

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 147 of 2020

Case of Azure Power Thirty Four Private Limited seeking compensation due to increase in costs on account of change in rate of Goods & Services Tax vide Notification dated 31.12.2018 issued by the Ministry of Finance

Azure Power Thirty Four Private Limited

..... Petitioner

Maharashtra State Electricity Distribution Co. Ltd.

..... Respondent

Coram

Shri Sanjay Kumar, Chairperson

Shri I.M. Bohari, Member

Shri Mukesh Khullar, Member

Appearance

For the

Petitioner

: Sh. Tarun Gulati (Adv.)

For the Respondent

: Sh. Abhishek Khare (Adv.)

ORDER

Date: 10 May, 2021

1. Azure Power Thirty Four Private Limited (APTFPL) filed this Petition dated 13 July 2020 seeking compensation due to increase in costs on account of change in rate of Goods & Services Tax (GST) amounting to a Change in Law event in terms of the Power Purchase Agreement (PPA) dated 30 July 2018, executed with Maharashtra State Electricity Distribution Company Limited (MSEDCL)

2. APTFPL's main prayers are as follows:

- a) *Direct a lump sum compensation of Rs. 22,52,61,708/- (Rupees Twenty Two Crores Fifty Two Lakhs Sixty One Thousand Seven Hundred and Eight Only) to be paid to the Petitioner by the Respondent for the increase in the project cost incurred by the Petitioner due to the issuance of the Amendment Notifications, along with appropriate carrying costs, in accordance with Article 9 of the PPA*

3. APTFPL in its Case has stated as follows:

- 3.1. On 9 April 2018, MSEDCL floated a tender to procure 1000 MW Solar Power on Long Term basis from new or existing Solar Projects through Competitive Bidding process (followed by reverse auction), to meet its Renewable Purchase Obligation (**RPO**).
- 3.2. Pursuant to the bid process, APTFPL executed the PPA with MSEDCL on 30 July 2018 and undertook the obligation to establish the Solar Power Generating System (SPGS) and sell the solar power generated to MSEDCL in terms of the PPA. Following the issuance of Letter of Award (LoA) dated 2 July 2018, APTFPL executed a Contract dated 25 July 2018 with Azure Power India Private Limited (APIPL) for the Supply of SPGS.
- 3.3. The applicable GST rate on the supply of the SPGS was 5%, as per the notifications issued under the Central Goods and Services Tax Act, 2017, Integrated Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017 (GST Laws). Therefore, APTFPL had considered 5% as the applicable GST rate on the supply of the SPGS.
- 3.4. Government of India (GoI) issued the Amendment Notifications on 31 December 2018, which led to an increase in the applicable GST rate to 8.9% with effect from 1 January 2019. As a result of the increase in the GST rate under the Amendment Notifications, APTFPL had to bear additional project costs toward the additional tax liability.
- 3.5. By the Amendment Notifications, a new entry for “service by way of construction or installation or other technical services, provided in relation to setting up of solar power generating system” has been added to the rate schedule for services under the GST Laws (GST Rate Schedule), prescribing a rate of 18 percent for such services. Further, an explanation has been inserted to the entry relating to the applicable tax on a SPGS supply contract, which provides for the following methodology to be adopted for the levy of GST:
- a. 70% of the gross consideration charged for all supplies under a contract for the supply of an SPGS, will be deemed as the value of all goods supplied thereunder, to be taxed at 5%; and

- b. 30% of the gross consideration charged for all supplies under a contract for the supply of a SPGS will be deemed as the value of the services provided thereunder, to be taxed at 18%.
- 3.6. As a result of the issuance of the Amendment Notifications, the tax rate borne by APTFPL in relation to the SPGS has increased from 5% earlier to 8.9% with effect from 1 January 2019 since APTFPL has incurred a tax of 5% on 70% of the gross consideration paid and 18% on 30% of the gross consideration paid under the SPGS Supply Contract.
- 3.7. APTFPL had filed a Petition before the Commission under Case No. 46 of 2019, seeking inter alia a declaration that the issuance of the Amendment Notifications amounted to a Change in Law under the PPA. APTFPL further sought a fixed lump sum compensation in the amount of Rs. 23,38,80,000/-, subject to reconciliation on actuals based on the submission of the relevant documentation.
- 3.8. The Commission vide its Order dated 24 June 2019 disposed of the aforesaid Petition inter alia holding that APTFPL could not seek an in-principle declaration of Change in Law beforehand. APTFPL was given liberty to approach the Commission again after it had incurred the additional costs, in case there was any dispute with the Respondent concerning the matter.
- 3.9. After commissioning the SPGS and having actually incurred the additional tax liability, APTFPL vide letter dated 18 May 2020 submitted its claim for Change in Law under the PPA to MSEDCL amounting to Rs. 22,52,61,708/- along with relevant documents.
- 3.10. Since there was no response from MSEDCL for over a month, APTFPL issued another letter dated 16 June 2020 following up on its claim. However, MSEDCL while acknowledging the issuance of the Amendment Notifications as a Change in Law event, rejected the said claim vide letter dated 20 June 2020, stating that it allegedly believed that the increase in costs of APTFPL due to issuance of the Amendment Notifications would have already been factored in at the time of bid submission.
- 3.11. It is submitted that APTFPL, at the time of submitting its bid was required to factor in only the taxes, duties, cess, etc., existing at the time of submission of bid. It was therefore not required to and could not have factored in any future tax changes in the tariff quoted, as alleged by MSEDCL or otherwise.
- 3.12. Further, MSEDCL's contention that APTFPL should be put to strict proof that it assumed a rate of 5% GST at the time of bidding is also misconceived. It is settled law that in a Change

in Law claim, APTFPL is not required to justify the basis or assumptions it made while submitting its bid.

- 3.13. APTFPL had duly assumed the then applicable rate of GST, namely 5%, at the time of bidding. As demonstrated in the foregoing paragraphs, the said assumption was in line with the applicable rates in the unamended GST Rate Schedule. It is further submitted that prior to the issuance of the Amendment Notifications, APTFPL's parent company has consistently assumed a GST rate of 5% while bidding for solar power projects and has paid GST at the rate of 5% under contracts for supply of SPGS in the course of executing the projects, including through SPVs, in accordance with the then existing GST rate schedule which provided for a GST rate of 5%. APTFPL has produced a few sample invoices raised by APIPL on other sister concerns which show that the said SPVs have paid GST at the rate of 5% under contracts for supply of SPGS.
- 3.14. The issuance of the Amendment Notifications resulting in additional expenditure incurred has occurred after the last date of bid submission under the bidding documents, namely 27 April 2018. The said event squarely attracts Article 9 of the PPA thereby to Change in Law relief.
- 3.15. The PPA provides for only the following to be established for grant of Change in Law relief:
 - a. The event should have occurred after the last date of bid submission;
 - b. The event should fall in one or more of the five categories mentioned in Article 9.1 of the PPA; and
 - c. The event should have resulted in an increase in the project cost
- 3.16. In accordance with Article 9, APTFPL has to be compensated for the increased expenditure on account of issuance of the Amendment Notifications, along with appropriate carrying costs. APTFPL is entitled to claim a fixed lump sum compensation for the increased cost incurred on the project due to the issuance of the Amendment Notifications in the amount of Rs. 22,52,61,708/-, along with appropriate carrying costs, to offset the impact of such increase in expenditure on account of issuance of the Amendment Notifications.
- 3.17. APTFPL has already furnished all documentary evidence, including a certificate from a Chartered Accountant, evidencing the increase in the project cost due to the issuance of the Amendment Notifications before MSEDCL. It has also annexed all the invoices raised by APIPL upon APTFPL with the present Petition, which demonstrate the increased levy of tax for the supply of SPGS under the SPGS Supply Contract due to the issuance of the Amendment Notifications.

4. **MSEDCL in its reply dated 2 December 2020 has submitted as under:**

- 4.1. The Notification No. 27/2018 – CGST (Rate) and Notification No. 28/2018 – IGST (Rate) dated 31 December 2018 only inserts an explanation clause in serial no 234 of Notification 1/2017 – CGST (Rate) and Notification 1/2017 – IGST (Rate) dated 28 June 2017. The explanation states that in cases of supply of goods and services to SPGS, rate of GST will be calculated at 70% on gross value of goods supplied in the contract and 30% on gross value of services supplied in the contract depending on the place of supply.
- 4.2. The Notification No. 27/2018 – CGST (Rate) and Notification No. 28/2018 – IGST (Rate) dated 31 December 2018 only inserts separate tariff entry for supply of services made to SPGS at the rate of 18%. Even prior to the introduction of Notification No. 27/2018 – CGST (Rate) and Notification No. 28/2018 – IGST (Rate) dated 31 December 2018, the rate of GST i.e CGST and IGST for supply of services to SPGS was at the rate of 18% as per Notification No. 11/2017 – CGST and Notification No. 8/2017 – IGST dated 28 June 2017.
- 4.3. The Amendment Notifications were issued on the basis of recommendations of the GST Council. By virtue of recommendations, the Amendment Notifications were introduced on 31 December 2018 with the effect 1 January 2019
- 4.4. The rate of CGST on supply of goods for setting up Solar Power Generating System is 5% as per Notification 1/2017 – CGST (Rate) dated 28 June 2017. The relevant entry is extracted as below:

S. No.	Chapter Section or heading	Description of Service	Rate (%)	Condition
234.	84, 85 or 94	Following renewable energy devices & parts for their manufacture (a) Bio-gas plant (b) Solar power based devices (c) Solar power generating system (d) Wind mills, Wind Operated Electricity Generator (WOEG) (e) Waste to energy plants / devices (f) Solar lantern / solar lamp (g) Ocean waves/tidal waves energy devices/plants	2.5%	-

S. No.	Chapter Section or heading	Description of Service	Rate (%)	Condition
		(h) Photo voltaic cells, whether or not assembled in modules or made up into panels		

4.5. As per the above notification, the rate of CGST for supply of goods to SPGS is 2.5% and rate of SGST is same as CGST i.e 2.5%. Hence the rate of GST for supply of goods within the state would be 5%.

4.6. The rate of CGST on supply of services for setting up SPGS is 9% and rate of SGST is same as CGST i.e 9%. Hence the rate of GST for supply of services within the state would be 18% as per Notification No. 11/2017 dated 28 June 2017. The relevant entry is extracted as below:

S. No.	Chapter Section or heading	Description of Service	Rate (%)	Condition
3	Heading 9954 (Construction services)	(xii) Construction services other than (i), (ii), (iii), (iv), (v), (vi), (vii), (viii),(ix), (x)and (xi) above and serial number 38 below Explanation. - For the removal of doubt, it is hereby clarified that, supply by way of services specified at items (i), (ia), (ib), (ic), (id), (ie) and (if) in column (3) shall attract central tax prescribed against them in column (4) subject to conditions specified against them in column (5) and shall not be levied at the rate as specified under this entry.	9%	-

4.7. Similarly, IGST is levied when the place of supply and supplier are in different states. The rate of IGST on supply of goods and services to SPGS is determined as per Notification No. 1/2017 – IGST (rate) and Notification No. 8/2017 – IGST (rate) dated 28 June 2017. The rate of IGST on supply of goods for setting up SPGS is 5% and the rate of IGST on supply of services for setting up SPGS is 18%.

- 4.8. The 31st GST Council Meeting was constituted as there were divergent views as regards Supply of goods and services provided for setting up a SPGS. There were decisions of Authority for Advance Ruling (AAR) treating the Supply to SPGS as “Composite Supply” and thereby the whole contract for supply to SPGS will be treated as Supply of goods and the rate of CGST and IGST will be at 5%. In few decisions of AAR, it was held that a supply made to SPGS is done under EPC and performance of the EPC contractor in relation to the supply of goods and supply of services would be treated as the whole contract and such supply is treated as “Works Contract” as per Section 2(119) and thereby the whole contract for supply made to SPGS will be levied at 18%.
- 4.9. Due to these divergent interpretation and to reduce the adverse impact of the high tax on solar power generation systems (SPGSs), the GST Council, in its 31st meeting on 22 December 2018, recommended that GST be paid at 5 per cent on 70 per cent of the gross value of the contract and at 18 per cent on the balance value that is 30 per cent of the gross value of the contract.
- 4.10. To effectuate the recommendations, vide Notification No. 24/2018 – CGST and Notification No. 25/2018 – IGST dated 31 December 2018, an explanation was inserted in Sr. No. 234 of Schedule I of Notification No. 1/2017 – CGST (rate) and Notification No. 1/2017 – IGST (rate) dated 28 June 2017 in line with the recommendation. The Explanation inserted vide Notification No. 24/2018 – CGST and Notification No. 25/2018 – IGST dated 31 December 2018 is extracted below:

“Explanation: If the goods specified in this entry are supplied, by a supplier, along with supplies of other goods and services, one of which being a taxable service specified in the entry at S. No. 38 of the Table mentioned in the notification No. 11/2017- Central Tax (Rate), dated 28th June, 2017 [G.S.R. 690(E)], the value of supply of goods for the purposes of this entry shall be deemed as seventy per cent of the gross consideration charged for all such supplies, and the remaining thirty per cent of the gross consideration charged shall be deemed as value of the said taxable service.”

The explanation inserted through the Amendment Notifications only weaves a path of an overall reduced rate of GST at 8.9% for supply of goods and services provided for setting up of SPGS.

- 4.11. The overall rate of GST has been reduced from 18% to 8.9% and in view of this, the Amendment Notifications only reduces the rate of GST on supply made to SPGS and there is no increase in rate of GST. Hence, implementation of Amendment Notification will fall under the terms of Change in Law but compensation cannot be sought as the overall rate of GST has been reduced and not increase in rate of GST.

- 4.12. The rate of CGST and IGST on supply of goods and services for setting up a Solar Power Generating System has not changed. Only the computation of the rate of GST has been changed vide the Amendment Notifications.
- 4.13. The claim of compensation on account of Change in Law vis-a-viz Change in Tax Rates cannot be accepted as there is no Change of Rates and thereby no Change in Law.
- 4.14. APTFPL, in its Statement of Invoice annexed to the Petition, indicates the excess payment of duty on account of increase of rate in GST to 8.9%. In the said Statement of Invoice Sheet, it has calculated the rate of GST at 5% for supply of goods and services to SPGS whereas in the copy of the invoice attached by APTFPL reveals that it has paid a total of 5% on supply of goods to SPGS and total of 18% on supply of services to SPGS. However, while claiming the excess duty, APTFPL has only considered the rate of tax on supply of goods i.e. 5% and not 18%.
- 4.15. APTFPL sees the increased rate of duty only with the respect of rate of tax pertaining to supply of goods to SPGS. However, it has failed to note that 8.9% is the effective rate of tax for supply made in relation goods and services towards setting up the SPGS. Hence, the consolidated rate of CGST on supply of goods and services to SPGS was 23% (i.e. 5% + 18%) till 31 December 2018 or 18% if it is treated as Works Contract. However, the Amendment Notifications the rate of CGST on supply of goods and services to SPGS is only 8.9%.
- 4.16. It is mandatory to include the rate of 18% paid by APTFPL for receiving services for setting up of SPGS. However, this is not disclosed by APTFPL for calculation of excess duty in relation to the compensation claimed by it.
- 4.17. Further, the introduction of Amendment Notifications No. 24/2018 and 25/2018 has only implemented to reduce the duty payable under GST for supplies of goods and services given to set up a SPGS.
- 4.18. The Clause 9.2.2 will not apply to the present case as there is no Change in Law as explained in the above paragraphs. There is no Change in Rate of Tax as the CGST (Rate of SGST is included i.e. 2.5%) rate of Tax for supply of goods to SPGS is 5% and CGST (Rate of SGST is included i.e. 9%) rate of Tax for supply of services to SPGS is 18%. The New Notification vide 24/2018 and 25/2018 only brings in a reduced rate of CGST at 8.9%. Hence, there is no increase in rate of GST and no increase in the project cost and thereby no additional cost incurred by the APTFPL. On the contrary GST has decreased from 18% to 8.9%, which needs to be passed on to MSEDCL.

- 4.19. The PPA entered with APTFPL is for supply of Solar Power and not supply of the SPGS. In the event of additional cost incurred by APTFPL for setting up of SPGS, such additional cost will not be borne by MSEDCL as it has entered for Supply of Solar Power and Supply of Solar Power is exempted from GST.
- 4.20. The definition of Project in the PPA, defines a Project set up for delivery of Solar Power. The Article 9.1 allows to claim Changes in law with respect to Change in Taxes and Duties that has direct impact on the project. In the present case, as allegedly submitted Change in GST rates only affected the cost of the project. However, in this present case, the word 'project' is referred to supply of Solar Power and not supply of equipment and in changes in law due to which the setting up of SPGS increases that such cost can never be recovered from the Respondent. In short, the change in law claimed by the APTFPL is not qua the project i.e. not supply of solar power but it is qua supply of goods and services for setting of SPGS which will not be covered within the scope of the PPA.
- 4.21. Clause 9.2.2 is inconsistent with Clause 5.2 of the PPA. Clause 5.2 of PPA and the terms of RfS clearly states that the tariff rate for supply of Solar Power is fixed at Rs. 2.72/unit. The intent of the RfS was to allow the RfS to the applicants who quotes the less tariff rate for supply of 130 MW solar power to MSEDCL for 25 years.
- 4.22. It has been captured in the RfS in paragraph 3.3 that the successful bidder shall set up SPGS including transmission and Distribution network up to delivery point will be done at his own cost. Any cost or excess cost incurred by the successful bidder for setting up of SGPS will be borne by him. The alleged additional cost is a cost incurred at the time of setting of SPGS which will be completely borne by APTFPL as stipulated in the terms of RfS. The Change in Law clause in PPA will not apply in the present case as it is important to give weightage to the specific clause of the contract over general clause of the contract.
- 4.23. Though in this PPA, there is a provision for Change in Law but this Clause cannot give full force because the tariff rate for supply of solar power is fixed as reiterated in RfS and PPA. When the intention of MSEDCL is so clear and lucid, the other clauses of the contract should not be interpreted against the intention of the parties to the contract.

5. APTFPL filed its rejoinder dated 10 February 2021 which has been summarized below:

- 5.1. Ministry of New and Renewable Energy (MNRE), vide letter dated 3 April 2018 addressed to NTPC, SECI and Power/ Energy/ Renewable departments of State Governments/ Union Territory administrations, has also clarified that a 5% concessional rate of GST may be applied on EPC Contracts where supply of SPGS is the principal supply.

- 5.2. Prior to the issuance of the Amendment Notifications, the supply of SPGS was taxed at 5%. However, by the Amendment Notifications, a new entry for “service by way of construction or installation or other technical services, provided in relation to setting up of solar power generating system” has been inserted to the GST Rate Schedule, prescribing a rate of 18% for services provided in relation to setting up of an SPGS. The aforesaid is a substantive amendment as it widens the tax net. Further, it is settled law that a purported Explanation, which widens the tax net, cannot be held to be retrospective merely because it is inserted as an Explanation. Notably, the minutes of the 31st meeting of the GST Council also acknowledge the composite nature of supplies under EPC Contracts by suggesting that there is more than one supply involved in such cases. The said minutes also acknowledge that the proposal would eliminate disputes regarding the applicable tax on a total solar power project. As such, the said Explanation is applicable prospectively. In any case, the MSEDCL has not placed anything on record to suggest that the aforesaid amendment is sought to be applied retrospectively.
- 5.3. Further, an explanation has also been inserted to the entry for the aforesaid specified renewable energy goods in the GST Rate Schedule, which provides that where renewable energy goods are supplied by a supplier along with other goods and services, where one service is of construction or engineering or installation or other technical services, provided in relation of setting up renewable energy projects, 70% of the gross consideration of the supplies under such EPC Contract will be taxed at 5% while the remaining 30% of the gross consideration of the supplies will be taxed at 18%. This explanation also prospectively adds a modality of value split which was not prevalent earlier. Thus, the Amendment Notifications have enhanced the GST rates relating to setting up of an SPGS with effect from 1 January 2019 from 5% earlier to 8.9%, necessitating the present Petition seeking Change in Law relief for the additional GST burden of 3.9% cast upon APTFPL by the enhanced GST rate.
- 5.4. Prior to 1 January 2019, the supply of SPGS devices was liable to be levied 2.5% CGST and SGST, respectively. Further, in case of interstate supply, solar power developers were liable to pay 5% IGST in terms of the relevant notification issued under the IGST Act.
- 5.5. The EPC Contract in the instant case is a contract for composite supply as both goods and services are supplied under it, with the principal supply being the supply of SPGS devices. Once it is concluded that the supply is a composite supply with the principal supply being the supply of SPGS devices, the rate of tax applicable on such a composite supply, as per the provisions of the CGST Act, would be the rate applicable on SPGS devices, i.e., 5%.
- 5.6. MSEDCL’s claim that the EPC Contract executed between APTFPL and APIPL is a ‘works contract’ under the GST Laws and is therefore liable to be taxed at 18% is wholly

misconceived. Section 2(119) of the CGST Act defines 'works contract' to mean contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract. From the above, it is evident that a works contract involves the installation and erection of an immovable property. However, the SPGS device, as commissioned, is considered as 'goods' under the GST Laws and therefore cannot be termed as an immovable property. In any case, and without prejudice to the aforesaid, it is submitted that a subsequent immovability is irrelevant in order to determine the nature of the system.

- 5.7. Pertinently, Section 2(102) of the CGST Act defines 'services' to mean, inter alia, anything other than 'goods'. It is clear, therefore, that meaning of the expression 'goods' and 'services', as contained in the CGST Act is mutually exclusive. Hence, once SPGS has been classified as goods, it cannot be classified as services, and consequently cannot be classified as a 'works contract'.
- 5.8. Moreover, in order to be classified as a "works contract", the EPC Contract must be in relation to immovable property as per the mandate of section 2(119) of the CGST Act. However, by virtue of well settled law, SPGS devices amount to movable property as:
- (a) The SPG Systems are moved to the site for their erection and are not per se immovable property;
 - (b) They cannot be said to be attached to the earth as:
 - (i) They are not rooted to the earth as in the case of trees or shrubs;
 - (ii) They are not embedded to the earth as walls and buildings;
 - (iii) They are only annexed to the earth with the help of nuts and bolts;
 - (c) The fixing to the earth is meant only to give stability and functional efficiency to the equipment;
 - (d) The mode of annexation is merely by way of nuts and bolts which can be removed and cannot be considered to be a permanent part of the land.
- 5.9. MSEDCL has relied upon the principles laid down by certain Authorities for Advanced Rulings (AARs) to contend that the applicable rate of GST prior to 1 January 2019 on supply of SPGS was 18%. APTFPL submits that MSEDCL's reliance on the aforesaid principles laid down by such AARs is misplaced and misconceived. A decision of the AAR is not a judgment in rem but merely a judgment in personam. Accordingly, such judgments are not binding on the facts of APTFPL. Further, there is no adjudication or decision in the case of APTFPL.

- 5.10. The value of services in the present EPC Contract is only approximately 10% while the value of supplies amounts to approximately 90% of the contract value. As such, even by MSEDCL's own averments, APTFPL was earlier only required to pay tax at 18% on only 10% of the contract value. However, after the issuance of the Amendment Notifications, 30% of the total contract value is required to be taxed at the rate applicable to supply of services, i.e., at 18%. While APTFPL continues to maintain that the tax applicable on the total value of the EPC Contract was only 5% prior to the Amendment Notification, in any case and without making any admission on this account and strictly on a without prejudice basis, APTFPL contends that the value of services has been enhanced by way of a statutory amendment to 30% and this itself is a Change in Law event which has increased the cost, which also it has claimed by virtue of the present Petition.
- 5.11. The Amendment Notifications are squarely covered within the change in law events set out in Article 9.1 of the PPA, as the issuance of the Amendment Notifications, is an enactment of a new law, which amended and modified the then existing rate notifications of GST applicable on setting up of SPGS, thereby changing the rate of taxes which have a direct effect on the SPGS. Therefore, the issuance of the Amendment Notifications has resulted in an increase in the effective tax rates under the GST Laws from 5% to 8.9% (on gross consideration) on the aforesaid EPC Contract with effect from 1 January 2019.
- 5.12. The Appellate Tribunal for Electricity in past judgments has rejected arguments similar to those made by MSEDCL in the present matter to hold that any change in tax/levies/ duties etc. or application of new tax/levies/ duties etc. on supply of power covers the taxes on inputs required for such generation and supply of power under the relevant PPA. In fact, even the Central Electricity Regulatory Commission (CERC) while passing orders on similarly worded change in law clauses has held that supply of power includes within its ambit the impact on capital cost and operating cost of the project, including the cost of materials, equipment, services for installation of the project and production and supply of electricity as well as taxes, duties and levies on such equipment, materials and services. Therefore, any increase in the taxes on the goods and services required for setting up the SPGS is covered under supply of power and consequently the Change in Law clause of the PPA.
- 5.13. MSEDCL has erroneously contended that Article 9.2 of the PPA is inconsistent with Article 5.2 of the PPA and the terms of the RfS, which state that the tariff for supply of solar power is fixed at Rs. 2.72/ unit. The aforesaid contentions of MSEDCL are erroneous and misplaced.
- 5.14. It is settled law that the terms of a contract have to be interpreted in a manner which furthers the intention of the parties and does not render any part of the contract redundant and otiose. APTFPL had quoted a non escalable tariff for the duration of the PPA on the basis of the

taxes, duties and levies prevailing at the time of bid submission. As such, the introduction of any new taxes, duties and/ or levies necessarily has to be dealt with under the Change in Law mechanism of Article 9 and APTFPL cannot be precluded from claiming the impact of such Change in Law under the PPA. Similarly, while Clause 3.3 of the RfS requires APTFPL inter alia to be responsible for setting up the SPGS at its own cost, the said cost parameters were determined based on the taxes, duties and levies existing at the time of bid submission.

6. At the first e-hearing through video conferencing held on 11 February 2021, the Advocate of MSEDCL submitted that rejoinder from APTFPL was received on 10 February 2021 and sought some time to study their replies. Accordingly, the Commission passed a Daily Order and adjourned the hearing for a short period.
7. At the second hearing through video conferencing held 23 March 2021, the representative of APTFPL and MSEDCL reiterated their submission in the Petition. After hearing at length, the Commission granted 2 weeks' time to the Parties to file their written notes of arguments.
8. **MSEDCL submitted its written submission dated 7 April 2021 which is summarized as below:**
 - 8.1. The definition of 'works contract' is provided in Section 2(119) of the CGST Act, 2017. It defines 'works contract' as a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract.
 - 8.2. The EPC contractor is singularly assigned task of setting up of the entire solar power plant. The various activities the EPC contractor is obligated to perform broad range from designing the power plant, preparing the drawings/ map, preparing the estimate, sourcing the various goods required, carrying out the construction of civil structures involved, testing the equipment's and finally commissioning the power project.
 - 8.3. It is thus the considered view of the Authority for advance ruling that the EPC contract is a works contract and has to be taxed accordingly. The performance of the EPC contractor in relation to the supply of goods and supply of services related to the installation and commissioning of the goods are so intricately woven that they cannot be evaluated in isolation from each other. This indivisible nature of the total supply imparts the entire contract the nature of a works contract.

- 8.4. Considering that the intention of the EPC contractor is for setting up of a Solar Power Project, the said EPC contract cannot be treated as supply of goods but supply of service making it as “Works Contract”.
- 8.5. The contract is for the engineering, procurement and commissioning of the solar power generating system and what is transferred is the entire solar power generating system including the civil works involved in the project. The project has a very high element of permanence. Civil structures are created and various equipments are installed on those structures. A project of this magnitude is not envisaged to be one which shall keep shifting its location. It is essentially of the nature of an immovable property. The individual components may be capable of being shifted but in its entirety the project is certainly of the nature of an immovable property. The project after completion at the time of transfer is thus an immovable property, more so as there are no separate considerations for the individual components of the project.
- 8.6. That is the reason where a supply involves engineering, design, procurement, supply, development, testing and commissioning of a civil structure, it is treated as “works contract” in terms of Section 2(119) of the CGST Act, 2017 and not a composite supply as envisaged under Section 2 (30) of the CGST Act.
- 8.7. APTFPL cannot move its Solar Power Project to any other place for 25 years as it needs to fulfill the obligation of sale of solar power for period 25 years. Therefore, it would have noted its obligation under its PPA and there won't be mobility and the Solar Power Project will be permanent structure for 25 years.
- 8.8. The term 'immovable property' has not been defined under the GST Act. However, there is a plethora of judgments of the Supreme Court and the High Courts which have helped understand the term 'immovable property'. These decisions held machines as immovable property by taking into account facts such that the machines could not be shifted without first dismantling it and then re-erecting it at another site.
- 8.9. As per Para 6 of Schedule II of the CGST Act, works contract under section 2(119) of the CGST Act constitutes supply of services, hence, the concessional rate of tax as applicable to supply goods shall not be applicable.
- 8.10. As the activity of Engineering, procurement and construction falls within the scope of Works Contract and they are not ancillary or incidental to the supply of goods. Further, the supply is towards an immovable property and cannot be subjected under composite supply of 2(30) of the CGST.

- 8.11. Even in the pre GST era and GST era, the rate of GST for construction of the thermal plant was always treated as “Works Contract” will be taxable at 18%.
- 8.12. Further before the determination of the rate of GST for supply to solar power project, APTFPL should have adjudged the rate of GST on basis of the judicial precedents. The judicial precedent clearly states the rate of GST for construction of thermal projects will be at 18% as per Works Contract 2 (119) of the CGST Act.
- 8.13. The decisions of the AAR have persuasive value. The decisions of several AAR in following matters have been relied upon by MSEDCL:
- a. RFE Solar Pvt Ltd Rajasthan/AAR/2018-19/08 dated 1/7/2018,
 - b. RFE Solar Pvt Ltd Rajasthan/AAAR/2018-19/08 dated 29/11/2018,
 - c. Giriraj Renewables Pvt Ltd Maharashtra/AAR/01/2017/B-01 dated 17/2/2018,
 - d. Giriraj Renewables Pvt Ltd Maharashtra/AAAR/SS-RJ/08/2018-19 dated 05/09/2018,
 - e. Ferni Solar Farms Pvt Ltd Maharashtra/AAR/03/2017/B-03 dated 3/3/2018,
 - f. Ferni Solar Farms Pvt Ltd - Maharashtra/AAAR/SS-RJ/07/2018-19 dated 4/9/2018,
 - g. In Re_ M_s. Solarsys Non-Conventional Energy Private Limited
- 8.14. These judgements have unanimously held that supply of goods along with erection, engineering, design, construction, installation and like that cannot be held as composite supply but only as Works contract.
- 8.15. In view of the above, the rate of tax for supplies of SPGS will be as per Works contract and the rate of tax has been reduced from 18% to 8.9% in view of the amendment notifications.
- 8.16. APTFPL has relied upon letter from the MNRE dated 3 April 2018. However, the same denotes the understanding of the Ministry regarding the GST treatment for solar sector and cannot be taken as legal advice/opinion. The letter itself clarifies in the end that the same is not a legal advice or an opinion. The issue of classification or determination of the agreements have to be done with respect to the laws and relevant provisions.
- 8.17. As per the obligations mentioned in the PPA, APTFPL was obligated to take the responsibility of constructing, operating, and maintaining the Solar Power Project and supplying solar power. Other PPA holders such as – Acme, Adani, and ReNew who have analogous PPAs haven’t claimed change in law, they haven’t faced any problems.
- 8.18. No compensation is payable on account of amendment Notification Nos. 24/2018, 25/2018, 27/2018 and 28/2018 dated 31.12.2018. The rate of GST on EPC contract for setting up of Solar power generating systems is reduced from 18% to 8.9%.

9. APTFPL submitted its written submission dated 7 April 2021 and are summarized below:

- 9.1. In terms of the relevant notifications issued by the Central and State Governments under the GST Laws, the applicable rates of GST for the supply of SPGS devices at the time of bid submission were 2.5% each under the CGST Act (2017 CGST Notification) and the Rajasthan SGST Act (2017 SGST Notification), respectively. Further, as per the then prevalent GST rate schedule, the applicable integrated tax rate on the supply of SPGS devices was 5% (2017 IGST Notification).
- 9.2. Pertinently, at the relevant time, there was no separate GST rate specified for the construction or engineering or installation of SPGS devices, including when such services are provided along with the supply of the SPGS system. Notably, in terms of the above notifications, various group companies of the APTFPL that had executed an EPC contract with APIPL were paying GST on the procurement of SPGS devices at the rate of 5% under the relevant EPC Contracts for all projects across the country. Further, APIPL has submitted its returns before the GST Authorities on the basis of a 5% GST rate on such EPC contracts.
- 9.3. It is pertinent to mention that GST is paid on a self-assessment basis. As aforesaid, APIPL has raised invoices under relevant EPC contracts at the aforesaid rate of 5% and has filed its returns on the said basis as well. It is also pertinent to mention that the self-assessment is deemed to be final unless it is disturbed in accordance with law. Notably, the aforesaid assessment has not been disturbed by the competent authorities. In any event, MSEDCL does not have the competence, nor the jurisdiction to disturb or challenge the aforesaid assessment made by the APTFPL's EPC contractor.
- 9.4. The minutes of the 31st meeting of the GST Council also acknowledge the composite nature of supplies under EPC Contracts by suggesting that there is more than one supply involved in such cases. The said minutes also acknowledge that the proposal would eliminate disputes regarding the applicable tax on a total solar power project. As such, the said Explanation is applicable prospectively. In any case, MSEDCL has not placed anything on record to suggest that the aforesaid amendment is sought to be applied retrospectively.
- 9.5. In the instant case, the supply of the goods portion of the SPGS is the principal supply since the primary purpose of entering into the EPC Contract was to supply SPGS devices. The aforesaid purpose is also evident from the fact that approximately 90% of the value of the said contract comprises supply of parts and devices as opposed to approximately 10% of the value of the contract which is attributable to supply of services.

- 9.6. MSEDCL's claim that the EPC Contract executed between APTFPL and APIPL is a 'works contract' under the GST Laws and is therefore liable to be taxed at 18% is wholly misconceived. It is evident that a works contract involves the installation and erection of an immovable property. However, it is submitted that the SPGS device, as commissioned, is considered as 'goods' under the GST Laws and therefore cannot be termed as an immovable property. In any case, and without prejudice to the aforesaid, it is submitted that a subsequent immovability is irrelevant in order to determine the nature of the system.
- 9.7. Erection and assembly of a plant at the site which is capable of being moved and shifted to another place without being dismantled is considered as movable property. Further, the Hon'ble Supreme Court (SC) in *Quality Steel Tubes Pvt. Ltd. v. CCE*; UP 1995 (75) ELT 17 and *Triveni Engineering and Industries Ltd. v. CCE*; 2000 (120) ELT 273 (SC), has held that the test is not whether in fact, the goods are dismantled and moved by the assessee but whether the goods are capable of being moved from one location to another.
- 9.8. Further, the SC in the case of *CCE v. Solid and Correct Engineering Works*, 2010 (5) SCC 122, while relying on the test of annexation to earth and the object of such annexation, held that if the annexation is not with the object of enjoying the land or building and is merely for operational and functional reasons, the machinery cannot be held to be an immovable property.
- 9.9. The Hon'ble High Court of Delhi in the case of *Vodafone Mobile Services Ltd. v. CST*, 2018-TIOL-2409-HC-DEL-ST placing reliance on several judgements of the SC on the issue, has held that telecom towers which are fixed to the earth by way of nuts and bolts and angles for the purpose of functionality cannot be classified as immovable property. The aforesaid principles have been reiterated by various courts including the SC in several judgments where it has consistently been held that where a plant or machinery is fixed to the earth through nuts and bolts, it does not partake the character of an immovable property. It has further been held that where it is necessary to imbed or fix such movable property to the earth for its beneficial use or enjoyment, it should not be regarded as an immovable property solely for that reason.
- 9.10. Under the GST Laws, specifically Section 103 of the CGST Act, the decisions of the AARs do not have any precedential effect or value and are not binding on the parties which did not approach it.
- 9.11. MSEDCL has made a selective reference to the observations made by the AARs on the instant issue, omitting reference to the AAR in the State of Uttarakhand which has held that SPGS are liable to tax at the rate of 5% by its rulings dated 28 August 2018 and 23 January 2019.

- 9.12. GST rates on supply of SPGS mentioned above and the clarification dated 3 April 2018 issued by the MNRE, the prevalent rate of GST on the supply of SPGS prior to 1 January 2019 was 5%, and hence change in law claim made under the present Petition ought to be considered and decided by the Commission accordingly.
- 9.13. Article 9.1, more specifically item No. (v), covers increase in all taxes and duties which have a direct impact on the Project. Since the principal obligation under the PPA is to supply power to MSEDCL, any increase in input costs required for APTFPL to ensure such supply of power to MSEDCL under the PPA, amounts to a direct impact on the Project. Accordingly, APTFPL is entitled to change in law relief under Article 9 of the PPA.

Commission's Analysis and Rulings

10. APTFPL had initially filed a Petition before the Commission under Case No. 46 of 2019, seeking declaration that issuance of the Amendment Notifications by Ministry of Finance dated 31 December 2018 amounted to a Change in Law under the PPA. APTFPL further sought a fixed lump sum compensation of Rs. 23,38,80,000/- subject to reconciliation on actuals based on the submission of the relevant documentation.
11. The Commission vide its Order dated 24 June 2019 held that Commission cannot give an in-principle declaration of Change in Law beforehand. However, APTFPL was given liberty to approach the Commission again after it had incurred the additional costs and MSEDCL is not agreed to such claims. The relevant extracts of the Order are reproduced below:

“13. In view of the above, the Commission is of the opinion that APTFPL's present Petition claiming impact of Change in Law event on estimated basis is premature and hence needs to be dismissed. Further as regards the request of declaring the event in principle as Change in Law, the Commission is of the opinion that PPA has very clear provisions describing which event can be considered as Change in Law event. Accordingly, parties to PPA can interpret which event can constitute as Change in Law event and accordingly claim compensation on actual basis. If there is dispute between the parties at that time or for allowing compensation for Change in Law event, then parties to PPA can approach the Commission. Concept of in-principle approval or declaration of any event as Change in Law event and then final approval of compensation in subsequent proceeding based on actual impact is alien to PPA provision and if so required, needs to be used only under exceptional circumstance. Making it as regular practice would not be consistent with PPA provisions.”

12. APTFPL has submitted that as MSEDCL rejected its letters dated 18 May 2020 and 16 June 2020, submitting its claim for Change in law, it has filed the present Petition seeking compensation for the increase in costs on account of Change in Law event.
13. APTFPL had entered into PPA on 30 July 2018 with MSEDCL for capacity of 130 MW from Solar power project to be located in Rajasthan. APTFPL has contended that it incurred additional amount of Rs. 23.39 Cr. on account of change of rate of GST and accordingly it is seeking compensation of this amount along with carrying cost from MSEDCL by relying on restitution principle stipulated in the PPA.
14. APTFPL has submitted that at the time of bid submission (8 May 2018), which was prior to the MoF Notification dated 31 December 2018, the GST of 5% was applicable on Supply contracts and 18% on Service contracts for setting up of solar power projects. However, MoF notification dated 31 December 2018 clarified that for composite contracts, 70% of the taxable value would be treated as the supply component of the contract (to be taxed at 5% - CGST + SGST), and the remaining 30% would be considered as service component of the contract (to be taxed at 18% - CGST + SGST). Thus, effective GST rate becomes 8.9%.
15. MSEDCL has opposed such contention and stated that prior to the MoF's Notifications dated 31 December 2018, rate of GST for supply of goods and services for setting of SPGS was at 18% and that the same is applicable in this case which is required to be treated as 'Works Contracts' as per Section 2(119) of the CGST Act, 2017. Post the notification dated 31 December 2018, the GST rate has been reduced to 8.9% for supply of goods and services for setting up of SPGS. MSEDCL further claims that there is no change in the GST rate. Hence, APTFPL's claim for additional expenses can not be sustained.
16. In view of above submissions, the Commission notes that parties are mainly disputing about GST rate which was applicable on date of submission of bid and whether changes which has been introduced by 2018 notifications (which is post bid submission date) have changed the rate of applicable GST for the project under consideration.
17. The Commission notes that any event can be said to be 'Change in Law Event', only if satisfies the provisions stipulated under the PPA. Relevant part of PPA dealing with provisions of Change in Law are reproduced below:

“Law” shall mean any valid legislation, statute, rule, regulation, notification, directive or order, issued or promulgated by any Governmental Instrumentality.”

“Governmental Instrumentality” shall mean the GoI, the GoM and their ministries, inspectorate, departments, agencies, bodies, authorities, legislative bodies.”

Article 9. CHANGE IN LAW

9.1. Definitions In this Article 9, the following terms shall have the following meanings:

"Change in Law" shall refer to the occurrence of any of the following events after the last date of the bid submission, including (i) the enactment of any new law; or (ii) an amendment, modification or repeal of an existing law; or (iii) the requirement to obtain a new consent, permit or license; or (iv) any modification to the prevailing conditions prescribed for obtaining an consent, permit or license, not owing to any default of the Solar Power Generator; or (v) any change in the rates of any Taxes, Duties and Cess which have a direct effect on the Project. However, Change in Law shall not include any change in taxes on corporate income or any change in any withholding tax on income or dividends.

9.2. Relief for Change in Law

9.2.1 In the event a Change in Law results in any adverse financial loss/ gain to the Power Producer then, in order to ensure that the Power Producer is placed in the same financial position as it would have been had it not been for the occurrence of the Change in Law, the Power Producer/ Procurer shall be entitled to compensation by the other party, as the case may be, subject to the condition that the quantum and mechanism of compensation payment shall be determined and shall be effective from such date as may be decided by the MERC.

.....”

18. Thus, the Change in Law provisions of the PPA have the following ingredients, and the evaluation of whether or not an event qualifies as a Change in Law or not, and its consequences, has to be addressed accordingly:

- a. The definition of ‘Law’ under the PPA is an inclusive definition and contemplates all laws applicable in India in various forms. However, for an event to be considered a ‘Change in Law’ event requires that it be caused by the operation of law or by an Indian Governmental Instrumentality;
- b. The term ‘Indian Governmental Instrumentality’ covers GoI, GoM and any Ministry, Inspectorate, Department, Agency, Body, Authority or Legislative body under their direct or indirect control;
- c. ‘Change in Law’ encompasses introduction, increase, or modification of any law after last date of Bid submission (which is 8 May, 2018 in this case) which results in additional expenditure to the Power Producer, or in increase or decrease in revenues or cost to it;

- d. The expenditure or income or decrease in cost must be on actual basis and must financially impact the Power Producer;
- e. The object of the 'Change in Law' provision is to compensate the Party affected by such an event which was beyond its control so as to restore it, to the same financial position as if such Change in Law event had not occurred.

These are the guiding principles for ascertaining whether the events claimed as 'Change in Law' by Power Producers are to be treated as such under the PPA or not.

19. In present case, APTFPL has claimed MoF notifications issued in December 2018 as Change in Law event. MoF is a Government Instrumentality as per PPA and MSEDCL has not disputed the same. APTFPL has claimed Change in Law as per Article 9.1 (v) of the PPA i.e. *any change in the rates of any Taxes, Duties and Cess which have a direct effect on the Project*. While disputing APTFPL's claim, MSEDCL has contended that rate of taxes applicable at the date of submission of bid has not increased but in fact have reduced due to subsequent MoF notification issued in December 2018.

20. In view of above, the Commission frames following issues for its considerations:

- a. What was applicable tax rates at the time of bid submission?
- b. Whether MoF's notifications in December 2018 has changed tax rates applicable for APTFPL's project?
- c. Whether APTFPL is eligible for claiming increased expenses on account of Change in Law event?

The Commission is addressing these issues in following paragraphs.

21. Issue A: What was applicable tax rates at the time of bid submission?

21.1. The Commission notes that bid submission date in present matter was 8 May 2018. GST was applicable at that time. Further, GST law provides different tax rates for supply of goods and supply of services. As construction of Solar projects involves supply of goods such as Solar panels/ modules, inverters, etc and also includes services such as design, construction etc. both tax rates i.e. GST on supply of goods and GST on supply of services can become applicable for respective activity.

21.2. GST notifications issued in 2017 was applicable at the time of bid submission. As per the said notifications, Solar projects falls under following tax classification:

a. For Supply of Goods (Notification 1/2017):

S. No.	Chapter/Heading/Sub-Heading/Tariff item	Description of Goods	CGST rate	SGCT rate	IGST rate
234	84 to 85	Following renewable energy devices & parts for their manufacture: (c) Solar power generating system	2.5%	2.5%	5%

b. For Supply of Services (Notification 11/2017):

S. No.	Chapter/Section or Heading	Description of Services	CGST rate	SGCT rate	IGST rate
3	Heading 9954 (Construction services)	(i) Construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.	9%	9%	18%
		(ii) composite supply of works contract as defined in clause 119 of section 2 of Central Goods and services Tax Act, 2017	9%	9%	18%
		(iii) construction services other than (i) and (ii) above	9%	9%	18%

- 21.3. As per above notifications, for supply of goods to Solar Power Generating System, GST at rate of 5% is applicable and for supply of services such as construction activities, GST at rate of 18% was applicable.
- 21.4. In present case, APTFPL has entered into Composite EPC Contract with APIPL dated 25 July 2018, under which both goods and services are supplied. APTFPL has claimed that as per the provisions of CGST Act, its EPC contract is covered under ‘Composite Supply’. Therefore, once the supply is composite supply, with the principal supply being the supply of SPGS devices, the rate of tax applicable on such a composite supply, as per the provisions of the CGST Act, would be the rate applicable on SPGS devices, i.e., 5%. Further, APTFPL contended that Works contract involves the installation and erection of an immovable property. However, the SPGS device, as commissioned, is considered as ‘goods’ under the GST Laws and therefore cannot be termed as an immovable property.
- 21.5. MSEDCL has contended that as such composite EPC contract includes activities such as designing the power plant, preparing the drawings/ map, preparing the estimate, sourcing the various goods required, carrying out the construction of civil structures involved, testing the equipment and finally commissioning the power project. MSEDCL has further submitted that engineering, procurement and commissioning of the solar power generating system and what is transpired is the entire solar power generating system including the civil works involved in the project. It is essentially in the nature of an immovable property. Considering that the intention of the EPC contractor is for setting up of a Solar Power Project, the said EPC contract cannot be treated as supply of goods but supply of service making it as “Works Contract” and hence GST at rate of 18% is applicable.
- 21.6. The Commission notes that GST Act 2017 defined the ‘composite supply’ as follows:
- “(30) ‘composite supply’ means a **supply made** by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply.*
- Illustration – Where goods are packed and transported with insurance, the supply of goods, packing materials, transport and insurance is a composite supply and supply of goods is a principal supply.” [emphasis added]*
- 21.7. The Commission also notes that Section 8 of the GST Act 2017 stipulates criteria for fixing tax liability of composite supply as follows:

“8. The tax liability on a composite or a mixed supply shall be determined in the following manner, namely-

(a) a composite supply comprising two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply; and

(b) a mixed supply comprising two or more supplies shall be treated as a supply of that particular supply which attracts the highest rate of tax” [emphasis added]

Further Schedule II (‘Activities to be treated as Supply of Goods or Supply of Services’) of GST Act 2017 has also stipulated about composite supply for the purpose of levy of GST as follows:

“6. Composite Supply

The following composite supplies shall be treated as supply of services, namely:-

(a) Works contract as defined in clause (119) of section 2; and

(b) Supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption), where such supply or service is for cash, deferred payment or other valuable consideration” [emphasis added]

Thus, as per GST Act 2017, composite supply can either be treated as ‘works contract’ if it fulfills requirement of definition in clause (119) of section 2 of GST Act and accordingly be treated as supply of services with GST rate of 18%. This is explicit provision provided under the GST Act. In case composite supply cannot be treated as ‘Work Contract’ and involves supply of two or more supplies and one of them is principal supply, then only tax rate applicable for principal supply shall be applicable for composite supply.

21.8. The Commission notes that ‘principal supply’ and ‘work contract’ has been defined under GST Act 2017 as below:

“(90) ‘principal supply’ means the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary.

.....

(119) ‘work contract’ means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance,

*renovation, alternation or commissioning of any **immovable property** wherein transfer of property in goods (whether as goods or in some other form) is involved in execution of such contract;” [emphasis added]*

Thus, composite supply can be treated as ‘work contract’ only if it involves installation of immovable property.

- 21.9. The Commission notes that APTFPL has submitted that MNRE by its notification dated 3 April 2018 has clarified that SPGS has ‘structural’ components and as such do not qualify as immovable property and hence are outside the domain of works contract:

‘Structurals, as such, do not qualify as immovable property and, hence, are outside the domain of ‘works contract service’. Whether the EPC contracts qualify as composite supply (u/s 2(30) of the CGST Act) as supply of goods or services or both, naturally bundled or supplied in conjunction with each other in the ordinary course of business will depend on the facts of the case. If such (EPC contracts) supplies could be treated as ‘composite supply’ with supply of solar power generating systems as the principal supply, then such supplies may be eligible for 5% GST rate as a whole. This aspect may, however, require examination of contracts.’

However, the Commission notes that the above para from the MNRE’s circular concludes with the view that such aspect requires examination of the contracts.

- 21.10. APTFPL has submitted that the SPGS are not an immovable property as they are not rooted/embedded to the earth and are only annexed to ground by nuts and bolts. The Commission underscores that in the present Case, APTFPL has signed a PPA of 130 MW with MSEDCL for 25 years. Considering thumb rule of land requirement of 5 acre/MW for a solar project, this solar project would be spread across approximate area of 650 acres. In the opinion of the Commission, by no stretch of imagination such project which is spread over huge area and setup for providing solar power under the PPA for a period of 25 years, cannot be termed as moveable. APTFPL has relied upon various judgments of the Supreme Court and High Court for proving its point that it is movable property. However, considering facts of this matter, the Commission is of the opinion that these judgments may not be applicable in present matter. Accordingly, such projects are strictly immovable as defined for ‘works contract’ under GST Act and hence the GST Rate of 18% was applicable before the Amendment Notifications dated 31 December 2018.

- 21.11. In view of above finding based on facts of present case, the Commission is not inclined to go into APTFPL’s claim that it has been paying 5% GST on similarly placed other contracts.

21.12. MSEDCL has referred to decisions of AAR treating EPC contracts for Solar plants as ‘Work Contract’ and ruling that GST rate of 18% is applicable. However, as both parties have agreed that such rulings are not decision in rem, hence same has not been referred by this Commission in its analysis.

21.13. Thus on this issue of the applicable tax rate, the Commission rules as per the para 21.10 above.

22. Issue B: Whether MoF’s notifications in December 2018 has changed tax rates applicable for APTFPL’s project?

22.1. Post issuance of GST notification in 2017, there seemed to be confusion about applicable tax rate for EPC contract of setting up of Solar power generating system. It is also evident from the decision of AAR referred by MSEDCL in its submission.

22.2. Issue of clarification on GST rate applicable to EPC contracts of solar plants and other Renewable Energy Generating System was discussed during 31st GST Council Meeting held on 22 December 2018. Minutes of the said meeting are reproduced below:

*“14.40. The Joint Secretary, TRU-I explained that this **proposal was regarding assigning value to the supplies falling under S. No. 234 of Schedule I in Notification No. 1/2017-Central Tax (rates), when supplied along with other supplies like services under EPC and goods not covered under the said entry, and it was recommended to take the deemed value of goods falling under entry 234 as 70% of total amount charged and remaining 30% value may be deemed as value of supply of services. He added that it was based on fair estimation of the cost break-up. He stated that this proposal would eliminate disputes regarding applicable rate of tax on a total solar power project. The Council agreed to the proposal.**”*

22.3. In order to simplify taxation of EPC contract, GST Council in above referred 31st Meeting has decided to value EPC contract for taxation purpose as supply of goods for 70% of contract value and supply of services for remaining 30% of contract value. Accordingly, following amendments have been made in GST notifications in the month of December 2018:

a. For Supply of Goods (Notification 24/2018):

S. No.	Chapter/Heading /Sub-Heading /Tariff item	Description of Goods	CGST rate	SGCT rate	IGST rate
234	84 to 85	<p>Following renewable energy devices & parts for their manufacture: (c) Solar power generating system <i>Explanation: If the goods specified in this entry are supplied, by a supplier, along with supplies of other goods and services, one of which being a taxable service specified in the entry at S. No. 38 of the Table mentioned in the notification No. 11/2017-Central Tax (rate),, the value of supply of goods for the purpose of this entry shall be deemed as seventy per cent of the gross consideration charged for all such supplies, and the remaining thirty per cent of the gross consideration charged shall be deemed as value of the said taxable services.</i></p>	2.5%	2.5%	5%

b. For Supply of Services (Notification 28/2018):

S. No.	Chapter/Section or Heading	Description of Services	CGST rate	SGCT rate	IGST rate
38	9954 or 9983 or 9987	<p>Service by way of construction or engineering or installation or other technical services, provided in relation of setting up of following – (c) Solar power generating system Explanation – This entry shall be read in conjunction with serial number 234 of</p>	9%	9%	18%

		Schedule I of the notification No. 1/2017-.....			
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Thus, through amendment in GST Notifications, Government has introduced entry no 38 (earlier only 37 entries were there) in ‘Supply of Services’ for EPC contracts for setting up Solar power generating system and fixed GST rate of 18% for such services. Explanation added to this entry no. 38 and entry no. 234 in ‘Supply of Goods’ has further clarified that in case supply of goods for Solar power generating system which falls under entry no. 234 of ‘Supply of Goods’ is undertaken with supply of other goods or EPC services as stipulated in entry no. 38 of ‘Supply of Services’ then value of supply of goods for the purpose of tax rate shall be deemed as seventy per cent of the gross consideration charged for all such supplies, and the remaining thirty per cent of the gross consideration charged shall be deemed as value of the said taxable services i.e. EPC services.

22.4. As an effect of above said 2018 notifications, Supply and Service Contracts for setting up of the Solar Power Plant attracts a composite tax rate of 8.9% (i.e. 5% on 70% of the consolidate taxable value of the Contracts and 18% on the remaining 30% of the consolidated taxable value of the Contracts).

22.5. In view of above, the Commission concludes that post 2018 GST notifications, tax rate for supply of goods to Solar power generating system remains 5%. Separate category of EPC services has been introduced at tax rate of 18%. And in case of composite supply wherein goods under entry 234 of ‘Supply of Goods’ is being supplied along with other goods and EPC services then effective tax rate of 8.9% will be applicable on such contract.

22.6. Thus on this issue, as analysed in the para 22.1 to 22.5 above, the Commission concludes that there is a change in the effective tax rate.

23. Issue C: Whether APTFPL is eligible for claiming increased expenses on account of Change in Law event?

23.1. As per analysis in earlier part of this Order, the Commission tabulated below the tax rate applicable to EPC contract entered by APTFPL for setting up of Solar power generating system:

Sr. No.	Contract Details	Applicable GST Rate	
		As on Bid Submission date (2017 GST Notifications)	Post 2018 GST Notifications

1	EPC Contract for setting up of Solar Power Generating System.	18%	8.9%
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23.2. Thus, due to GST Notifications issued in 2018, tax rate for Composite EPC contract has been notified as 8.9%. Therefore, there is a net reduction in the GST rate of APTFPL's EPC Contract from 18% to 8.9%.

23.3. The Commission notes that as per provisions of the PPA any adverse financial loss/ gain on account of Change in Law event needs to be compensated by other party. Thus, as in case of increased expenses, buyer has to compensate generator, similarly, in case of reduction in expenses or gain, generator shall pass on such gain to the buyer. However, at the same time it is also important to note that such provision of Change in Law is incorporated in the PPA to safeguard interest of contracting parties from the Change in Law event which is beyond their controls. Although, clause relating to Change in Law in the PPA does not talk about controllable factors, but PPA mandates that prudent utility practices are to be adopted. Considering settled legal principle of harmonious reading of the clauses of PPA, the Commission is of the opinion that if party through prudent utility practice is able to control impact of Change in Law event, it shall do the same. In the present case, although change in GST rate is clearly beyond the control of contracting parties, in the opinion of the Commission, APTFPL could have controlled the expenses on taxes.

23.4. The Commission also notes MSEDCL's submission that other successful bidders (excluding Tata Power Renewable Energy Ltd who has filed similar petition in Case No 25 of 2020) in the same bidding process have not approached with such request for compensation on account of GST notification issued in December 2018. This clearly establishes that present claim of increase in expenses due to 2018 GST notification is not related to change in tax rate but it is linked with contracting practice of the successful bidder. The Commission notes that PPA requires the generator to perform its activities in prudent manner. PPA also provides definition of Prudent Practices which is reproduced below:

“Prudent Utility Practices shall mean those practices, method, techniques and standards, that are generally accepted for use in electric utility industries taking into account conditions in India, and commonly used in prudent electric utility engineering and operations to design, engineer, construct, test, operate and maintain equipment lawfully, safely, efficiently and economically as applicable to power stations of the size, service and type of the Project, and that generally conform to the manufacturers' operation and maintenance guidelines.”

Thus, as per Prudent Utility Practices, APTFPL was expected and required to construct solar plant economically. By not entering into a most appropriate manner of contract for supply

of goods, APTFPL has lost opportunity of using legitimate lower tax rate of 5%. Therefore, contracting practice followed by APTFPL cannot be considered as economical and hence not a prudent one. The additional expenses in this case are thus due to contracting practice adopted by the APTFPL and not strictly due to change in tax rate (because tax rate for supply of goods for Solar power generating system remain unchanged i.e. 5%). As a corporate entity, APTFPL is within the full knowledge of various provisions of the law and due diligence by them atleast to the extent of the provisions of the PPA would have reduced the unnecessary tax burden. As tax expenses was within the control of APTFPL by following prudent industry practice on contracting, its adverse impact, if any, cannot be passed on to consumers of MSEDCL. Similarly, to balance the principles on both sides, any saving accrued to APTFPL due to contracting practice adopted by it, need not be passed on to the consumers of MSEDCL.

23.5. The Commission also notes APTFPL's contention that placing of EPC contract for setting up of Solar power generating system is well accepted industrial practice. The Commission does not deny such submission of APTFPL, but notes that in given circumstances, it would have been economical and prudent for APTFPL to place goods supply contract directly with manufacturers of Solar modules and other allied equipment. And for services such as erection, testing and commissioning it could have placed separate contract with its sister concerned i.e. Azure Power India Private Limited. Any implication of contracting practices adopted by APTFPL which are not prudent, cannot be allowed to be pass on to buyer under Change in Law provision of the PPA.

24. Hence, the following Order:


ORDER

1. Case No. 147 of 2020 is dismissed.

**Sd/-
(Mukesh Khullar)
Member**

**Sd/-
(I.M. Bohari)
Member**

**Sd/-
(Shri Sanjay Kumar)
Chairperson**


**(Abhijit Deshpande)
Secretary**

