.2 of the NTP as extracted above. The said policy has been held to be a law by the Hon'ble Supreme Court in M/s. Energy Watchdog v. Central Electricity Regulatory Commission. The relevant paragraph is extracted below.

> "… … Both the letter dated 31st July, 2013 and the revised tariff policy are statutory documents being issued under Section 3 of the Act and have the force of law. … …"

14. On the contrary, the respondents sought to rely on the Articles 1.12, 2.2, 2.3 and 6.10(B) of the PPA as extracted above. And also relied on the provision of section 63 in Act, 2003, along with observations of CERC in its decision dated 30.03.2015 in the matter of *"M/s Sasan Power Limited v. MP Power Management Company Limited & Ors."* on the aspect of 'Change in Law'. They also relied on the relief for 'Change in Law' in the standard bid document.

15. The crux of the matter before the Commission in the instant case hinges on the interpretation i.e., to be given to the definition provided on 'Change in Law' as well as the tariff applicable to the petitioner in the context of 'Change in Law'. It is common principle in law that the provisions of a document, be it the act of legislature, rule, regulation and byelaw have to be read completely together to give harmonious effective construction so that they are workable and not become ambiguous. Before proceeding further, it has to be stated that the petitioner has raised the issue of 'Change in Law' in view of the upholding of the Telangana Tax on Entry of Goods into Local Areas Act, 2001. This tax is liable to be paid by the petitioner and the tariff quoted by it is inclusive of this tax and not exclusive of this tax and whether such inclusive is correct or not is to be decided herein.

16. The petitioner prima facie relied on the judgment of the Hon'ble Supreme Court to contend that it is liable to pay entry tax as has been upheld by the Hon'ble Supreme Court and its finding through a constitutional bench of 9 judges. The Hon'ble Supreme Court in its judgment dated 11.11.2016 had concluded the following findings as extracted by the Hon'ble Supreme Court in the order dated 29.03.2017.

"… …

1. Taxes simpliciter are not within the contemplation of Part XIII of the Constitution of India. The word 'Free' used in Article 301 does not mean "free from taxation".

2. Only such taxes as are discriminatory in nature are prohibited by Article 304(a). It follows that levy of a non-discriminatory tax would not constitute an infraction of Article 301.

3. Clauses (a) and (b) of Article 304 have to be read disjunctively.

4. A levy that violates 304(a) cannot be saved even 14 if the procedure under Article 304(b) or the proviso there under is satisfied.

5. The compensatory tax theory evolved in Automobile Transport case and subsequently modified in Jindal's case has no juristic basis and is therefore rejected.

6. Decisions of this Court in Atiabari, Automobile Transport and Jindal cases (supra) and all other judgments that follow these pronouncements are to be extent of such reliance over ruled.

7. A tax on entry of goods into a local area for use, sale or consumption therein is permissible although similar goods are not produced within the taxing state.

8. Article 304 (a) frowns upon discrimination (of a hostile nature in the protectionist sense) and not on mere differentiation. Therefore, incentives, set-offs etc. granted to a specified class of dealers for a limited period of time in a non-hostile fashion with a view to developing economically backward areas would not violate Article 304(a). The question whether the levies in the present case indeed satisfy this test is left to be determined by the regular benches hearing the matters.

9. States are well within their right to design their fiscal legislations to ensure that the tax burden on goods imported from other States and goods produced within the State fall equally. Such measures if taken would not contravene Article 304(a) of the Constitution. The question whether the levies in the present case indeed satisfy this test is left to be determined by the regular benches hearing the matters.

10. The questions whether the entire State can be notified as a local area and whether entry tax can be levied on goods entering the

landmass of India from another country are left open to the determined in appropriate proceedings."

17. The above stated findings of the Hon'ble Supreme Court were rendered in exercise of powers conferred under Article 142 of the Constitution of India. A law being declared or being held to be valid or otherwise under the above said article constitute a law itself and binding on all the authorities under the Constitution of India and under various laws.

18. Having said that it has to be stated that this aspect has to be looked at in terms of the definition provided in the agreement itself with regard to 'Change in Law' and 'tariff'. In this case, the definition has to be read inconsonance with the definition of the tariff as also the provisions in clauses 3.2 and 6.1 of the PPA. Since the definition of 'Change in Law' does not provide for the word 'taxes' in the instant PPA, the aspect of taxes has to be reverted to the clauses on tariff, wherein it is made clear that the petitioner shall bear all expenditures and also make payments for taxes, cess, duties or levies and obligations imposed by the competent authorities in accordance with law.

19. It is appropriate to state that the petitioner had bid the project on the premise that it would bear all the expenses including taxes as of that date. However, it is the case of the petitioner that any subsequent event including rule, regulation or law which impose additional burden, cannot be termed as part and parcel of the quoted tariff. In this regard, the petitioner has extensively relied on the judgments rendered by the Hon'ble Supreme Court in the following cases:

1. SC – Union of India v. D.N.Revri & Co. and Ors. (1976) 4 SCC 147 para 7.
2. SC – Shivashakti Sugars Ltd. v. Shree Renuka Sugar Ltd. (2017) 7 SCC 729 para 44.
3. SC – Nabha Power Ltd. v. Punjab State Power Corporation Ltd. and Ors. (2018) 11 SCC 508 para 49.
4. SC – Dhanrajamal Gobindram v. Shamji Kalidas And Co. AIR 1961 SC – 1285 para 19.
5. SC – Satya Jain (Dead) & Ors. v. Anis Ahmed Rushdie (Dead) & Ors. (2013) 8 SCC 131 para 33.

20. The Commission examined the each of the judgments referred above in the context of the contentions set forth by the parties. The relevant paragraphs are discussed below at the cost of repetition for the sake of analysing the relevancy of the same in this case.

1. **SC – Union of India v. D. N. Revri & Co. and Ors. (1976) 4 SCC 147 para 7**

"7. It must be remembered that a contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow pedantic and legalistic interpretation. More, at the time when the arbitrator came to be nominated and the reference was made, there was a Ministry of Food and Agriculture and there was a Secretary in that Ministry, but the only difficulty, according to the High Court, was that there were, instead of one, two Secretaries and it could not be predicated as to which Secretary was intended to exercise the power of nominating an arbitrator. We do not think this difficulty is at all real. Let us consider, for a moment, why in clause (17), the power to nominate an arbitrator was conferred on the Secretary in the Ministry of Food and Agriculture and not on a Secretary in any other Ministry. The reason obviously was that at the date of the contract the Secretary in the Ministry of Food and Agriculture was the Officer dealing with the subject-matter of the contract. If this object and reason of the provision of clause (17) is kept in mind, it will become immediately clear that the "Secretary in the Ministry of Food and Agriculture" authorised to nominate an arbitrator was the Secretary in charge of the Department of Food who was concerned with the subject-matter of the contract. The Secretary in charge of the Department of Food filled the description "Secretary in the Ministry of Food and Agriculture" given in clause (17). The respondents relied strongly on the use of the definite article 'the' before the words "Secretary in the Ministry of Food and Agriculture" and urged that what the parties to the contract had in mind was not a Secretary in the Ministry of Food and Agriculture, but the Secretary in the Ministry of Food and Agriculture and that clearly postulated one definite Secretary in the Ministry of

Food and Agriculture and not one of two Secretaries in that Ministry. This is, in our opinion, a hypertechnical argument which seeks to make a fortress out of the dictionary and ignores the plain intendment of the contract. We fail to see why the Secretary in the Ministry of Food and Agriculture in charge of the Department of Food could not be described as the Secretary. He would be the Secretary in the Ministry of Food and Agriculture concerned with the subject-matter of the contract and dearly and indubitably he would be the person intended by the parties to exercise the power of nominating the arbitrator. The parties to the contract obviously could not be expected to use the words "a Secretary in the Ministry of Food and Agriculture", because their intendment was not that any Secretary in the Ministry of Food and Agriculture should be entitled to exercise the power of nominating an arbitrator, but it should only be the Secretary in the Ministry of Food and Agriculture concerned with the subject-matter of the contract. That is why the use of the definite article 'the'. It is also significant to note that when the Secretary in charge of the Department of Food in the Ministry of Food and Agriculture nominated the arbitrator, the respondents did not raise any objection to the appointment of the arbitrator and participated in the arbitration proceedings without any protest. The respondents knew at that time that there were two Secretaries in the Ministry of Food and Agriculture and the appointment of the arbitrator was made by the Secretary in charge of the Department of Food and yet they acquiesced in the appointment of the arbitrator and took part in the proceedings. This circumstance is also clearly indicative of the intendment of the parties that the Secretary in the Ministry of Food and Agriculture concerned with the subject-matter of the contract should be the person entitled to nominate the arbitrator. Or else the respondents would have objected to the appointment of the arbitrator and declined to participate in the arbitration proceedings or at any rate, participated under protest. We are, therefore, of the view that the arbitrator was validly nominated by the Secretary in charge of the Department of Food in the Ministry of Food and Agriculture."

The judgment is of no use as the issue canvassed is with regard to specific situation being 'Change in Law' and the interpretation thereof. It does not aid or assist the situation relating to payment of tariff, which is involved in this case. Thus, the judgment is of little help to the petitioner. The parties themselves are in consensus about a

particular clause in the agreement and as such, the same cannot be termed as hindering the business efficacy. The above judgment does not deal with this type of situation and therefore, the same cannot be relied upon.

2. SC – Shivashakti Sugars Ltd. v. Shree Renuka Sugar Ltd. (2017) 7 SCC 729 para 44

"44. We may hasten to add that it is by no means suggested that while taking into account these considerations specific provisions of law are to be ignored. First duty of the Court is to decide the case by applying the statutory provisions. However, on the application of law and while interpreting a particular provision, economic impact / effect of a decision, wherever warranted, has to be kept in mind. Likewise, in a situation where two views are possible or wherever there is a discretion given to the Court by law, the Court needs to lean in favour of a particular view which subserves the economic interest of the nation. Conversely, the Court needs to avoid that particular outcome which has a potential to create an adverse effect on employment, growth of infrastructure or economy or the revenue of the State. It is in this context that economic analysis of the impact of the decision becomes imperative."

It is pertinent to mention that the judgment is with reference to statutory provisions and powers. In this case, there is no statutory provision, which is sought to be interpreted or decided upon. What is left to be decided in this case, is that the interpretation of the provisions of the PPA and it does not touch upon any statutory provisions so as to decipher the intention of the parties and more towards the aspect of business efficacy submitted by the petitioner. As such, this judgment is of no consequence in the facts and circumstances of the case.

3. SC – Nabha Power Ltd. v. Punjab State Power Corporation Ltd. and Ors. (2018) 11 SCC 508 para 49

"49. We now proceed to apply the aforesaid principles which have evolved for interpreting the terms of a commercial contract in question. Parties indulging in commerce act in a commercial sense. It is this ground rule which is the basis of The Moorcock test of giving 'business efficacy' to the transaction, as must have been intended at all events by both business parties. The development of law saw the 'five condition test' for an implied condition to be read into the contract including the 'business efficacy' test. It also sought to incorporate 'The Officious Bystander Test' [Shirlaw v. Southern Foundries (1926 Ltd.)]. This test

has been set out in B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings requiring the requisite conditions to be satisfied: (1) reasonable and equitable; (2) necessary to give business efficacy to the contract; (3) it goes without saying, i.e., the Officious Bystander Test; (4) capable of clear expression; and (5) must not contradict any express term of the contract. The same penta-principles find reference also in Investors Compensation Scheme Ltd. v. West Bromwich Building Society (supra) and Attorney General of Belize v. Belize Telecom Ltd. Needless to say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regard to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract."

It is but axiomatic that the above said judgment emphasizes the clauses in the agreement have to be given effect to as a final word between the parties. The understanding that the clauses in the agreement have to be understood or given effect to so as to sustain the business. It is appropriate to notice that the clauses in the PPA in the present case are specific and clear as to 'Change in Law' and 'Tariff'. That being the case, it cannot be said that one clause is either overriding or disputing the other. It is also not appropriate for the Commission to come to any other conclusion other than the ordinarily understood meaning of the clauses in the agreement, as it will amount to negating the intention of the parties to the agreement. Further, it must be stated that the parties in the clause relating to 'Change in Law' and 'Tariff' have expressed their explicit intention. In that view of the matter, the above judgment is irrelevant for consideration.

4. SC – Dhanrajamal Gobindram v. Shamji Kalidas And Co. AIR 1961 SC – 1285 para 19

"19. Our case is more analogous to the decision referred to in Bishop & Baxter Ld. v. Anglo-Eastern Trading & Industrial Co. Ld. [[1944] 1 K.B. 12], namely, Shamrock S.S. Co. v. Storey [(1899) 5 Com. Cas. 21]. In speaking of the condition there, Lord Goddard observed as follows:

> "Abbreviated references in a commercial instrument are, in spite of brevity, often self-explanatory or susceptible of definite application in the

light of the circumstances, as, for instance, where the reference is to a term, clause, or document of a well-known import like c.i.f. or which prevails in common use in a particular place of performance as may be indicated by the addition of the epithet 'usual' : see Shamrock S.S. Co. v. Storey [(1899) 5 Com. Cas. 21], where 'usual colliery guarantee' was referred to in a charter-party in order to define loading obligation."

The addition of the word "usual" refers to something which is invariably to be found in contracts of a particular type. Commercial documents are sometimes expressed in language which does not, on its face, bear a clear meaning. The effort of Courts is to give a meaning, if possible. This was laid down by the House of Lords in Hillas & Co. v. Arcos Ltd. [[1932] All E.R. 494], and the observations of Lord Wright have become classic, and have been quoted with approval both by the Judicial Committee and the House of Lords ever since. The latest case of the House of Lords is Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd. [[1959] A.C. 133, 153]. There, the clause was "This bill of lading", whereas the document to which it referred was a charter-party. Viscount Simonds summarised at p. 158 all the rules applicable to construction of commercial documents, and laid down that effort should always be made to construe commercial agreements broadly and one must not be astute to find defects in them, or reject them as meaningless."

The judgment speaks of giving a plain meaning in the clauses in the agreement. It is not the case of the petitioner that the clause in the agreement would result in abnormal or unworkable solution. The words employed in the agreement are unambiguous and clear as to 'Change in Law' and 'Tariff'. That being the case, this judgment would not aid the case of the petitioner in any way. Though the petitioner sought to bring the case under the business efficacy nothing is placed on record that its operations are affected due to interpretation of the clauses in the agreement. The submission that there is additional levy of tax has neither attained finality nor it is in any way hindering its operation so as to state that the petitioner is estopped from discharging its duties under the agreement. In that view of the matter the judgment is inappropriate.

5. SC – Satya Jain (Dead) & Ors. v. Anis Ahmed Rushdie (Dead) & Ors. (2013) 8 SCC 131 para 33

"33. The principle of business efficacy is normally invoked to read a term in an agreement or contract so as to achieve the result or the consequence

intended by the parties acting as prudent businessmen. Business efficacy means the power to produce intended results. The classic test of business efficacy was proposed by Bowen L.J. in Moorcock. This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied – the bare minimum to achieve this goal. If the contract makes business sense without the term, the courts will not imply the same. The following passage from the opinion of Bowen L.J. in Moorcock sums up the position:

> "… … In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chance."

The judgment has been referred by the petitioner to canvass its case that its business is affected due to levy of entry tax and that is causing hardship. It is pertinent to state that the petitioner is neither constrained nor stopped from undertaking generation due to levy of the tax. What has happened is not outside the realm of the petitioner, who has knowledge of the issue at first instance about taxation. It is not out of place to mention that the clause in the agreement did not in any way curtail or denude the petitioner from discharging its obligations or for that matter the levy of taxes also. As such, the judgment does not mitigate the issue on which it is sought to be relied upon, more particularly, the 'Change in Law' and 'Tariff'. The petitioner, thus, while signing the agreement, has consciously provided for the 'Change in Law' and 'Tariff', which it cannot now revert back, merely because some law has intervened about to impose a tax.

21. Thus, all these judgments, whose relevant portion is extracted supra, speak of business efficacy along with purposeful interpretation of a contract. It is seen that although the petitioner is made liable for the taxes and charges completely, at the same time, any charge or tax, which has been subsequently brought into force, cannot

be said to be burden on the petitioner, as it itself has specifically bid for the project with the condition that the tariff payable is 'inclusive of all taxes'. Thus, the inference that the petitioner is liable to pay all the charges and taxes that came to be levied midway through intervening law as part of its tariff, cannot be wished away by it. This is more so because the petitioner itself consciously bid for the project with the condition in the tender notification that the tariff will be inclusive of all taxes.

22. The petitioner sought to emphasize on the issue of business efficacy in the light of the additional burden likely to be mulcted on it as a consequence of levy of entry tax. It is its case that the definition of 'Change in Law' would take care of the unforeseen changes in the Governmental action. However, by its own volition, it has agreed to the condition mentioned at clauses 2.1 and 2.2 read with clauses 3.2 and 6.1 of the PPA.

23. Suffice it to state that purposeful interpretation could be ventured into only in the event of combined reading of the provisions of the PPA resulting in an ambiguous situation, such is not the case of the petitioner. If purposive interpretation is not required, then business efficacy would not stand on its own legs. However, business efficacy could have been agitated by the petitioner without reference to reliance on purposeful interpretation of the contract and more particularly the definition of 'Change in Law' as the provisions relating to the tariff are strict and quite clear.

24. The petitioner ventured to bring in section 70 of the Indian Contract Act, 1872 to canvas its case that its actions are not out of gratis. The petitioner has relied on the following judgments of the CERC, Hon'ble ATE and Hon'ble Supreme Court.

1. SC – Piloo Dhunjishaw Sidhwa vs Municipal Corporation of the City AIR 1970 SC 1201, para 9 to 10.
2. CERC – Tata Power Trading Company Limited & Anr. v. The Brihan Mumbai Electric Supply & Transport Undertaking - Petition No.159/MP/2017, para 30 to 34.
3. CERC – Sasan Power Ltd. v. MPPMCL – Petition No.06/MP/2013, para 33.
4. SC – K. S. Satyanarayana v. V. R. Narayana Rao – (1999) 6 SCC 104, para 8, 9.

5. SC – South Eastern Coalfields Ltd. v. State of M. P. and Ors. – AIR 2003 SC 4482, para 21, 22 and 24.

6. APTEL – M/s. SLS Power Ltd. v. APERC & Ors. – Appeal No.150 of 2011, para 35.5 to 35.7.

25. The judgments and orders relied upon by the petitioner with regard to application of section 70 of the Indian Contract Act as also payment of interest are inappropriate and does not aid to the case of the petitioner. The case on hand is with regard to specific clauses in the agreement and there is no issue involved therein that the petitioner has rendered or delivered additional goods or services, which was not intended gratuitously. Suffice it to state that the contentions and the relief sought depend upon the interpretation of the specific clauses, which are the basis for the present petition. In this context, the Commission proceeds to examine the judgments relied and referred to by the petitioner.

1. SC – Piloo Dhunjishaw Sidhwa vs Municipal Corporation of the City AIR 1970 SC 1201, para 9 & 10

"9. The plaintiff is not entitled to maintain a suit for price of the goods relying upon any contractual obligation of the Corporation. But the plaintiff may still maintain his claim for compensation under Section 70 of the Contract Act which provides:

> "Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore, the thing so done or delivered."

That is not disputed by the Corporation. The Trial Court awarded to the plaintiff the invoice value of the goods delivered by him. The learned Judge was of the view that the plaintiff as the sole selling agent of "motor spare parts" for the manufacturers in the Bombay State, was entitled to the listed price with 12½% thereon because of the increase notified by the manufacturer. In the view of the learned Judge the price for which the plaintiff made out an invoice was "reasonable and proper". The High Court held that the plaintiff may recover compensation equal to the "fair price" of the goods.

10. In our view the High Court was in error in holding that the plaintiff is entitled not to the invoice value of the goods, but only to "the fair price" of the goods. Under Section 70 of the Contract Act, a person lawfully delivering goods to another, and not intending to do so gratuitously, is entitled to demand that the goods delivered shall be returned, or that compensation for the goods shall be made Compensation would normally be the market price of the goods. By refusing to return the goods, the person to whom the goods have been delivered cannot improve his position and seek to pay less than the market value of the goods. The High Court of Lahore in Secretary of State and Another v. G.T.Sarin and Company held that a person without an enforceable contract in his favour supplying goods to a Government Department is entitled to a money equivalent of the goods delivered assessed at the market rate prevailing on the date on which the supplies were made."

Reference has been made to the judgment of the Hon'ble Supreme Court above, which enunciates a situation where the contract provided that the goods and services are to be delivered at a particular price and while doing so, the party is undertaking to provide additional quantum other than contracted for, then such a situation would definitely entail additional action of payment. It would, thus, attract section 70 of the Contract Act. It is seen here in this case that such is not the situation. What has been occasioned in this case is that the levy of Entry tax liability, for which the other party is not responsible as that event is a consequence of legislative or judicial action. At the same time, it must be remembered that the petitioner has consciously bound itself that all taxes are to its fold only by providing for the clause in tariff and other terms agreed upon. As such, it is not now open to the petitioner to term such situation as 'Change in Law', as also attracting ingredients of section 70 of the Contract Act. Thus, the judgment is not applicable to the facts and circumstances of the case on *hand.*

2. CERC – Tata Power Trading Company Limited & Anr. v. The Brihan Mumbai Electric Supply & Transport Undertaking - Petition No.159/MP/2017, para 30 to 34

"30 Clause 17 of the LoI dated 14.1.2016 (clause 16 in EoI) provides as under:

"17. Force Majeure - A Force Majeure event or circumstance or combination of events or circumstances (not otherwise constituting and Indian political event) that adversely affects, prevents or delays any party

in the performance of its obligation in accordance with the terms of this agreement, but only if and to the extent that (i) such events and circumstances are not within the reasonable control of the affected party, and (ii) such events or circumstances could not have been prevented through employment of prudent utility practices.

Neither party shall be in breach of its obligations pursuant to this understanding to the extent that the performance of its obligation was prevented, hindered or delayed due to force majeure event, and without in any way prejudicing the obligation of either party to make payments of amounts accrued due prior to the occurrence of the event of force majeure, which shall be payable on the original due date.

Force majeure events shall include but not limited to:

A) Act of war, invasion, armed conflict, blockade, revolution, riot, resurrection or civil commotion, terrorism, sabotage, fire explosion or criminal damage;

B) Act of God, including fire, lighting, cyclone, typhoon, flood, tidal wave, storm, earthquake, landslide, epidemic or similar cataclysmic event;

C) Any curtailment/ suspension/non availability of transmission capacity by intervening SLDC's/RLDC's;

D) Any restriction imposed by any RLDC's and including generation constraints/ equipment breakdown/ islanding/ accidents;

E) Change in law;

F) Regulatory intervention in the matter of power trading as also orders from CERC/ SERCs/ Appellate Tribunal of Electricity/ High Courts/ Supreme Court particularly related to rates at which power can be sold/ purchased/ traded. This will also include regulations, orders already issued buy yet to be conclusively enforced.

G) Any directive by Government of Maharashtra not to export/import power outside Maharashtra boundary."

31. The Petitioners have submitted that the provision of Change in law has been inserted in the LoI to enable the generator to recover costs which could

not have been foreseen at the time of participating in the bid for sale of power. They have submitted that the change in law provision has been introduced under the Force majeure clause of the LoI to ensure that the parameters based on which the Petitioner had bid for supplying power, if modified or changed in times to come, would not have any adverse effect upon the performance of the generator. Accordingly, in return for bidders quoting the lowest possible price and bearing the commercial risk, the quid pro quo is that the procurer agrees under the PPA to bear the regulatory risk of compensating them for changes in the law, which is beyond the control of the bidder. The Petitioners have argued that BEST having induced the Petitioners to believe that any such event necessitating invocation of change in law event shall be adequately addressed within the confines of the LoI, cannot subsequently refuse to provide the relief otherwise admissible under the provisions of change in law. In addition, the Petitioners have contended that the intent of the parties as can be gathered from the overall construction of the terms of the LoI is that although the event may be a change in law event, the same shall be treated as Force majeure if it qualifies the additional criteria of "adversely affects, prevents or delays any party in performance of its obligation". Further, an event shall nonetheless constitute a change in law event even though it may not qualify as a force majeure in terms of the LoI, if it otherwise meets the requirements of change in law. The Respondent BEST has submitted that the LoI does not provide for an independent and substantive clause for „change in law" but merely includes "change in law" as a force majeure event in the limited and specific context of force majeure.

32. The submissions have been considered. It is evident from clause 17 of LoI as quoted in para 30 above that "force majeure" can be invoked where "any event or circumstances or combination of events or circumstances adversely affects, prevents or delays any party in the performance of its obligations". Further, Clause 17 provides an inclusive definition of Force Majeure. Clause 17(E) recognises "change in law" as an event of force majeure. Unlike in the case of standard PPAs, Change in Law in Clause 17(E) is neither defined nor has its scope been clearly delineated. In our view, an event would constitute a change in law, even though it may not qualify as a force majeure in terms of the LoI, if it meets the requirements of change in law in standard PPA. In the

standard model PPA issued by Ministry of Power Government of India under Section 63 of the 2003 Act, the term “Law” inter alia includes any statute, ordinance, regulation, notification or code, rule or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law. The term „Change in Law" includes any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal of any law, occurrence of any of the events mentioned therein if the same has occurred after the cut-off date (which is seven days before the bid deadline) and has the effect of incurring of recurring or non-recurring expenditure by the Seller (Generating Company). In the present case, the Petitioners have claimed compensation for additional expenditure incurred by due to increase rate of Clean Energy Cess on coal, after the cut-off date (31.12.2015) based on MOF, GOI notification dated 29.2.2016. Thus, the increase in levy of Clean Energy Cess, in our view, qualifies as a „change in law" event in terms of clause 17(E) of the LoI. It is pertinent to note that the Model PPA provides for the award of compensation for Change in Law which occurred during the Construction Period and Operating Period. In the absence of any such provision for award of compensation for change in law in the LoI, it needs to be considered as to what relief should be admissible for Change in Law on account of change in rate of Clean Energy Cess.

33. The Petitioners have submitted that the increase in levy of Clean Energy Cess qualifies as a change in law event under clause 17 of the LoI and hence they ought to be compensated in terms of clause 17 and restored back to the same economic position as if such change in law has not occurred. It is to be noted that compensations under a contract has to be governed as per the provisions of the contract. The LoI dated 14.1.2016 does not contain any provision for payment of compensation on the occurrence of events of change in law. Further, Change in Law has been shown under “force majeure”. The compensation for force majeure under the LoI is in terms of the following:

> “Neither party shall be in breach of its obligations pursuant to this understanding to the extent that the performance of its obligation was prevented, hindered or delayed due to force majeure event, and without in any way prejudicing the obligation of either party to make payments

of amounts accrued due prior to the occurrence of the event of force majeure, which shall be payable on the original due date."

Since "Change in Law" is a sub-sect of force majeure, the above provisions will be applicable for Change in Law also. In terms of the above provision, neither party will be in breach of its obligations to the extent the performance of its obligation was prevented or hindered or delayed due to force majeure event. Change in rates of Clean Energy Cess which is covered under Change in Law and is a force majeure event in terms of the LoI will certainly hinder JITPL/TPTCL from discharging their obligations under the LoI and for such hindrance, JITPL/TPTCL would not have been in breach of their obligation under the LoI. However, JITPL/TPTCL despite being affected by force majeure arising out of change in law have supplied power by incurring additional expenditure. In our view, JITPL/TPTCL needs to be considered for compensation for the additional expenditure incurred by them on account of change in rate of Clean Energy Cess on coal which was used for supply of power to BEST.

34. Where the contract does not provide for a particular eventuality, the parties shall be governed by the provisions of the Indian Contract Act, 1872 (Indian Contract Act) in respect of that eventuality. Section 70 of the Indian Contract Act is extracted hereunder:

"70. Obligation of person enjoying of non-gratuitous act.- Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered".

As per the above provision, where a person does a thing, not intending to act gratuitously and the other person derives any benefit of such act, then the person enjoying the benefit is liable to compensate the other to the extent of the benefit received."

The decision rendered by the coordinate body of the Commission has connotations, which had specific clauses agreed between the parties therein. Provisions that have been concluded and have reference to the force majeure, which also encompassed the 'Change in Law' as it appears the said agreement did not have a specific term of definition for the 'Change in Law'. The petitioner sought to juggle the said terms with

section 70 of the Contract Act. This is not the situation in the present petition and it can be safely distinguished owing to the clauses of 'Change in Law' and 'Tariff' that have been specifically defined in the agreement between the parties. Accordingly, this Commission is not inclined to consider the findings of the coordinate body, even if, there is a similar aspect of levy of cess (understandably it is a taxation).

3. CERC – Sasan Power Ltd. v. MPPMCL – Petition No.06/MP/2013, para 33

"33. We have considered the submissions made by both petitioner and the respondents on the clean energy cess. The clean energy cess on coal was introduced by the Government of India through the Finance Act, 2010 for the first time which is after the due date i.e. seven days prior to the bid deadline. Since there was no clean energy cess on the date of submission of the bid, the petitioner could not be expected to factor in the impact of such cess in the bid. Moreover, clean energy cess adds to the input cost of production of electricity. Therefore, the claim is covered under Article 13.1.1(i) of the PPA and consequently the liabilities shall be borne by the procurers. It has been submitted that Sasan UMPP is not the sole beneficiary of the captive coal block and the petitioner is using the coal for its other generation projects. Accordingly, impact of clean energy cess shall be restricted in proportion to the quantum of coal used for generation of contracted capacity of power from Sasan UMPP. The petitioner is directed to submit the information sought in para 30 of the order."

The reference made to the order of the coordinate Commission is of no significance, as the decision therein did not lay down any law nor interpreted any statutory provisions more particularly the Act, 2003. In the absence of the above aspects and as it is not binding on this Commission, the same is not considered. Further, there is no law laid down in the said order, which could persuade this Commission to take into account while deciding the issue in the instant case. As such, the decision cannot be *considered.*

4. SC – K. S. Satyanarayana v. V. R. Narayana Rao – (1999) 6 SCC 104, para 8 & 9

"8. It was a case where instead of going into a protracted trial, trial court could have decreed the suit of the plaintiff against the 1st defendant as well at the stage of Order 10 (Examination of Parties by the Court) of the Code of Civil

Procedure. After the 1st defendant admitted having received rupees one lakh from the plaintiff he could not retain that money on the spacious plea that there was no privity of contract between him and the plaintiff. Amount of rupees one lakh had been given to him by the plaintiff as he wanted to purchase ground floor of his property. The agreement to sell for the purpose was entered into through the 2nd defendant whom the 1st defendant had authorised to enter into any such agreement on his behalf. The plaintiff could not have paid to the 1st defendant rupees one lakh but for the agreement to sell in respect of ground floor of his property. It is only on the basis of this agreement (Exh.P-2) which is entered into by the 2nd defendant on the strength of Exh.P-1 that the plaintiff paid rupees one lakh each to the 1st and 2nd defendants. If we accept the pleadings of the 1st defendant then the amount of rupees one lakh had been given by the plaintiff under some mistake. In any case, it was not a payment gratuitously made. Doctrine of undue enrichment would squarely apply in the present case and the plaintiff would be entitled to restitution. In this connection Sections 70 and 72 of the Indian Contract Act, 1872 may be referred to, which are as under:-

> "70. Obligation of person enjoying benefit of non-gratuitous act.- Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.
>
> 72. Liability of person to whom money is paid, or thing delivered, by mistake or under coercion.- A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it."

9. In Mulamchand v. State of Madhya Pradesh (AIR 1968 SC 1218), the contract between the appellant and the State Government was held to be void as it was entered into in contravention of the provisions of the Government of India Act, 1935. Appellant, however, sued for return of his deposit and for the goods supplied and services rendered. This Court said: -

> "In other words if the conditions imposed by Section 70 of the Indian Contract Act are satisfied then the provisions of that section can be

invoked by the aggrieved party to the void contract. The first condition is that a person should lawfully do something for another person or deliver something to him; the second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third condition is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. If these conditions are satisfied, Section 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the thing so done or delivered. The important point to notice is that in a case falling under Section 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract, nor ask for damages for the breach of the contract, for the simple reason that there is no contract between him and the other person for whom he does something or to whom he delivers something. So where a claim for compensation is made by one person against another under Section 70 it is not on the basis of any subsisting contract between the parties but on a different kind of obligation. The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or restitution."

This Court quoted with approval two decisions of the English Courts, which are quite illuminating and which we reproduce as under:-

1. "In Bibrosa v. Fairbairn, 1943 AC 32 Lord Wright has stated the legal position as follows:

> "… …any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English Law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution."

2. In Nelson v. Larholt, (1948) 1 KB 339 Lord Denning has observed as follows:

"It is no longer appropriate to draw distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to http://JUDIS.NIC.IN SUPREME COURT OF INDIA Page 5 of 5 canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires."

The petitioner has sought to rely on a judgment, which is squarely in the realm of Contract Act only and the lis is between two individuals. It also does not involve any statutory interpretation of the Act, 2003 qua section 70 of the Contract Act. The reference to section 70 in the present instance is a non-issue as the case basically hinges on the interpretation of the clauses relating to 'Change in Law' and 'Tariff' as has been pointed out earlier. Thus, the present judgment is of utmost irrelevance to the facts and circumstances of the case.

5. **SC – South Eastern Coalfields Ltd. v. State of M.P. and Ors. – AIR 2003 SC 4482, para 21, 22 and 24**

"21. Interest is also payable in equity in certain circumstances, me rule in equity is that interest is payable even in the absence of any agreement or custom to that effect though subject, of course, to a contrary agreement (See : Chitty on Contracts, Addition 1999, Vol. II, Part 38-248, at page 712). Interest in equity has been held to be payable on a market rate even though the deed contains no mention of interest. Applicability of the rule to award interest in equity is attracted on the existence of a state of circumstances being established which justify the exercise of such equitable jurisdiction and such circumstances can be many.

22. We may refer to the decision of this Court in Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa and Ors. v. N.C. Budharaj (Deceased) by Lrs. and Ors., (2001) 2 5CC 721, wherein the controversy relating to the power of an arbitrator (under the Arbitration Act 1940) to award interest for pre-reference period has been settled at rest by the Constitution Bench. The majority speaking through Doraiswamy Raju, J., has opined that

the basic proposition of law that a person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation by whatever name it may be called, viz., interest, compensation or damages and this proposition is unmistakable and valid; the efficacy and binding nature of such law cannot be either diminished or whittled down. It was held that in the absence of anything in the arbitration agreement, excluding the jurisdiction of the arbitrator to award interest on the amount due under the contract, and in the absence of any other prohibition, the arbitrator can award interest.

… …

24. We are, therefore, of the opinion that in the absence of there being a prohibition either in law or in the contract entered into between the two parties, there is no reason why the Coalfields should not be compensated by payment of interest for the period for which the consumers/purchasers did not pay the amount of enhanced royalty which is a constituent part of the price of the mineral for the period for which it remained unpaid. The justification for award of interest stands fortified by the weighty factor that the Coalfields themselves are obliged to pay interest to the State on such amount. It will be a travesty of justice to hold that though the Coalfields must pay the amount of interest to the State but the consumers/purchasers in whose hands the money was actually withheld be exonerated from liability to pay the interest."

The judgment referred to by the petitioner is with regard to payment of interest otherwise understood as carrying cost in electricity. In the instant case, the petitioner seeks payment of carrying cost in view of the additional expenditure made by it towards payment of Entry tax for which financial arrangements have been made. While payment of tax is the liability of the petitioner only and is not even passed on to the other party in the agreement, nothing is placed at present before the Commission as to what is the loss that is sustained by the petitioner. Moreover, as stated by the petitioner itself, the issue of levy of tax is still sub judice before the Hon'ble High Court, wherein it cannot be said at present that the liability will be confirmed or exempted. Only upon actual result of the issue and upon payment of the Entry tax, if the petitioner sustains loss or incurs additional expenditure, then there is a case for the petitioner to claim carrying cost. At present, neither the judgment nor the facts and circumstances of the case would prod this Commission in accepting the contention of the petitioner

and as such, the contention of the petitioner based on the above judgment is not acceptable.

6. APTEL – M/s SLS Power Ltd. v. APERC & Ors. – Appeal No.150 of 2011, para 35.5 to 35.7.

"35.5 The principle of carrying cost has been well established in the various judgments of the Tribunal. The carrying cost is the compensation for time value of money or the monies denied at the appropriate time and paid after a lapse of time. Therefore, the developers are entitled to interest on the differential amount due to them as a consequence of re-determination of tariff by the State Commission on the principles laid down in this judgment. We do not accept the contention of the licensees that they should not be penalized with interest. The carrying cost is not a penal charge if the interest rate is fixed according to commercial principles. It is only a compensation for the money denied at the appropriate time.

35.6 As the interest rate has been decided as 12% determination of tariff, the same rate may be applied for calculation of interest/carrying cost. The interest will be due from the date the payment is due and shall be compounded on quarterly basis.

35.7 The State Commission shall also set a time period within which the payment of arrears and interest will be paid to the developers by the distribution licensees."

Though the Hon'ble ATE had in no uncertain terms has agreed to the payment of carrying cost where arrears are payable, the present case has no quantification of arrears or loss sustained by the petitioner, which would attract carrying cost. Inasmuch as, the issue of payment of tax is itself in cloud due to pendency before the Hon'ble High Court, it cannot be said that the petitioner had sustained loss and therefore entitled to carrying cost. It is also relevant to state that the petitioner has not quantified the loss sustained or the cost incurred by it at present. In the absence of the same also, the Commission cannot accept the plea of the petitioner based on the above judgment.

26. Reliance placed by the petitioner on section 70 of the Indian Contract Act, 1872 may not be appropriate in this case, as the petitioner has constructed its case on the premise of clauses relating to 'Change in Law' as well as 'Tariff' and not the ingredients

of section 70, which is already extracted in the order supra. It must be remembered that what is sought in this petition, is not realization of the loss suffered, but interpretation of the provisions of the PPA and consequent directions to reimburse the amount spent by it towards Entry tax.

27. The Commission while considering the submission came across the judgement rendered by the Hon'ble Supreme Court in the matter of "*Gujarat Urja Vikas Nigam Limited v. ACME Solar Technologies (Gujarat Pvt) Ltd & Ors*." wherein it was observed as below:

> "… …
>
> 7. We have taken note of the elaborate arguments advanced on behalf of the rival parties. When the parties were bound by the terms and conditions of the PPA dated 31st May, 2010 and Supplemental PPA dated 24th March, 2011 we do not think that it was proper on the part of either the State Commission or the Appellate Tribunal to travel beyond the said terms and conditions to determine the liability of the first respondent to pay liquidated damages or the period thereof. … …"

It has to be stated that this Commission is also in a similar situation, which is called upon to mitigate the situation of Entry tax burden despite the provisions in the PPA. In view of the specific observation, though in the facts and circumstances of that case, the same is squarely applicable in this case also. This Commission cannot venture to go beyond the clauses in the agreement relating the 'Change in Law' and 'Tariff' as parties have themselves agreed to specific conditions. As such, this Commission is constrained to accept the contentions of the petitioner in the case.

28. It is a settled proposition of the law that the bidding documents and subsequent agreement thereof are vital to the rights and liabilities of the parties. Inasmuch as the petitioner in this case had bid the project based on RfS notified by the respondents and consciously entered into an agreement binding itself to specific conditions thereof. The petitioner is required to assess and consider all the aspects and the likely intervening circumstances before appending its approval to the agreement. Nothing stopped the petitioner from agitating any issue at the first instance, if any, of the conditions or terms set out in the bid (RfS) documents as also in the agreement are detrimental to it. As such, the petitioner cannot circumvent its grounds on the terms

and conditions at a belated stage merely because some legal action has resulted in burdening it with additional costs, in this case, payment of Entry tax.

29. It is trite to state that the petitioner has acted and agreed to the conditions with its eyes open, as such, it cannot turn round upon happening of certain events to allege that it is being put to loss. In fact, the bid documents as also the agreement is not merely making of the respondents, as it in fact stood approved by this Commission then only they were notified. In that view of the matter, the Commission is constrained to interfere with the bid documents and the agreement at the belated stage, as it would amount to reviewing its own prudent decision taken earlier to allow the licensees to procure power through the bidding route on the premise of the terms and conditions placed before it which were also approved by the Commission. It is also worth mentioning here that the petitioner's case cannot be termed as generic issue, as it has not been stated that several generators under the same bidding process are being mulcted with similar levy under the Entry tax.

30. The concept of business efficacy would survive if and only if the petitioner had placed on record the probable financial hardship specifically quantified and the consequent loss that it would sustain upon the levy of such tax, if the same were to be a pass through under the tariff. Inasmuch as the petitioner itself chose to bind itself with the clause that the tariff payable to it is 'inclusive of all taxes'. It also did not provide for any way out to mitigate a strict construction set out therein.

31. Likewise, the petitioner also relied on section 70 of the Indian Contract Act, but the attendant tax on record would not repeat a scenario by which section 70 can be relied upon. The intention of section 70 is to save the person, who has done additional work or incurred additional expenditure so as to provide the goods and services, they being not done gratuitously. Inasmuch as, the payment of additional liability towards tax cannot be termed as a gratuitous act, but a statutory duty which the petitioner is bound to perform. Such statutory duty, if not subjected to, modification clauses and fixed into the specific condition of tariff then, nothing can be demanded by the petitioner from the respondent being the other contracting party as the clause that has been agreed for tariff is 'inclusive of all taxes'. Thus, it is clear that the petitioner has no case to take relief under section 70 of the Indian Contract Act.

32. The Commission also notices that the petitioner, while agreeing to the clauses in the agreement on the aspect of force majeure, had provided for ‘Change in Law’ under direction political event. However, it is appropriate to state that as the words employed therein have specific meaning assigned to them in the agreement itself under the head of definition, this aspect cannot be treated as force majeure event. The definition of ‘Change in Law’ also does not cover subsequent modification of any law, rule and regulation so as to understand that levy of Entry tax is subsequent law. In those circumstances also, the petitioner cannot succeed in this petition.

33. One other contention that requires attention of the Commission is that the petitioner has relied on the provisions of the NTP with regard to change in law. Even the NTP is subsequent to the agreement, but the clause relied upon the petitioner itself is self explanatory as employs the words 'unless otherwise provided in the contract'. That being the case the petitioner would not benefiting from the said clause at all as the agreement between the parties in this case stood with specific words of 'inclusive all taxes'. Though as stated supra quoting the Hon'ble Supreme Court that the NTP is a law, but since the parties have expressed their specific intention in the agreement, the Commission cannot give an extraordinary meaning to the clauses in the agreement. Thus, the said contention cannot be accepted.

34. The petitioner has asserted that it has made payment of a part of the amount demanded by the assessing officer pursuant to the directions of the Hon'ble High Court and as such it should be reimbursed the said amount. It is relevant to state here that the petitioner in order to safeguard its interest against liability imposed under another statute and the claims made under another statute are not liable to be paid has made a part payment for escaping from coercive action as the Hon'ble High Court only gave interim protection. That in itself cannot be said that the claim by other authority has attained finality and resulted in additional burden and loss to the petitioner. Thus, at this stage the petitioner cannot canvass that it is liable to carrying cost now itself unless the issue is settled. Therefore, this contention is also rejected.

35. Given the understanding set out above, the reliance placed on the judgments of the Hon’ble Supreme Court, Hon’ble ATE and the CERC as appreciated and understood by the Commission at the relevant places, would not support the case of the petitioner. It is noticed that in all the said judgments and clauses thereof in the

agreement or factual matrix do not fit into the facts and circumstances as are applicable and noticed in the present case.

36. Law as subsisting on the day of agreement would have to be complied with by the parties to the agreement. In the instant case, it is noticed that the parties have bound themselves to specific conditions in the agreement, as such, it cannot be said that subsequent events would change the provisions of the agreement. The levy of tax consequent upon upholding the Entry tax cannot be said to be a 'Change in Law' in the context of the provisions agreed upon by the parties to the agreement signed by them.

37. Pursuant to the above discussions, the Commission is of the considered view that the petitioner is not entitled to any relief. The petitioner, having agreed to static tariff, cannot now at this point of time seek to convert the same into a dynamic tariff, thereby resulting in payment of additional amounts beyond the amount agreed by the parties. The petitioner, having opted to the proposals in the RfS as quoted tariff, cannot now seek to change the option after the agreement has worked out itself consequent upon certain developments regarding levy of taxes.

38. Accordingly, the petition is dismissed, but in the circumstances no costs.

I.A.No.3 of 2021

The Interlocutory Application for amendment of the prayer filed by the petitioner is taken on record as I.A.No.3 of 2021. The parties have filed their submissions and accordingly, the Commission allows the I.A. by treating the submissions made in the I.A.No.3 of 2021 as part and parcel of the main petition. Consequently, the Interlocutory Application (I.A.No.3 of 2021) stands disposed of.

This Order is corrected and signed on this the 04th day of October, 2021.

Sd/-	**Sd/-**	**Sd/-**
(BANDARU KRISHNAIAH)	(M.D.MANOHAR RAJU)	(T.SRIRANGA RAO)
MEMBER	MEMBER	CHAIRMAN

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