

**BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION
GANDHINAGAR**

Petition No. 2200 of 2023.

In the matter of:

Petition under Section 86(1) (f) of the Electricity Act, 2003 read with Regulation 23 of GERC (Conduct of Business) Regulations, 2004 and Article 9 of the Power Purchase Agreement (PPA) dated 23.04.2021 seeking 'In Principle' declaration of issuance of Notifications dated 19.10.2022 and 01.02.2023 as a Change in Law Event..

Petitioner : Tata Power Saurya Limited

Represented by : Ld. Sr. Adv. Rashesh Sanjanwala alongwith Adv. Suhael Buttan, Nikunj Bhatnagar and Mr. Jatin Ghuliani

Vs.

Respondent : Gujarat Urja Vijkas Nigam Limited

Represented by : Ld. Adv. Ms. Srishti Kindaria along with Ms. G. Bhavani and Mr. A. H. Chavda.

CORAM:

**Anil Mukim, Chairman
Mehul M. Gandhi, Member
S. R. Pandey, Member**

Date: 06/11/2024.

Daily Order

1. The matter was listed for hearing on 12.06.2024.
2. Ld. Adv. appearing on behalf of the Petitioner submitted that the present Petition is filed by the Petitioner under Section 86 (1) (f) of the Electricity Act, 2003 read with Article 9 of the Power Purchase Agreement (PPA) dated 23.04.2021 executed between the parties seeking in principle declaration of the Project Imports (Amendment) Regulations, 2022 introduced vide

Notification bearing reference No. 54/2022 Customs dated 19.10.2022 and the Project Imports (Amendment) Regulations, 2023 introduced vide Notification bearing reference No. 07/2023 – Customs Notification dated 01.02.2023 by the Central Board Indirect Taxes and Customs (CBIC) and published by the Ministry of Finance (MoF), Govt. of India as Change in Law event. The Petitioner is also seeking the compensation and relief *qua* the aforementioned “Change in Law” event, in terms of the mechanism envisaged under Article 9.2.2 of the PPA.

2.1. It is further submitted that the chain of events leading to the aforementioned “Change in Law” began in following phases:

- 2.1.1. Request for Procurement (RfP) issued by the Respondent GUVNL having RfP No. GUVNL/ 500 MW/Solar (Phase XII)” for purchase of power from 500 MW Grid connected solar PV power projects to be set up in Gujarat (Phase XII) on 23.01.2021.
- 2.1.2. The last date of the said RfS. bid submission was 12.03.2021.
- 2.1.3. The Petitioner participated in the bid and was successful selected and the Letter of Award (LOA) was issued to it on 26.03.2021.
- 2.1.4. Pursuant to the LOA the Power Purchase Agreement (PPA) was signed on 23.04.2021.
- 2.1.5. Pursuant to the PPA the Respondent filed the Petition before the Commission seeking adoption of tariff which was approved on 13.05.2021.
- 2.1.6. The MNRE issued the Notification vide O.M. dated 09.03.2021 for imposition of BCD of 25% on the import of solar cells and 40% on import of solar modules with effect from 01.04.2022.
- 2.1.7. Notificaiton dated 19.10.2022 of CBIC and published by MoF which amended the Project Imports Regulations, 1986 (PIR) whereby Solar Power Projects were excluded from the ‘Sr. No. 2 in column 2’ and ‘Sr. No. 3 in column No. 2’ of the table appended to the PIR, 1986 w.e.f. 20.10.2022, it disentitled the benefits of concessional rate or custom duty.

- 2.1.8. Pursuant to the said amendment the Petitioner issued the Notice of Change in law under Article 9 of the PPA to the Respondent on 17.11.2022.
- 2.1.9. Vide Notification dated 01.02.2023, the CBIC again exercised its powers conferred under Section 157 of the Customs Act, 1962 and amended the PIR, 1986 thereby excluding Solar Power Projects from 'Sr. No. 4 in column 2' of the table appended to the PIR,1986.
- 2.1.10. The Petitioner had achieved part commissioning of the Project up to the extent of 25 MW on 15.12.2022.
- 2.2. It is further submitted that the Ministry of Power (MoP) vide its Resolution issued the Tariff Policy dated 28.01.2016 which is a statutory document and it clarifies the legal position under Section 3 (3) of the Electricity Act, 2003 which empowers the Central Government to review or revise the tariff policy from time to time. Also Clause 2.2 of the said Resolution clarifies that the State Electricity Regulatory Commission shall be guided by the tariff policy in discharging its functions including framing the Regulations. Hence, as per the said document, the Petitioner is entitled to the said event of Change in Law.
- 2.3. It is further submitted that the import of solar panels fall under two heads namely Chapter 85 and 98 of the Customs Tariff Act, 1975. Chapter 85 is applicable to general imports, whereas the Chapter 98 is applicable to the project specific imports. Under Chapter 85 the rates were 0% till March 2021, which was increased to 25%, and then to 40% in the month of March, 2021 and got implemented from 01.04.2022. It is further submitted that Chapter 98 remained unchanged and if the Petitioner's project qualify then the benefits would be applicable accordingly. The bid process RfS date was 23.01.2021. It is submitted that Clause 1.2.3 of the said RfS document defines that the bidders will be free to avail fiscal incentives like accelerated depreciation, concessional Customs and Excise Duties, Tax Holidays,

benefits of carbon credits etc. as available for such projects and it will have no bearing on comparison of bids of selection and as equal opportunity is being provided to all the bidders at the time of tendering itself hence it is up to the bidders to avail various tax and other benefits. No claim shall arise on GUVNL for any liability if bidders are not able to avail fiscal incentives and it will not have any bearing on the applicable tariff. So, from the said clause it was clear that the Petitioner entitled to avail the benefit and the rate quoted would be factored such concessional rate of pricing for the bid. On the other hand if the bidders were unable to avail the said fiscal incentives it would have no bearing on the applicable tariff. So whole purpose was if the Petitioner cannot avail the benefit may be due to procedure or other reasons than it could not be the ground to avail such benefits afterwards.

- 2.4. It is further referred Clause 3.9.1 of the RfS document and submitted that the applicable and relevant clause is Clause 1.2.3 which puts notice to all the bidders that if they do not avail the tax benefits then it will have no bearing. Hence, it cannot be the Change in Law.
- 2.5. It is further referred the Office Memorandum (OM) dated 09.03.2021 issued by the Ministry of New and Renewable Energy (MNRE) on which the Respondent has relied, at para No. 4, in CTH column it is clear from the numbers '85414012' and '85414011' that it is Chapter 85 items. There is no reference to Chapter 98. Chapter 98 remained as it was. If the benefits of Chapter 85 could have availed than it would be 'Zero' rate of duty. But chapter 98 had concessional duty but not 'Zero' duty. The Petitioner could have availed the benefits of Chapter 98 by following the procedure of PIR, 1986. So, when the bidding was under process the said notification came on 09.03.2021.
- 2.6. It is further referred the Corrigendum – 2 dated 10.03.2021, wherein it notifies all the parties that there is change. It is further submitted that on

09.03.2021 the Notification came on 10.03.2021 the Respondent put to notice of changes in Chapter 85 but there was no change in Chapter 98.

2.7. It is further submitted that the Petitioner and other bidders had an option to factor the rates before quoting under Chapter 98 of the CTA. It is further submitted that the LOA was issued on 26.03.2021 for 60 MW and PPA was executed on 23.04.2021.

2.8. Referring to the relevant Clause 9.1 of the PPA which deals with the provisions of Change in Law it is submitted that there cannot be any dispute that Change in Law would include the changes in the duty regime and there is a change.

2.9. It is further submitted that after the PPA was executed on 29.03.2021, the Petitioner approached the Energy and Petrochemicals Department, Govt. of Gujarat, as it is the sponsoring authority for the project. The sponsoring Authority addressed letter to the Assistant Commissioner of Customs on 28.09.2022, requesting for issuance of recommendation letter for availment of Concessional rate of Customs Duty benefit in respect of Goods sought to be imported for solar power project having capacity of 60 MW. It is submitted that in the said letter the approval was given to the Petitioner by the sponsoring authority.

2.10. It is further submitted that the Tata Power Solar Systems Limited was the EPC contractor for import of the solar cells the Petitioner's power project. The EPC Contractor addressed a letter on 29.09.2022 to the Assistant Commissioner of Customs, at para No. 2 and submitted that the Petitioner relied on the above mentioned Advance Ruling which was project specific, as the same was the case of the Petitioner. The Petitioner has sought the registration of the project under the said PIR from the Customs Authority.

2.11. It is further submitted that the Petitioner addressed a request letter on 11.10.2022 to the Respondent for extension of time for the commissioning of the 60 MW Solar Power Project and the Respondent had granted extension and presently the entire power project having 60 MW capacity is commissioned.

2.12. It is further submitted that there were queries raised by the Customs department in response to the application dated 29.09.2022, the Petitioner replied and submitted all documents to the department through its letter dated 18.10.2022. The Petitioner after responding to all the said queries raised by the Customs department requested to register the Petitioner's contract for the aforesaid solar power plants under the Project Import Regulation, 1986 (PIR, 1986).

2.13. It is further submitted that on 19.10.2022, the CBIC, Department of Revenue, Ministry of Finance, GoI issued a Notification No. 54/2022- Customs which notified the Project Imports (Amendment) Regulations, 2022, which shall come into force on 20.10.2022. It is further submitted that earlier it was only power plants and transmission projects which included solar also but by this amendment now they have excluded solar also. This is the Change in Law by virtue of which the petitioner was not entitled to claim the rates applicable in Chapter 98 of the Customs Tariff Act, 1975 and hence the Petitioner has to pay full Customs Duty.

2.14. It is further submitted that the Petitioner thereafter approached the Office of the Commissioner of Customs requesting Project Imports under the PIR, 1986. The said request was rejected by the Authorities vide letter dated 21.10.2022 by citing the reasons as Notification No. 54/2022 Customs dated 19.10.2022 wherein specific amendment is made in the Project Import Regulations for excluding the Solar Power Projects from the scheme.

- 2.15. It is further submitted that after denial from the Customs department the Petitioner addressed the notice to the Respondent under Article 9 of the PPA for intimating of Change in Law event due to the Ministry of Finance Notification No. 54/2022 – Customs dated 19.10.2022.
3. On the query of the Commission about the date of commissioning of the power project, he replied that the project was commissioned on different dates during years 2022, 2023 and 2024 as per GEDA certificates. On the further query about the original Scheduled Commercial Operation Date, he submitted that there was two times extensions granted and the original SCOD was 23.10.2022 which was extended by 54 days upto 16.12.2022. The extension in the SCOD was applied in 20.09.2022. The Petitioner approached the sponsoring authority, GoG. on 27.09.2022 for recommendation and the Petitioner got recommendation on 28.09.2022. The 25 MW power project was commissioned on 14.12.2022 and the Petitioner was entitled to the benefit. For the balance capacity of the 35 MW the Petitioner had applied to the Authorities under the PIR, 1986.
4. Ld. Adv. Ms. Shrishti Kindaria appearing on behalf of the Respondent submitted in response to the arguments and contended that the letter dated 21.10.2022 of the Assistant Commissioner Customs itself clarifies the reasons for not considering the Petitioner's power project under specific Project Import Regulations, 1986.
5. In response to the contention raised by the Respondent, Ld. Sr. Adv. appearing on behalf of the Petitioner submitted that this is first stage application and once the inprinciple approval is granted than under stage 2 the documents would be filed to ascertain the claim.
6. Ld. Adv. Ms. Shristi Kindaria on behalf of the Respondent submitted that as per the reply and objection letter dated 21.10.2022 given by the Authority of

Customs department. She further submitted that amendment was not the only reason, it was in furtherance of the intention which already existed.

- 6.1. It is further submitted referring to the Office Memorandum issued by the MNRE dated 09.03.2021, wherein at Sr. No. 6, it is clarified that all the RE developers should consider the said OM. Referring the said OM, she submitted that it was clarified by the MNRE that such imposition of BCD should not be considered as Change in Law for the upcoming projects. Also the said OM was in the knowledge of all the bidders. She further submitted that the said OM dated 09.03.2021 was subsequent to the change in the rates and it specifically indicated. The bid was submitted post these two events. Hence, the Petitioner today cannot claim the said OM as Change in Law.
- 6.2. She further submitted that the Petitioner has delayed to procure the solar panels and cells, as per the original SCOD the Petitioner could have imported much earlier. The original SCOD was on 23.10.2022, which was extended to 16.12.2022. At the time of extension the Petitioner had filed an undertaking on 17.08.2021 mentioning that the Petitioner would not claim any upward revision in tariff under the provisions of the PPA. Referring the said undertaking given by the Petitioner it clarifies that the Petitioner cannot claim any upward revision in project cost due to Change in Law for the extended period.
- 6.3. She further referred Article 9 of the PPA and submitted that any Change in Law is to be decided by the Commission and whether the Notification qualifies as a Change in Law within the scope of Article 9 of the PPA has to be decided by the Commission. She submitted that Article 9 is divided in two parts. She further submitted that Article 9.1.1 (b) is for the Change in Law due to occurrence of any events notified after the bid deadline and Article 9.2.2 allows the Power Producer to claim any increase/decrease of

Rs. 2 Lakh per MW in the Project Cost incurred upto the SCOD upon submission of proof of payment made by the power producer.

- 6.4. She further submitted that for any claim under the relief sought by the Petitioner has to satisfy the requirement of Article 9 which includes demonstrating a change in the said specific taxes and duties and that there has to be direct impact on the Solar PV Modules and such impact was incurred upto the SCOD and further such impact is substantiated and proved and there is no means for the petitioner to mitigate such additional costs.
- 6.5. It is further submitted that the imposition of Customs Duty was known even before the bid deadline date and therefore it is not a Change in Law. The bid deadline was 12.03.2021, prior to the bid deadline date, it was made clear by the MNRE in the Notification dated 09.03.2021 that the entities have to account for the imposition of the Basic Customs Duty which was to be applied from 01.04.2022.
- 6.6. It is further submitted that there is no Change in Law under Article 9.1 and the Petitioner is not entitled to any relief under Article 9.2.2 as the Petitioner has incurred any expenditure upto the SCOD. The revised SCOD was 16.12.2022 and the modules were not imported prior to such date and therefore there is no question of payment of any Customs Duty. It is further submitted that there is no introduction or modification or change in rates of Customs Duty. The Petitioner has claimed to pay the Customs Duty of 40% which is the rate specified in OM dated 09.03.2021 and GUVNL Corrigendum to RfS dated 10.03.2021. Therefore there is no new rate or change in rate and therefore there is no Change in Law in terms of Article 9.1.1 (b).
- 6.7. She further referred Article 9.2.3 and 9.2.4 of the PPA. Article 9.2.3 mandates that the Power Procurer/ GUVNL or the power producer shall

provide a certificate to other party stating that adjustment in the tariff payment is directly attributable to Change in Law and it should provide supporting documents to substantiate the same and such certificate shall correctly reflect the increase or decrease in costs. Article 9.2.4 of the PPA defines that the revised tariff shall be effective from the date of such Change in Law as approved by the Commission. She further submitted the relief admissible to the Petitioner should be considered only which confines to the PPA, the Authorities cannot re-write the existing contract.

- 6.8. It is further referred Article 3 of the Contract Agreement dated 13.07.2021 executed between the Petitioner TP Saurya Limited and Tata Power Solar Systems Ltd. and submitted that if the contractor is not making any claim, then it would be required to inquiry that whether the impact has actually come to them or not.
- 6.9. It is further submitted that the Petitioner is required to substantiate the prayers sought for declaration with all necessary documentary evidence with regards to Change in Law, in terms of Article 9 of the PPA and prove the same.
7. On the query of the Commission about the relevance said Contract dated 13.07.2021 in the present Petition, she submitted that it is in line with the PPA being signed between the parties and is for the Supply Contract.
8. Ld. Sr. Adv. Rashesh Sanjanwala responded to the contention of the Respondent that the Solar power project were never included, it is submitted that in law if the power project were included nobody can say that it was not included. It was general term in the PIR which were certainly included the Solar power projects also and most of the imports were under the PIR, 1986. So now the Respondent cannot contend that the solar power projects were never included under PIR route. If the law is amended than Chapter 98 is also amended along with the

PIR, 1986. Earlier the Solar Power Projects were included and hence it were excluded by the amendment in the PIR, 1986.

8.1. It is further referred the letter dated 21.10.2022 received from Office of the Commissioner of Customs and submitted that through the Notification No. 54/2022 Customs dated 19.10.2022 specific amendment is made in the PIR itself which specifically excluded the Solar Power Projects from the scheme. From the said Notification itself it is clear that the said exclusion was from 19.10.2022 under the PIR, 1986. The contention of the Respondent that rejection of the Project under the PIR that Solar Power Projects were never included is not correct. There are number of instances that the Solar Power Project developers have imported under the PIR mechanism.

8.2. The contention raised by the Respondent that any “Change in Law” event under Article 9 of the PPA is only permissible if it occurs after the bid deadline, he replied that the Petitioner is not denying the same. In the present case the Petitioner is not citing amendment in Chapter 85 as ‘Change in Law’. The basic argument claiming for ‘Change in Law’ is the rejection of the registration of the Solar Power Project under PIR, 1986 as per the letter dated 21.10.2022 of the Office of the Commissioner of Customs. It is submitted that there are two changes since the bid process has started the first one is Amendment in Chapter 85 of the Customs Tariff Act which the Petitioner is not relying for its claim and the other change which the Petitioner has relied upon is of exclusion of Solar Power Projects from the said PIR.

8.3. The other contention of the Respondent that there is delay in procuring of Solar modules and cells, it is responded that when there is deadline for commissioning of the Solar Power Project subject to extension which could be either by the Respondent or by the Commission. In the present case there is the Order passed by the Commission and the extension was granted and such extension is not subject to any other condition. When the

extension is granted it is subject to the PPA and all other provisions applicable under the law. Therefore the tariff policy is referred which is the source document. It is further submitted that in absence of the Regulations of the Commission, the Solar Policy prevails for any prohibition or restriction to the claim of the Petitioner. He sought time to file its response to the submissions of the Petitioner. He agreed to submit all necessary documentary evidences etc. to substantiate its claim.

9. Heard the parties. We note that the present Petition is filed by the Petitioner under Section 86 (1) (f) of the Electricity Act, 2003 read with Article 9 of the Power Purchase Agreement (PPA) dated 23.04.2021 seeking in-principle declaration of issuance of Notification dated 19.10.2022 and 01.02.2023 as a event of Change in Law. We also note that the Petitioner at this stage is seeking in-principle approval of its claim of Change in Law and the Respondent has raised objections to the said claim of the Petitioner. The Petitioner has also agreed to file its submissions to the contentions raised by the Respondent, hence let it be filed within two weeks' time with a copy to the Respondent. The Respondent is at liberty to file its Reply within two weeks' time with a copy to the Petitioner.

10. The next date of the hearing would be intimated separately.

11. Order accordingly.

Sd/-
(S.R. Pandey)
Member

Sd/-
(Mehul M. Gandhi)
Member

Sd/-
(Anil Mukim)
Chairman

Place: Gandhinagar

Date: 06/11/2024.