

**BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION
AHMEDABAD**

Petition No.1210/2012

In the Matter of:

Application under Article 13 (Change in Law) of the Power Purchase Agreement dated 02.02.2007 entered into between Gujarat Urja Vikas Nigam Limited and Adani Power Ltd. for the adjustment of tariff.

Petitioner : Adani Power Limited,
Having its Registered Office at,
“Shikhar”, Near Mithakhali Circle,
Navrangpura, Ahmedabad-380009.

Represented by: Learned Advocate Shri Vikram Nankani with S/Shri
Kandarp Patel, Malav Deliwala and Vipul Jadav.

Versus

Respondent: Gujarat Urja Vikas Nigam Limited
Sardar Patel Vidyut Bhavan,
Race Course Circle, Vadodara-390007.

Represented by: Learned Advocate Shri M. G. Ramchandran
alongwith Anand Ganesan and Swapna Sheshadri
with S/Shri K.P. Jangid and S.K. Nair.

CORAM:

**Dr. P. K. Mishra, Chairman
Shri Pravinbhai Patel, Member (Technical)
Dr. M. K. Iyer, Member (Finance)**

ORDER

1. The present petition has been filed by the petitioner seeking the following reliefs:

- (a) To adjust and increase the tariff with regard to levy of customs duty @Rs. 0.103 per unit for all the energy removed from the Special Economic Zone(SEZ) to Domestic Tariff Area (DTA);
- (b) To adjust and increase the tariff with regard to levy of Clean Energy Cess and increase in per unit cost accordingly;
- (c) To adjust and increase the tariff with regard to levy of Green Cess and increase in per unit cost.
- (d) To adjust and increase the tariff with regards to imposition of Minimum Alternate Tax (MAT) in the financial year 2011-12 till the expiry of the Power Purchase Agreement (PPA) and give effect of it in the per unit cost.

2. The facts mentioned in the petition in brief are as under:

2.1 The petitioner is a company incorporated under the Companies Act, 1956 and engaged in the business of generation of the electricity. The petitioner has set up a power plant with a total capacity of 4620 MW at Mundra SEZ which consists of 4 Units (Unit No.1 to Unit No. 4) of the 330 MW each and 5 Units (Unit No. 5 to Unit No. 9) of 660 MW each. The petitioner has signed two separate PPAs with the respondent after being selected in the two separate Competitive Bidding Processes under Bid No.1 & Bid No.2 initiated by the GUVNL for supply 1000 MW power under each bid. Thus, it is a generating company within the meaning of sub-section 28 of section 2 of the Electricity Act, 2003.

- 2.2 The respondent is a company incorporated under the provisions of the Companies Act, 1956 and is also a licensee within the meaning of the Electricity Act, 2003 and procuring the electricity on behalf of the unbundled distribution licensees of the erstwhile GEB in the Gujarat State.
- 2.3 The respondent had initiated Competitive Bidding Process for procurement of 1000 MW power by inviting Bids under section 63 of the Electricity Act, 2003 as Bid No. 2. The petitioner had submitted his bid on 02.01.2007 for supply of 1000 MW (500 x 2 MW) power from the proposed power plant that was to be located in Chhattisgarh at a levelised tariff of Rs. 2.35/ unit for the entire period of the PPA, with an option to consider Mundra in Gujarat as an alternative project site.
- 2.4 The petitioner was selected as a successful bidder in Bid No. 02/LTPP/2006 invited by the respondent. Therefore, the petitioner and the respondent executed a Power Purchase Agreement (PPA) on 02.02.2007 for supply of 1000 MW from the power plant set up at Chhattisgarh at levelised tariff of Rs. 2.35 per kWh.
- 2.5 The PPA dated 02.02.2007 was subsequently amended on 18.04.2007 by the parties and a supplemental Power Purchase Agreement was signed between the parties, which stipulates that the power under this PPA will be supplied from the 5th & 6th units of 660 MW each to be set up at Mundra Power Project of the petitioner.

2.6 Both the Units No. 5 & 6 at Mundra SEZ have achieved Scheduled Commercial Operation Date (SCOD) and started commercial operation and power supply to the respondent.

2.7 Both the petitioner and the respondent agreed that whenever there is any change in law during the construction or operation of the power plant having impact on monthly tariff receivable by the petitioner as a burden on revenue or cost, the same shall be passed through. Accordingly, necessary provisions were made in Article 13 of the PPA according to which impact of Change In Law during the operation period, shall be effective from the date and in the manner as decided by the GERC. Both the units i.e. Units No. 5 and 6 of the petitioner have achieved the Scheduled Commercial Operation Date (SCOD) and the petitioner has commenced the supply of power to the respondent. Thus, the procurer, GUVNL, is now receiving the power during the operation period of the power plant, during which the impact of the change in law has been observed in the following aspects by the petitioner:

- (a) Levy of Custom Duty @ Rs. 0.103 per unit on electrical energy removed from SEZ into Domestic Tariff Area (DTA).
- (b) Levy of Clean Energy Cess for the use of coal including imported coal.
- (c) Levy of Green Cess @ 2 paisa per unit basis.

- (d) Minimum Alternate Tax (MAT) paid by the petitioner based on the book profits shown in annual accounts of the company.
- 2.8 Based on the above submissions, the petitioner submitted that the Commission may grant the reliefs sought by the petitioner as in para 1[(a) to (d)].
3. The respondent filed a reply contending, inter alia, that the petitioner should provide all necessary details and evidences on record to prove the change in law as claimed by the petitioner and its impact in Rs. per unit in the quoted tariff by the petitioner as per the provisions of the PPA.
- 3.1 As regard the impact of Change in Law pertaining to (i) Custom Duty, (ii) Clean Energy Cess and (iii) Green Cess are concerned, the petitioner was required to submit the details of calculation for payment made by the petitioner to the authority concerned with necessary receipt for it. Further, the petitioner is having a capacity of 1320 MW out of which 1000 MW capacity of unit No. 5 and 6 is allocated/contracted by the respondent. As such, the petitioner is required to pay the amount due to change in law only for the energy which was supplied by the petitioner to the respondent, and not for all the energy generated from the above units.
- 3.2 The respondent disputed the claim of the petitioner regarding adjustment of tariff on account of Minimum Alternate Tax (MAT), with consideration of the provision specified in the Article 13 i.e. Change in

Law in the PPA, which provides that any change in withholding tax on income will not qualify for change in Law. Therefore, adjustment in the tariff sought by the petitioner on account of MAT may not be allowed, as it is excluded as per the provisions of Article 13.1.1 of the PPA.

4. The matter was heard by the Commission on 02.06.2012, 21.07.2012, 21.08.2012 and finally on 15.09.2012.
5. In the light of the contentions of the petitioner and the respondent, the following issues emerge for decision of the Commission.
 - 1) Whether the Commission has jurisdiction to decide the disputes between the parties relating to change in law as per the terms of the PPA?
 - 2) Whether the claim of the petitioner towards levy of Custom Duty @ Rs. 0.103 per unit on the electrical energy removed from SEZ to Domestic Tariff Area is permissible?
 - 3) Is the petitioner entitled to recover the levy of Clean Energy Cess for use of coal, including imported coal, imposed by the Government of India?
 - 4) Is the claim of the petitioner for allowing levy of Green Cess @ 2 paise per unit imposed by the Government of Gujarat permissible? and

- 5) Whether the petitioner is eligible to recover MAT @ 18.5% imposed by the Government of India on SEZ w.e.f. 1.9.2011 as claimed by the petitioner and if eligible, the methodology of calculation of the same and its impact to the tariff?
6. The first question as to whether the Commission has jurisdiction to decide the disputes between the parties has to be dealt with in reference to the PPA dated 2.2.2007 signed between the petitioner and the respondent. The relevant article of the PPA relating to change of law is Article 13.2 of the PPA which reads as under:

“13.2 Application and Principles for computing impact of Change in Law

(a) Construction Period

As a result of any Change in Law, the impact of increase/decrease of Capital Cost of the Power Station in the Tariff shall be governed by the formula given below:

For every cumulative increase/ decrease of each Rupees 1.251 lakhs in the per MW Capital Cost, in relation to the installed Capacity, over the term of this agreement, the increase/ decrease in Non Escalable Capacity Charges shall be an amount equal to Zero point two six seven (0.267%) of the Non Escalable Capacity Charges. Provided that the Seller provides to the Procurer documentary proof of such increase/ decrease in

*Capital Cost for establishing the impact of such Change in Law.
In case of Dispute, Article 17 shall apply.*

It is clarified that the above mentioned compensation shall be payable to either Party, only with effect from the date on which the total increase/ decrease exceeds amount of Rs. 1.25 lakhs in the per MW Capital Cost.

b) Operating Period

As a result of Change in Law, the compensation for any decrease in revenue or increase/decrease in revenues or cost to the seller Shall be determined and effective from such date, as decided by the Gujarat Electricity Regulatory Commission payable whose decision shall be final and binding on both the parties, subject to rights of appeal provided under applicable Law.

Provided that the above mentioned compensation shall be payable only if and for increase/decrease in revenue or cost of the Seller is in excess of an amount equivalent to 1% of the value of the Letter of Credit in aggregate for the relevant Contract Year”.

- 6.1 As per the above articles, the impact of change in law in the form of increase/decrease in the revenue or cost incurred by the petitioner shall be determined by the Commission and shall be effective from

such date as decided by the Commission. Further, the Commission has accorded approval to the PPA entered in between the petitioner and the respondent as per Section 63 of the Electricity Act, 2003 based on the competitive bidding process initiated.

6.2 Moreover, the appropriate Commission defined in the PPA is Gujarat Electricity Regulatory Commission constituted under the Gujarat Electricity Industry (Regulation and Reorganisation) Act, 2003 or such other succeeding authority or commission as may be notified by Government of Gujarat from time to time. Therefore for any dispute pertaining to Power Purchase Agreement, this Commission is the only appropriate Commission.

6.3 The deviation in the bid No. 02/LTPP/2006 under which the petitioner was selected as successful bidder and the PPA executed between the petitioner and GUVNL were approved by the Commission. Therefore, also this Commission has jurisdiction to decide the dispute pertaining to this PPA.

6.4 The Commission has decided the disputes regarding termination of the PPA pertaining to this PPA in Petition No. 1000/2010 and the same was also challenged before the Hon'ble Appellate Tribunal for Electricity. In the said dispute the Commission has decided its jurisdiction.

6.5 From the above, we decide that this Commission has jurisdiction to decide the present dispute between the petitioner and the respondent

with regard to the impact of change in law, if any, in respect of the terms and conditions of the PPA.

7. With reference to question No. 2 as to whether the claim of the petitioner towards levy of Custom Duty is permissible as change in law, the petitioner and the respondent argued the same under Articles 13.1.1 and 13.2.

7.1 The petitioner has prayed to allow the custom duty @ Rs. 0.103 per unit for the energy removed from the SEZ area to DTA (Domestic Tariff Area) as a part of change in law. The Government of India by Notification No. 25/2010-Cus dated 27.2.2010 imposed custom duty @ 16% ad valorem with retrospective effect from 26.6.2009. The said Notification was amended subsequently by the Government of India vide Notification No. 91/2010 dated 6.9.2010 wherein the custom duty was revised to Rs. 100/- per 1000 kWh i.e. 10 paise per kWh. Accordingly, as per the aforesaid Notification the effective rate of duty works out as under:

Table-1

Particulars	Unit	Notification no. 91/2010 dated 06.09.2010
Basic Custom Duty	Rs./kWh	0.10 Rs./kWh
Education Cess	%	3%
Effective/ Applicable Custom Duty	Rs./kWh	Rs. 0.103/kWh

The petitioner argued that as per Article 13.1.1 any enactment, amendment, modification etc. shall be a change in law and the consequential liabilities should be borne by the respondent. The change in law can occur during the construction period as per Article 13.2(a) and operation period as per Article 13.2(b) and the same shall be determined by and will be effective from the decision of GERC. Article 13.4 provides for adjustment in the monthly tariff and can be charged through a supplemental bill. He contended that the Commission may approve the change in law as per Article 13.2 of the PPA.

7.2 The respondent while agreeing to the contention of the petitioner that imposition of custom duty constitutes change in law, submitted that the amount payable against this shall be restricted to the energy supplied by the petitioner to the respondent and not on whole of the energy generated from the above units. As against the plant capacity of 1320 MW, only 1000 MW capacity of the units 5 and 6 are allocated to the respondent and hence, the respondent shall pay to the petitioner the impact of custom duty as determined by the Commission for the actual energy supplied.

7.3 The Commission having heard both the parties and also on perusal of Articles of the PPA mentioned above, finds that custom duty, as imposed by the Government of India, qualifies to be considered as change in law and consequently the liabilities shall be paid by the

respondent at the rate of Rs. 0.103 per unit for the actual energy supplied after due verification of the relevant documents.

8. With reference to the claim of impact of levy of clean energy cess imposed by Government of India, the parties contended as below.

8.1 The petitioner argued that the clean energy cess was levied by the Government of India for using coal, including imported coal, as specified in the 10th Schedule of the Finance Bill, 2011 at the rate of Rs. 100 per tonne. Subsequently, notifications No. 1 of 2010 and 3 of 2010 dated 22.6.2010 were issued by the Government of India to levy clean energy cess as in excess of the amount calculated @ Rs. 50 per tonne w.e.f. 1.7.2010. The petitioner contended that the clean energy cess should be reimbursed by the respondent as it is a part of change in law. In order to compute the effect of clean energy cess on tariff, the petitioner submitted copy of the EPC contract along with the Service Contract, Supply Contract and Detailed Technical Specifications of Unit 5 and 6 of the project. The turbine cycle heat rate and the boiler efficiency as per the technical specifications are as under:

Table-2

Particulars	Unit
Turbine Cycle Heat Rate	1946 Kcal/Kwh
Boiler Efficiency	90.5%

The impact of the same on a per unit basis would work out to Rs. 0.02235.

8.2 The respondent submitted that while the clean energy cess qualifies for change in law as per Article 13 of the PPA, the computation of the impact of per unit clean energy cess is required to be recalculated keeping in view the auxiliary consumption of the plant at 6.5% instead of 7.5% as contended by the petitioner as the plant is super critical boiler. The per unit impact of the said Clean Energy Cess as worked out by the petitioner after considering the auxiliary consumption at 6.5% is as under:

Table-3

		As per the petitioner	As per the respondent
Station Heat Rate	Kcal/Kwh	2150.28	2150.27
Auxiliary Consumption	%	7.5%	6.5%
Gross Station Heat Rate	Kcal/Kwh	2324.62	2299.75
GCV (ARB) of Imported Coal	Kcal/Kg	5200	5200
Specific Coal Consumption	Kcal/Kwh	0.4470	0.4423
Clean Energy Cess	Rs./ MT	50	50
Per Unit Clean Energy Cess	Rs./Kwh	0.02235	0.0221

The petitioner agreed to consider the auxiliary consumption at 6.5% and agreed to the impact of Clean Energy Cess as proposed by the respondent.

8.3 The Commission has considered the arguments of both the parties and approves the impact of Clean Energy cess @ Rs. 0.0221 per kWh as it falls under the change in law category as per Article 13 of the

PPA after considering the auxiliary consumption at 6.5% as agreed by the parties. The petitioner shall submit necessary evidence in support of its claim and the same shall be paid by the respondent.

9. As regards imposition of Green Cess by the Government of Gujarat under the Green Cess Act, 2011 @ 2 paise per unit on generation of all kinds of electrical energy in Gujarat, except generation from renewable energy, the petitioner and respondent agreed for the same to be a change in law as per Article 13 of the PPA.

9.1 The Commission examined the levy of Green Cess by the Government of Gujarat. The said Cess was levied w.e.f. 01.08.2011 vide rules framed under the above Act and the relevant provisions of the Act are mentioned below.

Definition of Cess:

“Cess means a Green cess levied on generation of electricity in the State under section 3.”

Section 3 of the Gujarat Green Cess Act, 2011: “Levy of Green Cess”:

1) *There shall be levied and collected a cess for the purposes of this Act, on generation of electricity except on generation of renewable energy by the generating company at the generating station or at the captive generating plant or the stand by generating plant.*

2) *Such cess under sub-section (1) shall be levied and payable on the electricity generated in the State of Gujarat irrespective of the*

fact whether such electricity is consumed within the State or not.

- 3) *Such cess under sub-section (1) shall be levied in such manner and at such rate not exceeding twenty paise per unit of the electricity generated as may be prescribed.*
- 4) *The State Government may by notification in the Official Gazette, exempt from payment of the cess, the generating company having aggregate installed capacity of not more than one thousand kilowatts.*
- 5) *The cess levied under sub-section (1) shall be payable by the generating company.”*

As per the above provisions, it is observed that the green cess falls under the change in law category as agreed between the petitioner and the respondent. We, therefore, decide to allow the green cess levied by the Government of Gujarat on the actual energy generated and supplied to the respondent. The respondent shall pay to the petitioner after due verification and proof of such payment by the petitioner.

10. With regard to the petitioner's claim for recovery of MAT which was imposed by the Government of India on the SEZ w.e.f. 1.9.2011, the petitioner and respondent argued as below.

10.1 The petitioner submitted that at the time of submission of bid on 02.01.2007, the applicant enjoyed exemption from payment of Minimum Alternate Tax (MAT) under sub-section (6) of section 115 JB of the Income Tax Act, 1961, which provides that developer of SEZ would not be liable to pay MAT. However, in the Finance Act, 2011,

the said benefit was withdrawn and MAT was imposed on the unit and developer operating in SEZs. As such, the MAT became applicable to the petitioner w.e.f. 01.04.2011. The petitioner has paid an amount of Rs. 50 crore to the Income Tax Department on account of MAT. He argued further that the payment of MAT falls within Article 13.1 of the PPA and he is entitled to recover the amount of MAT from the respondent. The introduction of MAT in the SEZ area has an impact on economic position of the petitioner during the operation of the plant. All laws stated in the PPA include the Taxation Law as a part of change in law and hence, will have an impact on the revenue and cost of the petitioner.

10.2 The respondent contended in his response to the petition that MAT cannot constitute a change in law as it is in the form of withholding tax and as per Article 13.1.1 para 2 any change in withholding tax cannot be included to be a part of change in law and the question of paying or compensating the petitioner for MAT does not arise.

10.3 The petitioner in reply indicated that withholding tax is different and distinct as compared to MAT. Withholding tax is Tax Deducted at Source (TDS) governed by Chapter XVII, while MAT is covered under section 115 JB of Chapter XII B which is a special provision. MAT is a tax on income in lieu of corporate Income Tax which is levied as a percentage of book profits calculated in accordance with section 115 JB and hence, the same qualifies as a change in law and MAT paid should be reimbursed.

10.4 The respondent during the hearing further submitted that the genesis of bid submitted by the petitioner is required to be looked into. He indicated that the bid was submitted by the petitioner for setting up a plant in the State of Chhattisgarh and was subsequently shifted to Mundra SEZ, Gujarat as a matter of convenience to the petitioner. At the time of bidding the plant was to be set up in the State of Chhattisgarh, which was not an SEZ, and where the provisions of MAT were applicable and hence, when the petitioner bid for the project he would have considered the impact of MAT in his quoted price of Rs. 2.35 per kWh. Mere shifting, for his convenience, of the plant from Chhattisgarh to an SEZ in the Mundra area, where MAT was not applicable at the time of bidding, cannot be considered for reimbursement. Any imposition of MAT in the SEZ area subsequent to the shifting of the plant from Chhattisgarh to Mundra cannot be considered to be an additional imposition and reimbursed.

10.5 From the above arguments of the petitioner as well as the respondents, there are two questions which are required to be decided by the Commission.

- 1) Whether MAT constitutes a change in law?
- 2) And if the above is in affirmative, whether the petitioner is eligible to recover the same from the respondent?

10.6 As regards question No. 1 above, the Article 13.1.1 is required to be looked into, which reads as under:

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

(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement, or (iv) any change in the cost of implementing Environmental Management Plan for the Power Station;

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission.

Provided that if Government of India does not extend the income tax holiday for power generation projects, under Section 80 IA of the Income Tax Act, upto the Scheduled Commercial Operation Date of the power Station, such non-extension shall be deemed to be a Change in Law”.

The petitioner and respondent have interpreted the above Article of the PPA differently. It is important to note that in terms of the above definition of Change in Law there has to be a resulting effect in the cost or revenue from the business of selling electricity by the Seller to

the Procurer under the PPA for the Change in Law to be effected. This is specifically provided in Article 13.1.1 as well as Article 13.2.

10.6.1 Article 13.1.1 deals with four aspects. An important question which arises is whether the expression “which results in any change in any cost of or revenue from the business of selling electricity” at the end of sub-clause (iii) applies only to sub-clause (iii) or also to sub-clauses (i) and (ii). The petitioner has argued that the above expression applies only to sub-clause (iii), because the word “or” after each sub-clause is used disjunctively to separate the four different categories of events. On the other hand, the respondent argued that the above expression applies to all the three sub-clauses. A very significant aspect – which comes out if we go through the clause carefully - is that though the four sub-clauses (i) to (iv) are separated by “or”, there is no comma (,) before “or” preceding sub-clauses (ii) and (iii), whereas the “or” preceding sub-clause (iv) has a comma before it. This indicates that the first three sub-clauses are under one category and the last is of a different category. Hence, we are unable to accept the argument of the petitioner that all the “or” have been used disjunctively. The use or absence of comma before “or” indicates that the expression “which results in any change in any cost of or revenue from the business of selling electricity” at the end of sub-clause (iii) applies not only to sub-clause (iii) but also to sub-clauses (i) and (ii), but not to sub-clause (iv). In other words, mere coming into force of an enactment, amendment, modification, repeal

etc. in law or change in interpretation by the competent court is not to be considered as Change in Law under Article 13.1.1 unless it results in any change in any cost or revenue from the business of selling electricity. The qualifying criterion is effect on the cost or revenue of the business of selling electricity. This is further elaborated in Article 13.2(a) and (b).

10.6.2 The contention of the petitioner that the above qualification or criterion applies only to sub-clause (iii) would lead to an anomalous interpretation because sub-clauses (i) and (ii) will become meaningless. Every enactment coming into operation or change in interpretation cannot become a Change in Law for the purpose of the PPA unless it has some effect on the agreement between the parties.

10.6.3 The above interpretation becomes reinforced by the provisions of Article 13.2(a) and (b) dealing with the impact for such change which occur during the construction period and operation period. Both these provisions refer to increase and decrease of revenue and cost.

10.6.4 The reference to withholding tax or dividend distribution tax has been made to avoid any confusion on the issue whether withholding tax or dividend distribution tax be treated as a cost of business of selling electricity. Under the Income Tax Act, 1961, dividend distribution tax is paid by the company out of its revenue and is treated like other cost elements. Similarly, withholding tax is also treated like other cost elements. In view of the above, a specific

provision has been made to exclude them from the effect of Change in Law. MAT is post revenue and post cost appropriation element. It is a tax on the income of the assessee. It is neither a cost nor a revenue from the business of sale of energy. Hence, we cannot accept the argument of the petitioner that MAT being different from withholding tax is covered by Change in Law.

10.6.5 The proviso to Article 13.1.1 deals with the specific situation of section 80(IA) of the Income Tax Act ceasing to provide tax holidays. This provision itself speaks about the only exception where income tax would be considered at the later stage as a Change in Law. If the intentions of the Article 13.1.1 were to include MAT or Income Tax generally under the Change in Law provision, the proviso would be redundant. If the interpretation of the petitioner is accepted, then, change as effected in the income tax in regard to tax holiday would be a Change in Law governed by Article 13.1.1 itself, as it amounts to imposing tax on which there was total exemption. It would not be necessary to provide for this under a specific proviso. Hence, the proviso to Article 13.1.1 further corroborates the interpretation that the effect of MAT/income tax generally is not covered by the Change in Law.

10.6.6 There is also another factual aspect for not including such tax as a pass through in the tariff of a generation station where the PPA is entered in pursuance of the competitive bidding process as per Article 63 of the Electricity Act, 2003. There is no separate elements

of return on equity or reasonable return. These are all factored in the bidding price itself. The quantum of revenue or return is not identified in the bidding price. The tax including MAT being on the revenue, there is no identification of tax payable at the time being seven days prior to the bid deadline as envisaged under Article 13.1.1. Accordingly, it is not possible at all to factor the increase or decrease in the tax including MAT. This is different from the tariff determination u/s. 62 of the Electricity Act where one of the components allowed is tax on income. The pass through of MAT or income under Tariff Regulations is by virtue of the specific provision, which is not provided in section 63 of the Electricity Act, 2003.

10.6.7 In view of the above analysis, we conclude that in terms of Article 13 of the Power Purchase Agreement, the MAT or increase/decrease in MAT is not to be adjusted in the tariff. Thus, the answer to the question whether MAT constitutes a Change in Law in the context of Article 13 of the PPA is in the negative.

10.7 Assuming for the sake of argument that MAT is a separate imposition under the IT Act and falls within the clause 13.1.1.(i), the petitioner cannot invoke the provisions of Change in Law if the same is seen in the light of the original bidding as rightly contended by the respondent. The respondent had pointed out that when the petitioner bid for the supply of electricity under the Bids 02/LTPP/2006 called for by GUVNL, the petitioner had sought to supply electricity from its proposed plant at Chhattisgarh with an option to consider Mundra in

Gujarat as an alternative project site. In the absence of any breakup of the price of Rs. 2.35 per kWh it would be difficult to conclude that the element of MAT prevalent at the time of quoting was not factored in the price. Indeed, one can safely conclude that MAT must have been accounted for in the price quoted. The petitioner in the supplementary submission has indicated that once the bid has been made and accepted it would not be permissible to break up the price to find out the value of each component and the elements thereto. At the time of bidding, MAT was not applicable in the SEZ area whereas the same was prevalent in the Chhattisgarh area which was one of the plant sites contemplated by the petitioner. As such, the supplementary PPA changing the location from Chhattisgarh to Mundra does not straight away qualify the petitioner to take advantage of imposition of MAT at a subsequent date in the Mundra SEZ area. It may be pointed out that even at the time of signing of the supplemental agreement, the petitioner agreed to supply the power at the levelised tariff of Rs. 2.35 per kWh, the same as in the original bid. The original bid was with the consideration of the plant being set up in Chhattisgarh and when the bid was submitted, MAT was applicable and thus, MAT is a part of the tariff quoted by the petitioner. Hence, it does not qualify as change in law and not payable.

10.8 Thus, even if MAT constitutes a change in law, the same cannot be passed through in present case in view of the fact that MAT was already applicable at the original location of the plant and its impact

already computed in the levelised tariff of Rs. 2.35 per kWh by the petitioner at the time of quoting. Hence, it does not qualify for reimbursement.

11. In summary, we decide to allow the petition partially as under:

- 1) Custom Duty @ Rs. 0.103 per unit for the electricity supplied to the respondent is allowed to be passed on to the respondent.
- 2) Clean Energy Cess @ Rs. 0.0221 per unit on the actual electricity supplied to the respondent is payable by the respondent.
- 3) Green Cess @ Rs. 0.02 per kWh on the actual electricity supply to the respondent is payable by the respondent, and
- 4) The MAT does not qualify as a Change in Law, and also to impact the quoted tariff due to the fact that the same must have been considered at the time of bidding by the petitioner.

12. We order accordingly.

13. With this order, the present petition stands disposed of.

Sd/-
[Dr. M. K. Iyer]
Member (F)

Sd/ -
[Pravinbhai Patel]
Member (T)

Sd/-
[Dr. P. K. Mishra]
Chairman

Place: Ahmedabad.

Date: 07/01/2013