SKV LAW OFFICES

NEWSLETTER

ENERGY AND INFRASTRUCTURE

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GREEN INFRA WIND POWER GENERATION LIMITED AND ANR. VS. MESCOM

(07/09/2021)

INTRODUCTION

The Karnataka Electricity Regulatory Commission (**KERC**) by way of its Order dated 07.09.2021 has held that Green Infra Wind Power Generation Limited (**Green Infra**) does not qualify as a captive power plant for FY 2018-19 as Green Infra could not furnish relevant documentation. However, at the same time, the KERC by way of the Order set aside the demand notices issued by Mangalore Electricity Supply Company Limited (**MESCOM**) whereby MESCOM had imposed Additional Surcharge and Cross Subsidy Surcharge on Green Infra and its Captive user, M/s Bright Packaging Pvt. Ltd. (**Bright Packaging**) and also directed MESCOM to refund the amount already collected within 2 months.

BRIEF FACTS

Green Infra owns and operates a wind based Captive Generating Plant (**CGP**) situated at Harpanhalli. The power generated from the said captive generating plant is sourced to a group of captive users for their self-consumption, including Bright Packaging. Green Infra has also entered into Wheeling and Banking Agreement (**WBA**) with KPTCL, BSECOM, CESC and GESCOM.

In compliance with Regulation 4(3) of the KERC Open Access Regulations, 2004, MESCOM allowed Green Infra to operate as a captive generating plant.

Thereafter Bright Packaging was also accorded the captive user status by MESCOM for FY 2017-2018 and the power was supplied to said captive user by Green Infra without levy of CSS or AS on monthly basis in accordance with exemption proviso under Section 42(2) and (4) of the Act read with Rule 3 of Electricity Rules 2005.

On 18.09.2018, KERC issued a letter dated 18.09.2018 to all the Distribution Companies to monitor the captive status of generators/users under their jurisdiction. Vide the said letter, it was clarified that unless the Group captive Users have set a captive generating plant themselves for their own use, they cannot claim the status of 'Group Captive Power Plant Owners/Group Captive Users.

Despite the captive status granted to Green Infra, Mangalore Electricity Supply Company Limited (**MESCOM**) from March 2019 to November 2019 raised invoices/demand notices to Green Infra imposing Compact Sub Stations (**CSS**), AS and enhanced electricity tax thereby both being treated as a Non CGP and Non captive user respectively.

In fact MESCOM on 06.11.2019 issued a demand notice dated 06.11.2019 wherein CSS, AS and enhanced electricity tax to the tune of Rs. 1,71,14,528/- for the period of 01.04.2017 and 31.01.2019 was imposed.

Bright Packaging was compelled to pay the invoices/demands raised in February, 2019 till January, 2020 amounting to Rs. 1,68,88,486/- under protest.

Aggrieved by the aforesaid demand, Green Infra and Bright Packaging filed the Petition before KERC *inter alia* seeking setting aside invoices from March 2019 to November 2019 as well as the demand notice dated 06.11.2019 and a declaration that Green Infra is a CGP and Bright Packaging is its Captive user. In a nutshell, the main argument for seeking the demand notices was that as per Rule 3 of the Electricity Rules, 2005, complete verification can only be done at the end of the financial year and such a demand cannot be raised mid-year by MESCOM which is also subject to final verification by KERC.

RULING

The KERC while going through the material evidence placed on record as well as the relevant provisions of the Electricity Act opined that Green Infra has failed to place documents on record indicating the total equity shares issued by it and thereby has failed to demonstrate whether the requirement under Rule 3 of the Electricity Rules, 2005 have been fulfilled or not. Accordingly, Green Infra was not granted the status of CGP for FY 2018-19. However, at the same considering the demand raised midyear by MESCOM, demand notices issued by MESCOM were set aside and MESCOM was directed to refund the amount already received as CSS and AS along with differential electricity duty tax within 2 months from the date of the Order. MESCOM was also granted liberty to verify the captive status of Bright Packaging.

Please find the link for the Order here

> *In our view, KERC has passed a balanced Order in as much as the KERC while rejecting the plea of Green Infra and Bright Packaging by relying Section 2(8) of the Act read with Rule 3 of Electricity Rules, 2005, has set aside the demand notices issued by MESCOM whilst granting liberty to verify the captive status of Bright Packaging.*

SKV Comment

MNRE ISSUES CLARIFICATIONS FOR TIME EXTENSION IN RE PROJECTS

(15/09/2021)

INTRODUCTION

On 15.09.2021, the Ministry of New and Renewable Energy (**MNRE**) issued an office memorandum (**OM**) clarifying previous OM's issued by it with respect to time extensions granted in light of the ongoing pandemic. Reference was made to the OM's issued on 12.05.2021 and 29.06.2021.

BACKGROUND

During the first wave of Covid 19 in 2020, the Ministry of Finance had issued a notification granting a blanket time-extension of 5 months without any pre-requisite conditions attached to such extension. This notification was released on 13.08.2021. During the second wave, the MNRE issued a notification granting a time extension of 2.5 months to facilitate Renewable Energy (**RE**) projects. The second notification was issued subject to a condition which states that RE developer desirous of seeking such time-extension would have to give an undertaking that said the time-extension shall not be used as a ground for claiming termination of Power Purchase Agreement (**PPA**) or for claiming any increase in the project cost, including Interest During Construction (**IDC**) or upward revision of tariff.

However, the duress of the RE Project Developers was pointed towards them having to relinquish their right to claim reimbursement under change-in-law provision under the PPA which was pointed to the MNRE.

CLARIFICATION

MNRE examined the request of RE project developers and released the following clarifications:

- The time extensions granted in the OM's aforementioned is an out-of-contract concession extended by MNRE to facilitate RE projects. This time-extension is optional; and can be claimed by RE Project Developers/EPC contractors provided they do not claim any increase in project cost on account of this time extension of 2.5 months. This increase in project cost includes any possible impact due to any change-in-law event which would not have been there if this optional time extension was not claimed.

RE developers shall have the option of not claiming the time-extension as per MNRE's OMs (aforementioned), but approaching the appropriate forum as per their respective PPAs, for claiming appropriate time-extension as may be admissible.

Please find link to Office Memorandum here

> *Owing to the various unprecedented events brought forth by the COVID-19 pandemic followed by nationwide lockdown and its aftereffects, have caused wide disruption in various sectors including the Power Sector. Thus, MNRE, by passing the present OM, has taken a positive step by granting an out of contract extension of 2.5 months.*
>
> ***SKV Comment***

MSEDCL VS. MERC & ORS.

(20/09/2021)

INTRODUCTION

The Appellate Tribunal for Electricity (**Tribunal**) passed a judgment on 20.09.2021 wherein the Tribunal dismissed the appeal filed by Maharashtra State Electricity Distribution Company Ltd (**MSEDCL**) which arose out of an Order dated 02.08.2019 (**Impugned Order**) passed by the Maharashtra Electricity Regulatory Commission (**MERC**) in Review Petition bearing Case no. 105 of 2019. By way of the said Judgment, the Tribunal has directed the MERC to examine the financial affairs of the Distribution Companies (**DISCOMS**) and also take necessary and appropriate measures in accordance with the law to ensure that there is financial discipline.

BRIEF FACTS

On 20.08.2014, MSEDCL entered into a Wind Energy Purchase Agreement (**WEPA**) with Rajlakshmi Minerals (**Rajlakshmi**) for the entire quantum of electricity generated from the operation of its 3.40 MW power plant, which is situated in Kolhapur District of Maharashtra. The purchase price being determined at Rs. 5.81 per Kwh. It is noteworthy that WEPA contains a provision, *inter alia*, for levy of Delayed Payment Surcharge (**DPC**) at 1.25% per month in case of delay in payment beyond the due date.

Certain disputes had arisen over the years between MSEDCL and Rajlakshmi qua delayed payments being made by MSEDCL in terms of WEPA for the electricity supplied by Rajlakshmi to MSEDCL. Being aggrieved of the said fact, Rajlakshmi on 09.01.2019 filed Case no. 26 of 2019 before the MERC wherein the MERC by way of its order dated 26.03.2019, allowed the petition and not only directed MSEDCL to pay the outstanding dues but also directed that in the event of untimely payment, MSEDCL would pay penal interest at 1.25% per month.

Thereafter, a petition for review of Order passed in Case no. 105 of 2019 was filed by MSEDCL. However the said Review Petition was outrightly rejected by way of the Impugned Order.

In this backdrop, MSEDCL filed the Appeal before the Tribunal. In a nutshell, MSEDCL's case essentially was that the levy of penal interest, amounts to levy of interest on interest which is impermissible under the provisions of the Interest Act, 1978. On the other hand, the primary contention of Rajlakshmi was interest has been awarded not on the interest but upon the claim made.

RULING

The Tribunal while relying upon the various Judgments of the Supreme Court, namely, Central Bank vs. Ravindra in particular opined that the contention and the primary ground of challenge of MSEDCL that the Impugned Order essentially amounts to interest on interest is completely misplaced as the MERC has only awarded future interest on the "principal sum adjudged".

The Tribunal further while passing scathing remarks on the conduct of MSEDCL noted that in case MSEDCL's argument is accepted then it would create an ambiguous and unfair situation wherein defaulting parties would simply avoid meeting their payment commitments to generating companies.

In the backdrop of the above observations, the Tribunal passed the following directions:

(a) MERC was directed to determine the amount payable by MSEDCL to Rajlakshmi in terms of the Impugned Order and further monitor that MSEDCL shall follow the said directions within three months from the date of the said direction.

(b) The MERC was further to examine the financial affairs of MSEDCL, in order for a regime of financial discipline to be implied upon the DISCOMS including MSEDCL.

Please find a link to the Judgment here

"

In our opinion, this Judgment comes as a welcome move for Power Generators, especially at a time when every other DISCOM is taking the plea of financial sickness. The Tribunal has appreciated the fact that in case the financial discipline is absent from the payment regime between the parties, the same shall add unwanted litigation cost for all the stake holders. The said Judgment is a sigh of relief for all the Power generators who now have the benefit of the said Judgment in terms of which the DISCOMS shall now mandatorily pay the dues to its Creditors in a disciplined manner.

SKV Comment

TATA POWER RENEWABLE ENERGY LIMITED VS. MERC & ANR.

(20/09/2021)

INTRODUCTION

The Appellate Tribunal of Electricity (**Tribunal**) by way of its judgment dated 20.09.2021 has directed the Maharashtra Electricity Regulatory Commission (**MERC**) to pass a fresh order after determining the amount of compensation payable due to changes in the GST regime and the carrying cost in such respect. The said Judgment arose out of Order dated 30.04.2021 (**Impugned Order**) passed by MERC in a case filed by Tata Power Renewable Energy Limited (**TPREL**) seeking compensation on account of change in rate of Goods & Services Tax (**GST**) in terms of the Central Goods and Services Tax Act, 2017 (**GST Act**) as a Change in Law event in terms of the Power Purchase Agreement executed between TPREL and Maharashtra State Electricity Distribution Limited (**MSEDCL**).

BRIEF FACTS

Pursuant to a Tender floated by MSEDCL on 09.04.2018, TPREL emerged as one of the successful bidders on 09.05.2018 basis which a Letter of Award (**LoA**) and a PPA was executed between TPREL and MSEDCL. In terms of the PPA, TPREL was required to construct, operate and maintain the Solar PV Project. Accordingly, on 21.09.2018, TPREL entered into an EPC and Civil Works Construction Contracts with Tata Power Solar Systems Limited (**TPSSL**).

On 31.12.2018, Goods and Services Tax Council (**GST Council**), issued two Notifications by way of which GST at the rate of 8.9% was imposed on Supply and Service Contracts for setting up solar power plants instead of 5% and 18% on the taxable value of the Service Contracts for setting up Solar Power Plants.

Since the aforesaid Notifications were issued after TPREL submitted its bid and would have a direct bearing on the cost of the project, TPREL issued a Change in Law Notice to MSEDCL on 07.11.2019. Thereafter, TPREL filed an Amendment Application claiming compensation for such Change in Law event which was eventually rejected by the MERC in its final order on the ground that as per Prudent Utility Practices, TPREL was expected and required to construct solar plant economically. Therefore, by failing to do so, TPREL has lost opportunity of using legitimate lower tax rate of 5%. Aggrieved by the same, TPREL filed an Appeal before the Tribunal.

RULING

The Tribunal relied heavily on Coastal Gujarat Power Limited vs Central Electricity Regulatory Commission & Ors. wherein it was held that any change in tax or duties amounts to a Change in Law event and that a Regulatory Authority has a very limited role in such matters restricted to ascertaining whether the event is a Change in Law event, whether the same has a direct impact on the business and whether the terms of the PPA have been complied with.

In so far as the finding MERC's finding qua prudent utility practice is concerned, the Tribunal opined that the same has been totally misinterpreted by MERC as the term "prudent utility practice" has been used in the context of Operation and Maintenance of the power plant in the PPA and at the same time has failed to appreciate the term "prudence check". Further, going by this logic, the Change in Law Clause will in effect be rendered otiose. In this backdrop, the Tribunal set aside the Impugned Order and held as follows:

(a) Directed MERC to pass a fresh Order as clearly the event is a Change in Law event in terms of the PPA

(b) TPREL is also entitled to Carrying Cost for such Change in Law event.

Please find the link to the Judgment here

> *This Judgment rendered by the Tribunal once again reaffirms the role a Regulatory Commission has while adjudicating claim for change in law events and the fact that any event which occurs after the date of bid submission and has a direct impact on the business of the developer, is a Change in Law event.*

SKV Comment

MOP ISSUES GUIDELINES FOR UTILISATION OF FLY ASH

(22/09/2021)

INTRODUCTION

In recent years the utilisation of fly ash has observed a significant rise. As a result, fly ash has emerged to be a valuable commodity. The Ministry of Power, while recognising this and considering that the end users of fly ash are essentially commercial agencies, released a notification on 22.09.2021 in order to make the auction of fly ash a more transparent process by adopting the bidding process. This notification lays down the guidelines to be adhered to by all coal/lignite-based power plants while providing fly ash to the end users for all new commitments for supply of fly ash.

GUIDELINES

- All power plants shall provide fly ash to end users through a transparent bidding process only.

- If in any case there is leftover fly ash which remains un-utilized after the bidding/auction only then shall it be considered to be given free of cost on a first-come-first-serve basis if the user agency is willing to bear the transportation cost.

- If the fly ash still remains un-utilized despite the first two points aforementioned then the Thermal Power Plant (**TPP**) shall bear the cost of transportation of fly ash to be provided free to eligible projects.

- The end users shall be obligated to source the fly ash from the nearest TPPs to reduce the cost of fly ash transportation. If the nearest TPP refuses to do so, the end user project shall approach Ministry of Power for appropriate directions.

- The transportation cost wherever required to be borne as per provisions of Ministry of Environment Forest & Climate Change (**MOEF&CC**) notification by the power plants, shall be discovered on competitive bidding basis only. Thermal Power Plants shall prepare a panel of transportation agencies every year based on competitive bidding for transportation in slabs of 50km which may be used for the period. The TPPs shall call for bids well in advance so, that a transportation panel is in place as soon as the previous panel expires. There should not be gap between the expiry of one panel and the finalization of the fresh panel.

- The fly ash will be offered to the end users on the competing demand basis, i.e the end users who offer the highest price for fly ash and seek minimum support for transportation cost will be offered the same fly ash on priority. This will reduce the tariff of electricity and burden on the consumers.
- The power plants may offer fly ash subject to their technical restrictions such as all precautions required for Dyke Stability and Safety etc. The power plants having lower ash utilizations shall make all out efforts to increase the fly ash utilization.

Please find link to Notification here

> *This comes as a welcome move as it will encourage the TPPs to increase their fly ash utilisation drastically lessen the inherent mismatch between demand and supply of Fly Ash that has been there over the years to the detriment of the TPPs.*

SKV Comment

THE SUPREME COURT OF INDIA RECALLS ITS ORDER ON LIMITATION PERIOD

(23/09/2021)

INTRODUCTION

The Supreme Court of India by way of its Order in Suo Motu Writ Petition decided to end the extension to file cases/initiate proceedings and the limitation period shall start running from 03.10.2021. By way of the said Writ Petition, the Supreme Court was seized with the issue of extension of time where limitation is due to expire in light of the outbreak of Novel Coronavirus (COVID-19) and the subsequent lockdown imposed across the country.

BACKGROUND

The Supreme Court initially by way of its Order dated 23.03.2020 had suspended the period of limitation in all proceedings, irrespective of the limitation envisaged/specified under the general laws or special laws with effect from 15.03.2020 in light of the outbreak of COVID-19 and the subsequent lockdown imposed across the country.

Soon thereafter, the said blanket extension was also accorded to all arbitration proceedings under the Arbitration and Conciliation Act, 1996 by way of Orders dated 06.05.2020 and 10.07.2020.

On 08.03.2021, the Supreme Court whilst considering that the lockdown has been eased and physical hearings have also resumed in a phased manner, lifted the suspension of the limitation period on account of COVID-19.

However, due to the rampant outbreak of the second wave of COVID-19 in April 2021 across the country, the suspension of limitation was once again considered by the Supreme Court wherein the Order dated 23.03.2020 was restored and the period of limitation was once again suspended until further orders.

However, with a considerable drop in the number of cases of COVID-19 and the restrictions being lifted in a phased manner, the Supreme Court by way of Order dated 23.09.2021 recalled the Order dated 23.03.2020 and restored the Order dated 08.03.2021, thereby bringing an end to the suspension of the period of limitation.

DIRECTIONS

By way of the Order dated 23.09.2021, the Supreme Court passed the following directions:

a. Whilst computing the period of limitation, the period from 15.03.2020 till 02.10.2021 shall stand excluded and the balance period of limitation remaining as on 15.03.2021, if any shall become available from 03.10.2021.

b. Cases where limitation would have expired during the period from 15.03.2020 till 02.10.2021, all persons shall have a limitation period of 90 days from 03.10.2021. however in case the balance period of limitation remaining is more than 90 days, the longer period will apply.

c. The same dispensation of excluding the period 15.03.2020 till 02.10.2021 while computing limitation shall also apply to Arbitration and Conciliation Act, 1996, Commercial Courts Act, 2015 and Negotiable Instruments, Act 1881 and any other laws which prescribe limitation for initiation of proceedings.

Please find the link to the Order here

> *Considering the situation at present and that physical hearings have also started in a phased manner; this is a step in the right direction as it will ensure timely initiation of proceedings and prevent fence sitting by litigants.*

SKV Comment

SOLAR POWER DEVELOPERS ASSOCIATION V. PUNJAB STATE POWER CORPORATION LTD & ANR.

(24/09/2021)

INTRODUCTION

The Punjab State Electricity Regulatory Commission (**PSERC**) by way of its Order dated 24.09.2021 wherein the PSERC while noting the Must Run status accorded to Renewable Energy Generators held the Curtailment Notices dated 30.03.2020 issued by Punjab State Power Corporation Ltd (**"PSPCL"**) as illegal and that the 5% deductions arbitrarily made by PSPCL against their monthly energy invoices for the month of April 2020 to June 2020 be released.

BRIEF FACTS

Solar Power Developers Association (**SPDA**) is a registered society under the Society Registration Act of 1860 and is a national association representing solar energy developers. SPDA's seven members own and operate power plants located in Punjab and have been supplying electricity to PSPCL under the long term PPAs.

Due to nation-wide lockdown, there was a consequent decline in the demand of electricity due to closure of industries, commercial establishment, offices. PSPCL on 30.03.2020 considering the lockdown and the decline in the demand of Electricity, invoked the Force Majeure Clause under the PPA and directed SPDA to shut down their plants until further notice. Moreover, PSPCL from the following month started making part payment and started deducting 5% on account of the COVID-19 Pandemic.

Aggrieved by the aforesaid actions of PSPCL, SPDA approached the PSERC seeking a declaration that the Curtailment Notice dated 30.03.2020 is illegal and a direction against PSPCL to release of payments of 5% deductions made by PSPCL against the monthly energy invoices for the month of April 2020 to June 2020

The case of SPDA before the PSERC was essentially that the Curtailment Notice dated 30.03.2020 is against the ethos of the Act as well as the PSERC and CERC Grid Code Regulations read with the various notifications issued by the Ministry of Power and Ministry of New and Renewable Energy (**MNRE**) and the provisions of

the PPA. Further, it was also contended by SPDA that the arbitrary deductions made by PSPCL are also illegal and the same should be released forthwith.

On the other hand, PSPCL tried to defend its stance by contending that the Petition filed by SPDA is itself not maintainable as it has been filed by the Association and individual generators have not approached the PSERC. Further it was contended by PSPCL that PSPCL is not obligated to procure full energy generated by the SPDA as the PPA entitles PSPDCL to suspend the following obligation under Force Majeure conditions.

RULING

The PSERC while accepting the contention of PSPCL that PSPCL was under a Force Majeure event, namely COVID-19, noted in so far as either party being absolved from fulfilling their obligations is concerned, the same needs to be stablished. For the same, the terms of the PPA as well as the Grid Code Regulations cannot be disregarded.

A conjoint reading of the PPA and the State Grid Code Regulations, it is abundantly clear that a "must run" status has been accorded to Solar Power Generators such as the members of SPDA and the only event under which the same can be curtailed is when there is an issue with grid security or safety/equipment of personnel.

In fact, during the period of 01.04.2020 to 07.04.2020 when the demand had improved, PSPCL opted for curtailment of solar power generators such as members of SPDA thereby completely ignoring the must run status accorded to the members of SPDA. Therefore, the said action of PSPCL was held to be illegal and unjustified and PSPCL was directed to make the payments for the same, along with the late payment surcharge as may be applicable, as per the provisions of the PPA.

In so far as the arbitrary deduction of 5% done by PSPCL on account of COVID-19 during April 2020 to June 2020, PSERC while relying upon the provisions of the PPA opined that there is no such clause which grants liberty to PSPCL for the arbitrary and unilateral deduction. Accordingly, PSPCL was directed to release the same along with late payment surcharge in terms of the PPA.

Please find the link for the Order here

> *In our opinion, is another much needed Order for the RE Sector, especially at a time when the Distribution Companies in a high headed manner are resorting to curtailment of RE Sources while disregarding the ethos of the Act as well as the Must Run Status accorded to them.*

SKV Comment

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