

No. N/48/49/50/51/52/53/54/2020

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
No.16, C-1, Millers Tank Bed Area, Vasanth Nagar, Bengaluru-560 052.

Dated:20.05.2022

Present

Shri H.M. Manjunatha : **Officiating Chairperson**
Shri M.D. Ravi : **Member**

OP No.10/2020

BETWEEN:

M/s Vivasvat Solar Energy Private Limited,
A Company Registered under the
provisions of the Companies Act,2013,
having its registered office at
138, Ansal Chambers II, Bikaji Cama Place,
Delhi-110 066,

...PETITIONER

(Represented by Sri. Sujit Ghosh Advocate,
for Law offices of Panag & Babu)

AND

Mangalore Electricity Supply Corporation Limited,
ESCOM Bhavan, MESCOM,
Bejai, Kavour Cross Road,
Mangaluru-575 004.

...RESPONDENT

(Represented by its Managing Director)

(Represented by Sri Shahbaaz Husain, Advocate,
for Precinct Legal)

OP No.11/2020

BETWEEN:

M/s Nokor Solar Energy Private Limited
138, Ansal Chambers II, Bikaji Cama Place,
Delhi-110 066, India.

...PETITIONER

(Represented by Sri. Sujit Ghosh Advocate,
for Law offices of Panag & Babu)

AND

Bangalore Electricity Supply Corporation Limited
A Company Registered under the Provisions of
Companies Act, 1956 having its Registered
Office at K.R. Circle,
Bengaluru-560 001
(Represented by its Managing Director)

...RESPONDENT

(Represented by Sri Shahbaaz Husain, Advocate,
for Precinct Legal)

OP No.12/2020

BETWEEN:

M/s Izra Solar Energy Private Limited
138, Ansal Chambers II, Bikaji Cama Place,
Delhi-110 066, India.

...PETITIONER

(Represented by Sri. Sujit Ghosh Advocate,
for Law offices of Panag & Babu)

AND

Chamundeshwari Electricity Supply Corporation,
CA-29, Vijayanagara 2nd Stage,
Hinkal, Mysore.
(Represented by its Managing Director)

...RESPONDENT

(Represented by Sri Shahbaaz Husain, Advocate,
for Precinct Legal)

OP No.13/2020

BETWEEN:

M/s Abha Sunlight Private Limited
138, Ansal Chambers II,
Bikaji Cama Place,
Delhi-110 066, India.

...PETITIONER

(Represented by Sri. Sujit Ghosh Advocate,
for Law offices of Panag & Babu)

AND

Chamundeshwari Electricity Supply Corporation,
CA-29, Vijayanagara 2nd Stage,
Hinkal, Mysore.
(Represented by its Managing Director)

...RESPONDENT

(Represented by Sri Shahbaaz Husain, Advocate,
for Precinct Legal)

OP No.14/2020

BETWEEN:

Renew Solar Power Private Limited
Flat NO.S-2, Gobind Bhawan, Gali No.-4A,
Tulsi Dass Street, Ansari Road,
Darya Ganj,
Delhi-110 002, India.

...PETITIONER

(Represented by Sri. Sujit Ghosh, Advocate,
for Law offices of Panag & Babu)

AND

Gulbarga Electricity Supply Company Limited
Station Main Road,
Gulbarga-585 102.
(Represented by its Managing Director)

... RESPONDENT

(Represented by Sri Shahbaaz Husain, Advocate,
for Precinct Legal)

OP No.15/2020

BETWEEN:

M/s Akhilagya Solar Energy Private Limited
138, Ansal Chambers II, Bikaji Cama Place,
Delhi-110 066, India.

...PETITIONER

(Represented by Sri. Sujit Ghosh, Advocate,
for Law offices of Panag & Babu)

AND

Bangalore Electricity Supply Corporation Limited
A Company Registered under the Provisions of
Companies Act, 1956 having its Registered
Office at K.R. Circle, Bengaluru – 560001
(Represented by its Managing Director)

...RESPONDENT

(Represented by Sri Shabaaz Hussain, Advocate,
for Precinct Legal)

OP No.16/2020

BETWEEN:

M/s Nokor Bhoomi Private Limited
138, Ansal Chambers II, Bikaji Cama Place,
Delhi-110 066, India.

...PETITIONER

(Represented by Sri. Sujit Ghosh, Advocate,
for Law offices of Panag & Babu)

AND

Chamundeshwari Electricity Supply Corporation,
CA-29, Vijayanagara 2nd Stage,
Hinkal, Mysore.
(Represented by its Managing Director)

...RESPONDENT

(Represented by Sri Shahbaaz Husain, Advocate,
for Precinct Legal)

COMMON ORDERS

1. The above seven petitions involve common questions of facts and law,
therefore, we heard all these cases together and clubbed these cases to

pass the final Orders. In all the petitions, the reliefs prayed are similar. The claim amounts in different cases vary to some extent. The petitioners are the Special Purpose Vehicles (SPVs) created by the Single Business Entity namely; ReNew Solar Power Private Limited which was declared as successful bidder in respect of different Solar Power Projects involved in the above cases. These petitions are filed for reimbursement of the additional capital cost incurred by the petitioners by way of payment of Safeguard Duty (SGD) and the GST paid on it on the Solar Panels imported from China PR, subsequent to submission of bids quoting the tariff taking into consideration the tax liability as it existed on the date of submission of bids.

2. Each of these petitions is filed under Section 86 (1) (f) of the Electricity Act, 2003, without quantifying the claim in the petition. Subsequently, in each of the petitions, the claim was quantified and the required Court fee was paid and the consequent amendment in the relief column was made inserting definite claim, praying for the following reliefs to:

- (a) Declare the imposition of safeguard duty on the import of solar modules as a Change in Law in terms of the PPA which have led to an increase in the recurring and non-recurring expenditure for the Project;
- (b) Direct payment of safeguard duty and IGST on account of safeguard duty in a lump sum;
- (c) Alternatively, direct payment of safeguard duty and IGST on account of safeguard duty in the form of annuity payment and evolve a suitable mechanism for the payment of the same.

(d) Grant interest/carrying cost from the date of impact till the date of reimbursement of the entire amount of safeguard duty and IGST on account of safeguard duty thereof;

(e) Pass such other and further reliefs as this Commission deems just and proper in the nature and circumstances of the case.

3. In each of the cases, the details of the claim made towards the payment of SGD and the GST on it, may be stated as follows:

Sl. No.	OP No.	Assessed Value of Modules supplied	SGD paid on the Assessed Value (in Rs.)	GST Paid on SGD (in Rs.)	Total (Column 4+5) Claim amount (In Rs.)
1	2	3	4	5	6
1	10/2020	43,56,08,874	8,71,21,775	43,56,089	9,14,77,863
2	11/2020	42,58,88,041	8,51,77,608	42,58,880	8,94,36,489
3	12/2020	44,70,79,586	8,94,15,917	44,70,796	9,38,86,713
4	13/2020	44,20,36,820	8,84,07,364	44,20,368	9,28,27,732
5	14/2020	43,84,51,059	8,76,90,212	43,84,511	9,20,74,722
6	15/2020	43,61,56,490	8,72,31,298	43,61,565	9,15,92,863
7	16/2020	43,60,60,679	8,73,23,136	43,60,607	9,15,72,743

4. The various particulars such as OP No., Parties Name, Project Location, Tariff discovered, Date of execution of PPA & Commercial Operation Date (COD) are stated below for easy reference:

Sl. No.	OP No.	Petitioner	Respondent	Project Location (Taluks)	Tariff discovered (in Rs. Per unit)	PPA Date	COD
1	2	3	4	5	6	7	8
1	10/2020	Vivasvat Solar Energy Pvt. Ltd	MESCOM	Babaleshwar	3.28	28.03.2018	25.10.2019
2	11/2020	Nokor Solar Energy Pvt. Ltd	BESCOM	Bailhongal	3.19	26.03.2018	27.10.2019
3	12/2020	Izra Solar Energy Pvt. Ltd	CESC	Gokak	3.24	24.03.2018	08.11.2019
4	13/2020	Abha Sunlight Pvt. Ltd	CESC	Kalghatagi	3.21	24.03.2019	11.11.2019
5	14/2020	Renew Solar Energy Pvt. Ltd	GESCOM	Bilagi	3.24	24.03.2018	02.11.2019
6	15/2020	Akilagya Solar Energy Pvt. Ltd	BESCOM	Gadag	3.19	26.03.2018	31.10.2019
7	16/2020	Nokar Bhoomi Pvt. Ltd	CESC	Navalgund	3.18	24.03.2018	30.10.2019

The Single Business Entity namely; ReNew Solar Power Private Limited had submitted the Techno-Commercial Bids in respect of all the locations in different taluks on 17.01.2018, as per Annexure-C, (wrongly mentioned as 09.03.2018 in the petitions). in compliance of the terms & conditions of RfP dated 07.12.2017. The ReNew Solar Power Private Limited was declared as successful bidder and issued LOAs dated 08.02.2018 with the usual terms & conditions. Pursuant to the LOAs issued, the petitioners who are the SPVs, executed PPAs with different ESCOMs as noted above. This Commission has communicated the approval of all the PPAs on 04.05.2018. The PPAs specify 18 months from the date of approval of PPAs for Scheduled Commissioning Date (SCOD). Therefore, in respect of all the Projects, the SCOD would fall on 03.11.2019.

5. The material facts relevant for the disposal of the present petitions as urged by the petitioners may be stated as follows:
 - a) The averments made in various petitions and the subsequent pleadings of the petitioners, are almost similar. The terms & conditions of all the PPAs executed between the parties are also similar.
 - b) The present petitions are filed seeking reimbursement of the SGD & GST paid on it on the Solar Modules imported from China PR, for establishment of the different Solar Power Projects. The petitioners have relied upon Article 15 of the PPA dealing with 'Change in Law', for claiming reimbursement of the SGD & GST paid on it, as a consequence of issuance of the Safeguard Duty (SGD) Notification dated 30.07.2018.

It is contended that the Single Business Entity had quoted the different Tariffs during the bidding process, taking into consideration all the liabilities then existing as on the date of submission of Techno-Commercial Bids. The terms & conditions of the different clauses in the RfP and different Articles in the PPA, provided for reimbursement of any additional expenditure to be incurred consequent to Change in Law after submission of the Techno-Commercial Bids. The petitioners have contended that the introduction of SGD Notification is a Change in Law and the consequent incurring of SGD & the GST payable on it, under the said SGD Notification is to be reimbursed by way of lump sum payment with carrying cost or by way of annuity for certain period or such other similar mode.

c) The averments made by the petitioners in all the petitions at paras 19, 20 (a & b), 26 & 29 relevant to understand the stand of the petitioners, are similar except in mentioning the name of different respondents at relevant places. The said paragraphs are extracted below:

“19 - Further, it is submitted that such imposition of safeguard duty would be in the nature of a tax and duty imposed on the import of solar cells and modules. Thus, with effect from 30.07.2018, the import of solar cells and modules into India would be leviable to a safeguard duty (in the nature of tax) at the rate of 25% ad valorem for the first year of imports, where after, the safeguard duty will be progressively liberalized.

20 – Thus, basis the above, the imposition of safeguard duty on the import of solar cells and modules, pursuant to the Safeguard Duty Notification would

qualify as a Change in Law Event in terms of the PPA in as much as:

- a) *Such imposition of safeguard duty by virtue of the Safeguard Duty Notification would be covered by the phrase introduction of any taxes and duties made applicable for setting up of the Project for supply of power on account of the fact that safeguard duty qualifies as a tax imposed on the solar cells and modules which are the primary component in the setting up of a solar power plant. Thus, the imposition of safeguard duty on imported solar cells and modules would in effect tantamount to an incremental tax cost accrued on the setting up of the solar power project.*

Further, the change in tax structure i.e., the imposition of safeguard duty has been brought into effect from 30.07.2018, which is much after the submission of the Technical Bid. Therefore, the imposition of safeguard duty vide Safeguard Duty Notification would qualify as a change in law event under the fifth bullet of Article 15.1 of the PPA and shall be to the account of CESC.

- b) *Alternatively, it is submitted that the imposition of safeguard duty is in the nature of an enactment of a new law in as much as the same has been imposed by a Notification of the Ministry of Finance which has come into effect on 30.07.2018, which is much after the date for submission of Technical Bid. Thus, the imposition of safeguard duty vide Safeguard Duty Notification would qualify as a change in law event even under the first bullet of Article 15.1 of the PPA.*

26 – IN terms of the first bullet of Article 15.1.1 of the PPA, in order to qualify as change in law, change in law event resulting in the increase in non-recurring expenditure must have occurred after the submission of Technical Bid. In the present case, the

petition submitted the Technical Bid on 09.03.2018. Thus, as the Safeguard Duty Notification came into effect on 30.07.2018, much after the date of bid submission and the non-recurring expenditure will be incurred from October, 2019 onwards, such imposition of safeguard duty would qualify as a change in law under the first bullet of Article 15.1.1 of the PPA.

29 – Further, Article 15.1.1 of the PPA provides that if any change in tax structure i.e., change in rate of tax or duty or introduction of any tax or duty has taken place after the date of submission of bid, then in such a case the effect of such change shall be to the account of BESCO and the consequent variation in tariff (whether proportionate increase or decrease) shall be in accordance with Article 15.2 of the PPA. The said Article provides that if the aggrieved party should approach before this Hon'ble Commission for seeking the approval of such change in law thereby obtain the consequent relief."

- d) The petitioners have given the particulars and other details regarding the additional expenditure incurred by them due to payment of the SGD & GST as a consequence of introduction of SGD Notification dated 30.07.2018.
- e) Each of the petitioners has entered into a separate Supply Agreements all dated 17.05.2019 in OP No.10/2020, OP No.11/2020, OP No.15/2020 & OP No.16/2020 & all dated 12.07.2019 in OP No.12/2020, OP No.13/2020 & OP No.14/2020, with ZNSHINE PV-Tech Company Limited (Supplier), for supply of Solar Modules for establishment of their respective Solar Power Projects. The PV Modules agreed to be supplied under each of the Supply Agreements vary between PV Modules

required for a total installed capacity ranging from about 26.57 MW_{DC} to 27.75 MW_{DC}. The Supply Agreement also contains other relevant terms & conditions. The supply of Solar Modules by the Supplier under the Supply Agreement, amounts to importing Solar Modules from China PR by the purchaser viz., the petitioners.

f) The petitioners have produced Bills of Entry, Invoices & other relevant documents for having imported Solar Modules from the Supplier. The petitioners have received the Solar PV Modules from Nhava Sheva Port, Navi Mumbai, mostly in between July 2019 and September 2019.

g) The petitioners have also produced the CA Certificate and other charts in support of the claim made in respective cases. The details of the claims made by the petitioners are brought out in earlier para 3 above and the allowable portions of it, will be narrated by us during the course of the Order.

6. In all the cases, the respondents appeared through the same counsel and filed separate statement of objections in each case. The defence of the several respondents, is almost same. The facts not disputed and the defence urged by the respondents opposing the claim of petitioners, may be stated as follows:

a) The issuance of the RfP and the participation of several bidders in the bidding process and the petitioners being successful bidders for development of the Solar Power Projects in different taluks and issuance of the LOA, execution of PPA and its approval by the Commission, etc.,

are not disputed. The import of Solar Modules is from China PR is also not in dispute.

- b) The averment that the imposition of SGD on import of Solar Cells and Modules, constitutes Change in Law is denied as false and erroneous.
- c) The petitioner is obliged to bear all the taxes and charges thereon under clause 5.1.1 (g) of the PPA and the said clause is not subject to the Article 15 relating to Change in Law, which leads to the conclusion that any change in tax rates shall be borne by the petitioners without being entitled to any kind of relief.
- d) No compensation for imposition of Safeguard Duty can be allowed, on account of the negligence of the petitioners in discharging their obligations imposed to act prudently and to mitigate losses, while establishing the Solar Power Projects. The reasons stated are as follows:
 - (i) The petitioners at the time of entering into the PPAs, ought to have known the intention of the Government to impose Safeguard Duty in the coming days on import of the solar cells and modules, thereby they should have at the earliest imported the solar panels, in which event the petitioners would not have been liable to pay Safeguard Duty and GST on it under the SGD Notification. The petitioners not adopting such a course amounted to negligence for which the petitioners cannot claim the reimbursement of Safeguard Duty and GST paid on it.

- (ii) That the petitioners making their minds to import solar panels subjected to Safeguard Duty is not a prudent act. The petitioners ought to have chosen to import the solar panels from developing countries other than China PR & Malaysia for which there would not have been any burden of Safeguard Duty. These respondents cannot be burdened by the choices made by the petitioners in importing the solar cells subjected to Safeguard Duty.
- (iii) In addition to the option of importing solar panels from countries which would not attract Safeguard Duty, the petitioners also had the choice of purchasing the solar panels from India which would work out much cheaper without resulting in any incremental cost. The petitioners could have obtained the solar panels at competitive rate without attracting the Safeguard Duty. The petitioners have not placed any material to show that it explored the quotes for solar panels from Indian manufacturers and other countries to ascertain the competitive rates than the rates of solar panels to be imported from China PR. Without placing such material, the petitioners are not entitled to reimbursement of the Safeguard Duty.
- (iv) That the solar panels required for production of 20 MW power alone should be considered for reimbursement of Safeguard Duty and the GST payable on it. These respondents have accordingly contended that the import of solar modules by the petitioners in excess of

contracted capacity of 20 MW, cannot be considered for reimbursement.

(v) These respondents have suggested the mode of payment of the amount payable to the petitioners that may become due as a consequence of SGD Notification by way of incremental tariff without considering the depreciation, interest on working capital, degradation and discounting factor. The reasons stated are that such tariff components are to be applied only on the capital cost and not on any taxes which are to be compensated as per actuals, as in the present cases.

e) The petitioners have not placed in the present cases all required material to establish that the Solar Panels imported were actually installed at the Project Sites. Thereby the claim made by them for reimbursement of Safeguard Duty is untenable.

f) The respondents have denied the validity and correctness of the contentions raised by the petitioners for installing Solar Modules in excess of the Modules required for contracted capacity of 20 MW.

g) Therefore, in all the cases the respondents have prayed for dismissal of the petitions.

7. The petitioners have filed rejoinders in each of the cases, denying the contentions raised by the respondents. It is contended that importing Solar Modules from China PR was a prudent commercial decision taken by the petitioners for which there was no legal impediment.

8. During the course of hearing, this Commission had directed for joint inspection of the Project Sites to verify the number of Solar Modules actually installed at the spot. Accordingly, the respondents viz., MESCOM, BESCO & GESCOM have filed their joint inspection reports in OP No.10/2020, OP No.11/2020, OP No.15/2020 & OP No.14/2020. However, the respondent viz., CESC has not filed joint inspection reports in OP No.12/2020, OP No.13/2020 & OP No.16/2020 . The respondents have filed CEIG reports in all the cases.
9. We have heard the learned counsel for the parties. They have also filed their written submissions in all the cases.
10. After considering the submissions of the parties and their pleadings and records, the following issues are for our consideration:

Issue No.1: Whether the petitioners prove that the imposition of Safeguard Duty vide Notification No.01/2018-Custom (SG) dated 30.07.2018 issued by the Ministry of Finance, Government of India, on import of Solar Modules or Panels from China PR amounts to Change in Law as per Article 15 of the PPA?

Issue No.2: Whether the terms of PPA, obligate the petitioners to avoid payment of Safeguard Duty by importing Solar Modules or Panels from Developing Countries other than China PR & Malaysia or purchasing the same from domestic market, as contended by respondents?

Issue No.3: Whether the petitioners were entitled to install Solar Modules or Panels in excess of the contracted capacity of 20 MW_{AC} on DC side of the power projects in OP No.10/2020, OP No.11/2020,

OP No.12/2020, OP No.13/2020, OP No.14/2020, OP No.15/2020 & OP No.16/2020? If so, with what restrictions?

Issue No.4: Whether the petitioners are entitled to reimbursement of Safeguard Duty and the GST paid on it, on the entire quantum of Solar Modules/Panels installed on DC side of the Projects?

Issue No.5: What shall be the mode of reimbursement of the Safeguard Duty and GST found payable to the petitioners?

Issue No.6: To which reliefs the petitioners are entitled to?

Issue No.7: What Order?

11. After considering the records and the submissions of the parties, our findings on the above issues are as follows:

12. Issue No.1: Whether the petitioners prove that the imposition of Safeguard Duty vide Notification No.01/2018-Custom (SG) dated 30.07.2018 issued by the Ministry of Finance, Government of India, on import of Solar Modules or Panels from China PR amounts to Change in Law as per Article 15 of the PPA?

a) That the Ministry of Finance (Department of Revenue), Government of India, issued Notification No.01/2018-Customs (SG) dated 30.07.2018 published in The Gazette of India on 30.07.2018 as per Annexure-P4, which reads as follows:

“GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(Department of Revenue)
NOTIFICATION
New Delhi, dated the 30th July, 2018
No.01/2018-Customs (SG)

G.S.R. 717 (E) – Whereas, in the matter of import of “Solar Cells whether or not assembled in modules or panels” (hereinafter referred to as the subject goods), falling under heading 8541 or tariff item 8541 40 11 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) (hereafter referred to as the Customs Tariff Act), the Directorate General of Trade Remedies vide final findings F.No.22/1/2018-DGTR, dated the 16th July, 2018, published in the Gazette of India, Extraordinary, Part I, Section 1, on 16th July, 2018, has recommended the imposition of safeguard duty on subject goods falling under heading 8541 or tariff item 8541 40 11 of the First Schedule to the Customs Tariff Act for a period of two years at the rate specified herein below:

Now, therefore, in exercise of the powers conferred by sub-section (1) of section 8B of the Customs Tariff Act, read with rules 12, 14 and 17 of the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997, after considering the said findings of the Directorate General of Trade Remedies and subject to the provisions of paragraph 2, hereby imposes on subject goods falling under heading 8541 or tariff item 8541 40 11 of the First Schedule to the Customs Tariff Act, when imported into India, a safeguard duty at the following rate, namely:-

- (a) Twenty five per cent. ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th July 2018 to 29th July, 2019 (both days inclusive);
 - (b) Twenty per cent. ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th July, 2019 to 29th January, 2020 (both days inclusive); and
 - (c) Fifteen per cent. ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th January, 2020 to 29th July, 2020 (both days inclusive).
2. Nothing contained in this notification shall apply to imports of subject goods from countries notified as developing countries vide notification No.19/2016-Customs (N.T.) dated 5th February, 2016, except China PR and Malaysia.

sd/-

(MOHIT TEWARI)

Under Secretary to Government of India.”

b) In substance, the effect of the above Notification would amount to imposing Safeguard Duty on import of solar cells from China PR and Malaysia which were developing countries, irrespective of the fact whether such solar cells are assembled or not in modules or panels imported for two years at the rates specified as under:

- (i) 25% ad valorem, minus anti-dumping duty payable, if any, when imported during the period from 30.07.2018 to 29.07.2019 (both days inclusive);
- (ii) 20% ad valorem, minus anti-dumping duty payable, if any, when imported during the period from 30.07.2019 to 29.07.2020 (both days inclusive);
- (iii) 15% ad valorem, minus anti-dumping duty payable, if any, when imported during the period from 30.01.2020 to 29.07.2020 (both days inclusive);

c) The opening part of the Change in Law as stated in Article 15.1.1 of the

PPA reads as follows:

15.1.1 "Change in Law" means the occurrence of any of the following events after the Effective Date resulting into any additional recurring/non-recurring expenditure by the Developer or any income to the Developer:

The ingredients of Change in Law from the above opening part, may be derived as follows:

- (i) Occurrence of an event as narrated in this Article after the Effective Date;
- (ii) Which results into:

- (a) any additional recurring/non-recurring expenditure by the Developer; or
- (b) any income to the Developer:

Note: The 'Effective Date' is defined in PPA as the date of getting concurrence from KERC on the PPA. In the present cases all the PPAs executed in the last week of March, 2018, were approved by the Commission on 04.05.2018. It appears in the opening part of Article 15.1.1 of the PPA describing "Change in Law", the words "Effective Date" are wrongly inserted instead of the words "Date of submission of the Technical Bid". This inference is to be drawn on reading clause (e) of Article 15.1.1 of the PPA, which is as given below:

15.1.1 – *"Change in Law" means the occurrence of any of the following events after the Effective Date resulting into any additional recurring/non-recurring expenditure by the Developer or any income to the Developer:*

- (a) xxxxxxxxxxxxxxxx
- (b) xxxxxxxxxxxxxxxx
- (c) xxxxxxxxxxxxxxxx
- (d) xxxxxxxxxxxxxxxx

(e) *any change in taxes and duties or introduction of any taxes and duties made applicable for setting up of the Project and supply of power by the Developer as per the terms of this Agreement. The Bidder shall consider all the prevailing taxes and duties applicable on the date of submission of Technical Bid while submitting the Bid for the Project(s). If any such above prevailing taxes and duties are not considered or omitted or ignored, then it shall be accepted that the Bidder has considered all such taxes and duties in its Bid. Any change in law pertaining to taxes and duties after the date of submission of Technical Bid shall be to the account of the ESCOMs and appropriate change in tariff, either increase or decrease in proportionate, due to the change in taxes and duties shall be as per clause 15.2 (Relief for Change in Law) of PPA.*

but shall not include (1) any change in any withholding tax on income or dividends distributed to the shareholders of the Developer, or (ii) any change on account of regulatory measures by the KERC, or (iii) any change in the KERC approved tariff as compared to the approved tariff exist as on the Bid Due Date."

In the present cases, the PPAs have been executed in the last week of March, 2018 and all the PPAs were approved by the Commission on 04.05.2018. The SGD Notification was issued on 30.07.2018. Hence, the imposition of SGD is subsequent to the date of submission of Technical Bid as well as the date of approval of the PPAs, thereby not affecting the right of the developers to realise the benefit of Change in Law.

d) The last date for submission of online Techno-Commercial Bid was on 08.01.2018. The petitioners have submitted online Techno-Commercial Bid within the stipulated period. Subsequently, the SGD Notification was issued on 30.07.2018, imposing Safeguard Duty for a period of two years as stated therein, for the import of Solar Cells whether or not assembled in modules or panels. Therefore, the import of Solar Modules/Panels from China PR within two years from 30.07.2018 would be liable for Safeguard Duty, resulting into additional expenditure by the Solar Power Developers.

e) The respondents in their statements of objections at para 4 have denied that the imposition of the SGD on import of Solar Cells & Modules constitutes Change in Law. Except this bare defence, no supporting reasons are stated. Article 15 of the PPA dealing with Change in Law

clearly covers the imposition of SGD as an event of Change in Law.

Therefore, such defence is to be rejected.

f) According to the respondents, the petitioners were not entitled to reimbursement of the Safeguard Duty and the GST paid on it or at least a part of it, for the reasons urged by them in the statement of objections, which we discuss under other issues.

g) For the above reasons, we hold Issue No.1 in affirmative.

13. Issue No.2: Whether the terms of PPA, obligate the petitioners to avoid payment of Safeguard Duty by importing Solar Modules or Panels from Developing Countries other than China PR & Malaysia or purchasing the same from domestic market, as contended by respondents?

a) The respondents in their statements of objections, have stated in detail the reasoning as to why the petitioners should have opted for purchasing the Solar modules or Panels from developing Countries other than China PR or Malaysia or from the domestic market. The gist of the grounds alleged are that:

(i) That it is a settled principle of law that the petitioners cannot seek compensation for the losses arising out of its own or its agent's negligence. That it is incumbent upon the petitioners to prove that no such negligence can be attributed to them or to their agent's actions and omissions.

- (ii) Article 5.1.2 of the PPA mandates the petitioners to follow “Good Industry Practice” and be prudent in mitigating such losses as may arise from time to time, which the petitioners have failed to do in the present petitions.
- (iii) It is a trite position of law that a person, while undertaking transactions which can adversely affect others, should exercise the same standard of care which the person would have ordinarily taken to mitigate the adverse effects that would otherwise impact only him. A prudent person takes all possible measures to minimise and mitigate any personal loss. Likewise, if the action of the same person can adversely affect others, a duty is cast on the person to act prudently as though the said adverse effects could impact him personally.
- (iv) In the instant cases, had it not been for the provisions of Change in Law which allows for the passing of SGD, the petitioners would have acted differently to mitigate the expenditure on account of imposition SGD. If there was no provision to pass on the SGD to the respondents, the petitioners would have been liable to bear the burden of the SGD. In such a scenario, the petitioners would have in all likelihood opted for options such as procurement of products from within India which would not attract SGD.
- (v) During relevant period, sufficient quantity of Solar Modules/Panels were available in domestic market.

- (vi) The petitioners could have purchased the solar modules/panels before issue of SGD Notification dated 30.07.2018. It is contended by these respondents that PPAs were executed in the last week of March 2018 and this Commission has approved the PPAs on 04.05.2018 and the petitioners were well aware of the likelihood of imposition of SGD even prior to execution of the PPAs. Therefore, it is contended that the petitioners should have purchased the solar modules/panels earlier to SGD Notification dated 30.07.2018.
- b) The petitioners in their rejoinders filed by them, have denied the grounds as noted above urged by the respondents and have stated that the import of Solar modules or Panels from China PR was essential and it was a prudent commercial decision required to be taken by the petitioners for commissioning the projects within the time allowed under PPAs. The petitioners have further contended that the terms of PPAs have allowed the reimbursement of the Safeguard Duty, thereby the respondents cannot legally find fault in procuring the Solar Modules from China PR. Further, it is contended that the grounds urged by the respondents are irrelevant. Further that the domestic market was not in a position to meet the local demands for the Solar Modules.
- c) In support of their contentions, the respondents relied upon the following relevant part of Article 5 and also the definitions of 'Good Industry Practice' and 'Prudent Utility Practices' stated in the PPA, which are as follows:

Article 5: Obligation of the Developer:

5.1 Obligation of the Developer:

5.1.1 Subject to and on the terms and conditions of this Agreement, the Developer shall at its own cost and expense:

- a) procure finance for and undertake the designing, constructing, erecting, testing, commissioning and completing of the Power Project in accordance with the Applicable Law and Grid Code observe, fulfil, comply with and perform all its obligations set out in this Agreement or arising hereunder;
- b) xxxxxxxxxxxx
- c) xxxxxxxxxxxx
- d) xxxxxxxxxxxx
- e) xxxxxxxxxxxx
- f) xxxxxxxxxxxx
- g) xxxxxxxxxxxx

5.1.2 The Developer shall discharge its obligations in accordance with Good Industry Practice and as a reasonable and prudent person.

“Good Industry Practice” - means the practices, methods, techniques, designs, standards, skills, diligence, efficiency, reliability and prudence which are generally and reasonably expected from a reasonably skilled and experienced operator engaged in the same type of undertaking as envisaged under this Agreement and which would be expected to result in the performance of its obligations by the Developer in accordance with this Agreement, Applicable Laws and Applicable Permits in reliable, safe, economical and efficient manner;

“Prudent Utility Practices” shall mean the practices, methods and standards that are generally accepted internationally from time to time by electric utilities for the purpose of ensuring the safe, efficient and

economic design, construction, commissioning, operation and maintenance of power generation equipment and which practices methods and standards shall be adjusted as necessary, to take account of:

a) operation and maintenance guidelines recommended by the manufacturers of the plant and equipment to be incorporated in the Power Projects;

b) the requirement of Indian Law; and physical conditions at the site of the Power Projects”.

d) We have carefully considered the above contentions and the provisions contained in the PPAs. We are of the considered opinion that the contentions advanced by the respondents in this regard cannot be accepted for the following reasons:

(i) As a matter of fact, the respondents have not produced any documentary evidence or relied upon any acceptable circumstance to establish their contentions regarding the competitive price and quality and abundant availability of the modules or panels as per the requirements of the project developers in the domestic markets. The burden of proving that the Solar Modules/Panels imported from Developing Countries other than China PR and Malaysia or procured from domestic market were equally or more efficient and were available abundantly in meeting the demands, is on the respondents. Except the say of the respondents which has been denied by the petitioners, they have not produced reliable evidence/material for accepting the said contentions.

(ii) In the presence of a specific provision in the PPA for reimbursement of the additional cost incurred by way of payment of Safeguard Duty, the respondents cannot rely on an implied term to be derived from the obligations undertaken by the petitioner, as narrated in the PPA, to deny the reimbursement of the payment made towards Safeguard Duty and the GST on it.

(iii) If the import of Solar Modules/Panels from China PR or Malaysia was intended to be discouraged by imposing Safeguard Duty, the SGD Notification should have contained a proper term that in no case, the Safeguard Duty would be a pass through from the purchaser of the Solar Power, under Article 15 of the PPA providing relief for Change in Law. In the absence of such term in the SGD Notification or a corresponding similar term in the PPA executed between parties, the petitioners could not be obliged to purchase Solar Modules/Panels from places other than China PR & Malaysia.

iv) The contention of the respondents that the petitioners should have purchased the solar modules/panels before issuance of the SGD Notification dated 30.07.2018 as there was possibility of imposing SGD on the import of solar panels, is legally not well-founded.

e) For the above reasons we hold Issue No.2 in Negative.

14. Issue No.3: Whether the petitioners were entitled to install Solar Modules or Panels in excess of the contracted capacity of 20 MW_{AC} on DC side of the power projects in OP No.10/2020, OP No.11/2020,

OP No.12/2020, OP No.13/2020, OP No.14/2020, OP No.15/2020 & OP No.16/2020? If so, with what restrictions?

- a) The petitioners have entered into separate supply agreements dated 17.05.2019 & 12.07.2019 as noted earlier with ZNSHINE PV-Tech Company Limited for supply of Solar Modules. Pursuant to these supply agreements, the solar modules were supplied in the months of July, August & September of 2019. Therefore, the import of solar modules attracted the imposition of SGD as per SGD Notification dated 30.07.2018.
- b) The petitioners have contended that they are at liberty to install on DC side of the projects, the solar modules/panels in excess of the contracted capacity of 20 MW_{AC}. On the other hand, the respondents contended that even on DC side of the projects, the petitioners were not entitled to install solar modules/panels in excess of the contracted capacity of 20 MW_{AC}.
- c) This controversy is to be resolved on the basis of relevant provisions contained in the PPAs. All the PPAs executed by the petitioners and respondents, contain exactly the similar terms & conditions. The 'Contracted Capacity' is defined in the PPA as 20 MW contracted with ESCOM for supply by the developer to ESCOM at the Delivery Point from the solar power project. The definition of 'Capacity Utilisation Factor' (CUF) also makes it clear that the CUF was expressed in AC terms in the PPA. Further, the definition of 'Installed Capacity' is as follows:

"Installed Capacity" - shall mean {the name plate capacity of all the units of the Solar PV Project

reckoned at Generator Terminals or the AC Rating of the Solar PV Project at Delivery Point}.”

The opening para of Article 5.6 of the PPA states regarding 'Right to Contracted Capacity & Energy' which reads as follows:

“5.6 Right to Contracted Capacity & Energy:

ESCOM, at any time during a Contract Year, shall not be obliged to purchase any additional energy from the Developer beyond 45.552/40.9968 Million kWh (MU) corresponding to a maximum CUF of 26% for Solar PV projects. If for any Contract Year, it is found that the Developer has not been able to generate minimum energy of 24.528/22.0752 Million kWh (MU) corresponding to a CUF of 14% for Solar PV Projects, on account of reasons solely attributable to the Developer, the non-compliance by Developer shall make the Developer liable to pay the compensation to the ESCOM. The amount of compensation shall be computed at the rate equal to 50% of the applicable tariff.

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Note:- In the two PPAs executed with BESCO Article 5.6 specifies that BESCO is not obliged to purchase any energy beyond 40.9968 MUs and the developer is liable for payment of compensation for supply of energy below 22.0752 MUs. In PPAs executed with other ESCOMs these limits are specified as 45.552 and 24.528 MUs.

d) It cannot be disputed that the parties had agreed that ESCOM shall not be obliged to purchase energy from the Developer beyond 45.552 MU/40.9968 MUs as the case may be corresponding to a maximum CUF of 26% and the Developer was required to generate minimum energy of 24.528 MU corresponding to a CUF of 14% and in case the Developer had not achieved the generation of minimum energy, he would be liable to pay compensation as stated in Article 5.6 of the PPA. It can also be

seen that Article 5.6 of the PPA further provides that in case of purchase of energy by ESCOM beyond 45.552 MU/40.9968 MUs the Developer would be entitled to the price at 75% of the PPA tariff or 75% of the applicable APPC Charges whichever is less.

e) In this connection, it is also useful to note the Advisory/Clarification dated 05.11.2019 issued by the Ministry of New & Renewable Energy (MNRE) which reads as follows:

“Advisory/Clarification

Sub: Advisory/Clarification w.r.t. D.C. Capacity of
Solar PV Power Plants.

- - -

- (1) *MNRE has received representations from various Solar Developers/Solar Developer Associations that recently few States have raised questions and concerns around globally adopted practice of installing additional DC capacity, over and above the nameplate/contracted AC capacity, with the objective of meeting the committed Capacity Utilisation Factor (CUF) in Power Purchase Agreements (PPAs)/Power Supply Agreements (PSAs).*
- (2) *It has further been stated that the State Governments feel that installation of such additional capacity serves as a medium for additional revenue generation for the developers and that such additional DC capacity cannot be allowed.*
- (3) *The issue has been examined in the Ministry of New & Renewable Energy (MNRE), and it is noted that:*
 - i. *As per the present bidding practice, the procurer, whether State Government Agencies/DISCOMs or Central Government entities like SECI/NTPC, invite bids from solar power developers for setting up solar PV power plant of a certain capacity (MW). The capacity won by the successful bidder (solar PV power developer), on signing of Power Purchase Agreement (PPA) becomes the “Contracted Capacity”, which is the capacity (MW) in AC terms, allocated for supply by that bidder.*
 - ii. *Along with ‘Contracted Capacity’, the PPA also provides for a range of energy supply based on Capacity Utilisation Factor (CUF). While the procurer is not*

obligated to buy energy beyond this range, the developer is liable for penal charges for supply of energy less than the minimum committed energy or minimum committed Capacity Utilisation Factor (CUF).

- iii. Thus, the PPAs define the relationship between the Solar Developers and the procurer in terms of AC capacity, and range of energy supply based on CUF, with procurement obligation within this range.*
- iv. The requirement of designing and installation of additional PV panels may emanate from the contractual need to supply the committed energy and does not cast any obligation on the procurer to buy generation in excess of the contracted energy range.*
- v. The procurer, without getting into the design and installation of solar capacity on the DC side, should only ensure that the AC capacity of the solar PV power plant set up by the developer corresponds with the contracted AC capacity and that, at no point, the power (MW) scheduled from the solar PV power plant, is in excess of the contracted AC capacity.*

(4) Accordingly, all concerned hereby advised that:

- i. As long as the solar PV power plant is in accordance with the contracted AC capacity and meets the range of energy supply based on Capacity Utilisation Factor (CUF) requirements, the design and installation of solar capacity on the DC side should be left to the generator/developer.*
- ii. Even if the installed DC capacity (MWp) [expressed as the sum of the nominal DC rating (Wp) of all the individual solar PV modules installed] in a solar PV power plant, is in excess of the value of the contracted AC capacity (MW), it is not violation of PPA or PSA, as long as the AC capacity of the solar PV power plant set up by the developer corresponds with the contracted AC capacity and that, at no point, the power (MW) scheduled from the solar PV power plant is in excess of the contracted AC capacity, unless there is any specific clause in the PPA restricting such DC capacity.*
- iii. The contracting party is not obliged to buy any power in excess of the contracted quantum. There is provisional*

penalty in case the supply falls short of the contracted quantity.

- iv. *As per law, the setting up of generation capacity is an unlicensed activity and therefore any person is entitled to set up any capacity which he desires to set up, and sell power to any entity which may want by it.*

(5) This issues with the approval of Hon'ble Minister (Power & NRE).

*sd/-
(Sanjay Karndhar)
Scientist-C"*

- f) The above Advisory/Clarification issued by the MNRE, Government of India, New Delhi, is not in contravention of any terms of the PPA. On the other hand, it reconciles the right of generator/developer to supply the energy up to 45.552 MU/40.9968 MUs corresponding to a maximum CUF of 26% and a liability to supply a minimum quantum of 24.528/22.0752 MUs. Therefore, it can be said that the petitioners at their discretion can install the Solar Panels or Modules on DC side of the Projects, exceeding the total number of Panels/Modules required for achieving the contracted capacity of 20 MW_{AC} to meet their right to supply up to the maximum quantum of energy and beyond it. The only restriction is that at any given point of time, the power should not be injected exceeding the contracted capacity of 20 MW_{AC}. The other restrictions are as stated in Article 5.6 of the PPA regarding the liability to supply a minimum quantum and a penalty for non-compliance of it and supply of energy up to a maximum quantum with normal tariff and the terms regarding

supply of excess energy more than the maximum obligation of the purchaser.

g) The above said twin purposes can be achieved by installing proper protection system involving relay equipment to limit AC capacity to 20 MW only at a given time, as per the standard practice. By installing such equipment, whenever the injection of power exceeds 20 MW_{AC}, the protection system would take care of it by tripping the supply line. Therefore, usually the generator/developer installs 'generation controlling equipment' when the installation of solar modules/panels exceeds, the number of panels required to reach 20 MW_{AC} power, at any given point of time. During early hours and late hours of the day time the solar radiation would be less, thereby generation of power would be less than the peak panel capacity of generation. During peak hours of the day, the solar radiation would be high and the energy generated would be up to the peak capacity of the solar module/panel. Thus, by using proper 'generation controlling equipment' the flow of power can be controlled up to the maximum contracted capacity agreed in the PPA.

h) The learned counsel for the petitioners relied upon the recent decision dated 16.11.2021 of the Hon'ble ATE passed in Appeal No.163 of 2020 between Nisarga Renewable Energy Private Limited Vs. Maharashtra Electricity Regulatory Commission and Another, in which in a somewhat similar situation, it is held that the generator/developer is at liberty to

install solar modules/panels on DC side of the project exceeding the modules/panels required to achieve the contracted capacity. In the above said judgment the Hon'ble ATE in para 36 has observed “.....*The higher installed DC capacity results in higher generation from the Project while using the same AC infrastructure, thereby optimising the utilization of AC infrastructure, leading to a lower cost of energy, benefits of which have statedly been passed to MSEDCL as lower tariff in terms of the PPAs. DC overloading is accepted as an industry practice for solar projects.....*”. In the earlier judgments passed by this Commission on similar disputes, it was held that the generator/developer was entitled to reimbursement of the Safeguard Duty and GST on it to such number of panels sufficient to meet the minimum CUF stated in the PPA. Subsequent to noticing of the above said decision of the Hon'ble ATE, on a second thought on the said controversy we are not inclined to follow the earlier finding on this issue, for the reasons already stated above and in view of the decision of the Hon'ble ATE.

i) In view of the above reasons, we hold Issue No.3 accordingly in affirmative.

15. Issue No.4: Whether the petitioners are entitled to reimbursement of Safeguard Duty and the GST paid on it, on the entire quantum of Solar Modules/Panels installed on DC side of the Projects?

a) The respondents relying on Article 5.1.1 (g) of the PPA contended that the petitioners are not entitled to reimbursement of the SGD and the

GST on it, as it is the responsibility of the petitioners to bear the same in view of the obligation imposed on the developers as per the said Article. It is also stated in the Statement of Objections filed by the respondents that Article 5.1.1 (g) is not subject to the Article 15 of the PPA relating to Change in Law.

b) Article 5.1.1 (g) of the PPA reads as follows:

5.1.1 Subject to and on the terms and conditions of this Agreement, the Developer shall at its own cost and expense:

a) xxxxxxxxxxxx

b) xxxxxxxxxxxx

c) xxxxxxxxxxxx

d) xxxxxxxxxxxx

e) xxxxxxxxxxxx

f) xxxxxxxxxxxx

g) be responsible for all payments related to any taxes, cesses, duties or levies imposed by the Government Instrumentalities or competent statutory authority on land, equipment, material or works of the project to or on the electricity consumed by the Project or by itself or on the income or assets owned by it.

c) It may be noted that Article 5.1.1 (g) of the PPA is a generic provision and impact of SGD and the GST on it as per Article 15 relating to 'Change in Law' is a special provision. Therefore, the special provision prevails over the generic provision. It can also be seen that Article 5.1.1 of the PPA starts with the phrase "*subject to and on the terms & conditions of this*

Agreement, the Developer shall at its cost and expense”, while specifying the different obligations and liabilities of the Solar Power Developer. Therefore, the contentions of the respondents that Article 5.1.1 (g) is not subject to the Article 15 of the PPA relating to Change in Law, is not acceptable. Hence, the contention of the respondents to this effect cannot be accepted.

d) The proposed claims including the details of Invoice No & Date, Assessed Value of Panels, Safeguard Duty of 20% on Assessed Value of Panels, IGST on the Safeguard Duty, the payments dates and total duty paid in OP No. 10/2020 to OP No. 16/2020 are shown in the below tables. These tables are prepared on verification of the Invoices produced by petitioner in each of the cases.

OP NO 10/2020							
							(Amount in Rs)
Sl.No	Invoice No and Date	Assessed value of Panels	Safeguard Duty 20% on Assessed value	IGST on Safegurd Duty	Total Impact	Payme nt Date	Total Duty Paid
1	2	3	4	5	6	7	8
1	ZN19070501LDL OT2 20/07/2019	74012400	14802480	740124	15542604	09.08.20	19243224
2	ZN19070501LDL OT3 20/07/2019	74012400 7513380	14802480 1502676	740124 75133.8	15542604 1577809.8	4.08.201	21196703
3	ZN19070501LDL OT1 16/07/2019	74012400	14802480	740124	15542604	09.08.20	19243224
4	ZN19070501LDL OT4 20/07/2019	71889683.25 585931.5	14377936.7 117186.3	718896.835 5859.315	15096833.54 123045.615	21.08.201	18843660
5	ZN19070501LDL OT5 31/07/2019	30847791.6	6169558.3	308477.915	6478036.215	22.08.20	8020426
6	ZN19080202LD 10/09/2019	100248584.5 285225.2	20049716.9 57045	1002485.85 2852.25	21052202.75 59897.25	03.10.201	26138791
7	ZN19070501LD 10/09/2019	2201077.47	440215.5	22010.775	462226.275	03.10.20	572280
		435608873.5	87121774.7	4356088.74	9,14,77,863.44		113258308

OP NO 11/2020							
							(Amount in Rs)
Sl.No	Invoice No and Date	Assessed value of Panels	Safeguard Duty 20% on Assessed v value	IGST on Safegurd Duty	Total Impact	Payment Date	Total Duty Paid
1	2	3	4	5	6	7	8
1	ZN19073001LD-LOT 31/07/2019	68371597.8	13674319.6	683715.98	14358035.58	28.08.2019	17783921
2	ZN19073001LD-LOT 31/07/2019	98758974.6	19751794.9	987589.745	20739384.65	28.08.2019	25687885
3	ZN19081601LD 08/08/2019	129146351.4	25829270.3	1291463.52	27120733.82	03.09.2019	33619449
4	ZN19082801LD 09/09/2019	128757610.08	25751522	1287576.1	27039098.1	30.09.2019	33698890
		853506.89	170701.4	8535.07	179236.47		
			85177608.2	4258880.41	8,94,36,488.61		110790145

OP NO 12/2020							
							(Amount in Rs)
Sl.No	Invoice No and Date	Assessed v value of Panels	Safeguard Duty 20% on Assessed v value	IGST on Safegurd Duty	Total Impact	Payment Date	Total Duty Paid
1	2	3	4	5	6	7	8
1	ZN19072203LD-LOT 05/08/2019	134561450.2	26912290	1345614.5	28257904.5	27.08.2019	34985977
2	ZN19072203LD-LOT3 10/08/2019	72651153.36	14530230.7	726511.535	15256742.24	30.08.2019	190428941
		590747.11	118149.4	5907.47	124056.87		
3	ZN19072203LD-LOT 10/08/2019	88160950.15	17632190	881609.5	18513799.5	30.08.2019	22921847
4	ZN19082804LD 13/09/2019	79265099.23	15853019.8	792650.99	16645670.79	4.10.2019	20608926
5	ZN19082804LD 19/09/2019	71547976.97	14309595.4	715479.77	15025075.17	3.10.2019	18681048
		302208.98	60441.8	3022.09	63463.89		
		447079586	89415917.1	4470795.855	9,38,86,712.96		287626739

OP NO 13/2020							
							(Amount in Rs)
Sl.No	Invoice No and Date	Assessed value of Panels	Safeguard Duty 20% on Assessed v value	IGST on Safegurd Duty	Total Impact	Payment Date	Total Duty Paid
1	2	3	4	5	6	7	8
1	ZN19081401LDLOT1 15/08/2019	95452680.96	19090536.2	954526.81	20045063.01	16.09.2019	24858493
2	ZN19081401LDLOT3 18/08/2019	119315851.20	23863170.2	1193158.51	25056328.71	16.09.2019	31073116
3	ZN19081401LDLOT3 17/08/2019	143179021.44	28635804.3	1431790.22	30067594.52	16.09.2019	37287740
4	ZN19082805LD 19/09/2019	83213336.7	16642667.3	832133.365	17474800.67	14.10.2019	21881179
		875929.86	175186	8759.3	183945.3		
		442036820.2	88407364	4420368.2	9,28,27,732.20		115100528

OP NO 14/2020							
							(Amount in Rs)
Sl.No	Invoice No and Date	Assessed value of Panels	Safeguard Duty 20% on Assessed v value	IGST on Safegurd Duty	Total Impact	Payment Date	Total Duty Paid
1	2	3	4	5	6	7	8
1	ZN19080201LDLOT1 - 25.08.2019	14563680.77	2912736.2	145636.81	3058373.01	19.09.2019	25569764
		83741164.41	16748232.90	837411.645	17585644.55		
2	ZN19080201LDLOT2 - 27.08.2019	29127361.54	5825472.30	291273.615	6116745.915	24.09.2019	25535018
3	ZN19080201LDLOT3 - 06.09.2019	81847352.45	16369470.5	818473.525	17187944.03	27.09.2019	33982228
		48853523.52	9770704.7	488535.235	10259239.94		
4	ZN19080201LDLOT4 - 13.09.2019	91208977.72	18241795.5	912089.775	19153885.28	09.10.2019	28999806
		434646.89	86929.4	4346.47	91275.87		
		19270000.94	3854000.2	192700.01	4046700.21		
		441038.75	88207.8	4410.39	92618.19		
		438451058.86	87690211.9	4384510.595	9,20,74,722.50		114086816

OP NO 15/2020							
							(Amount in Rs)
Sl.No	Invoice No and Date	Assessed value of Panels	Safeguard Duty 20% on Assessed value	IGST on Safeguard Duty	Total Impact	Payment Date	Total Duty Paid
1	2	3	4	5	6	7	8
1	ZN19082803LD-LOT-15.09.2019	114723905.47	22944781.1	1147239.06	24092020.16	05.10.2019	29828215
2	ZN19081402LD-LOT-18.08.2019	103913409.6	20782681.90	1039134.1	21821816	16.09.2019	27061899
3	ZN19082803LD-LOT-15.09.2019	80522883.3	16104576.7	805228.835	16909805.54	05.10.2019	20935950
4	ZN19090301LD-LOT-22.09.2019	95357047.5	19071409.5	953570.475	20024979.98	15.10.2019	24792832
5	ZN19090301LD-LOT-22.09.2019	40770435.42	8154087.1	407704.355	8561791.455	15.10.2019	10826203
		868808.66	173761.7	8688.085	182449.785		
		436156490	87231298	4361564.9	9,15,92,862.90		113445099

OP NO 16/2020							
							(Amount in Rs)
Sl.No	Invoice No and Date	Assessed value of Panels	Safeguard Duty 20% on Assessed value	IGST on Safeguard Duty	Total Impact	Payment Date	Total Duty Paid
1	2	3	4	5	6	7	8
1	ZN19082802LD-LOT-15.09.2019	107075645.1	21415129	1070756.45	22485885.45	05.10.2019	27839668
2	ZN19082802LD-LOT-15.09.2019	45889562.19	9177912.4	458895.62	9636808.02	05.10.2019	11931286
3	ZN19082802LD-LOT-15.09.2019	53537822.56	10707564.5	535378.225	11242942.73	05.10.2019	13919834
4	ZN19082802LD-LOT-15.09.2019	34417171.65	6883434.3	344171.715	7227606.015	05.10.2019	8948465
5	ZN19090302LD-LOT-22.09.2019	38142819	7628563.80	381428.19	8009991.99	15.10.2019	9917133
6	ZN19090302LD-LOT-22.09.2019	64842792.3	12968558.5	648427.925	13616986.43	14.10.2019	16859126
7	ZN19082802LD-LOT-22.09.2019	91286842.76	18257368.6	912868.43	19170237.03	14.10.2019	23960265
		868023.8	173604.8	8680.24	182285.04		
		436060679.4	87212135.9	4360606.795	9,15,72,742.70		113375777

e) As per the direction of this Commission, joint inspection of the Project Sites to verify the number of Solar Modules actually installed at the spot were conducted by the respondents viz., MESCOM, BESCO & GESCOM and they have filed their joint inspection reports in OP No.10/2020, OP No.11/2020, OP No.15/2020 & OP No.14/2020. The respondents also have filed CEIG reports in these cases. The gist of the joint inspection reports submitted by the parties can be stated per the tabular column as below:

Sl. No.	OP No.	Total No. of Modules procured as per invoices	Total MW of Modules procured as per invoices	Total No. of Modules actually installed on DC Side of the Project	Total MW of Modules actually installed on DC Side of the Project Site
1	2	3	4	5	6
1	10/2020	57,301 of 330 Wp each	18.909	57,280 of 330 Wp each	18.902
		26,290 of 335 Wp each	8.807	26,144 of 335 Wp each	8.758
	Total	83,591	27.716	83,424	27.660
2	11/2020	80,609 of 330 Wp each	26.600	80,448 of 330 Wp each	26.5478
		Total	80,609	26.600	80,448
3	15/2020	82,020 of 330 Wp each	27.066	81,856 of 330 Wp each	27.0125
		Total	82,020	27.066	81,856
4	14/2020**	38,910 of 340 Wp each	13.229	38,784 of 340 Wp each	13.186
		38,910 of 345 Wp each	13.424	41,376 of 345 Wp each	14.274
		Total	77,820	26.653	80,160

Note: **In OP No.14/2020, as per CEIG report dated 25.10.2019, the total number of modules installed were 77,624 and the total capacity of them was 26.586 MW. As per invoice, the total number of modules installed were 77,820 and the total capacity of them was 26.652 MW. As per spot inspector report, the total modules installed were 80,160 and the total capacity of them was 27.460 MW as noted above. As the number of modules and the capacity of them as noted by the CEIG report, is less than the total number of modules as noted in invoices and joint inspection report and also their capacity in MW, we may consider the CEIG report for reckoning the total number of panels installed and its capacity in MW.

In other cases, the total number of panels installed and its corresponding capacity in MW as stated in joint inspection reports, being little lower than the total number of panels and their capacity as per invoices & CEIG report, we may consider the joint inspection reports for reckoning the total number of panels installed and its capacity in MW.

- f) In OP No.12/2020, OP No.13/2020, & OP No.16/2020, the joint inspection reports, are not submitted, but only the CEIG reports are filed.

The relevant particulars as per CEIG Reports in different cases may be stated as per the Table below:

Sl. No.	OP No.	Total No. of Modules procured as per invoices	Total MW of Modules procured as per invoices	Total No. of Modules installed as per CEIG report	Total MW of Modules installed on DC Side as per CEIG report
1	2	3	4	5	6
1	12/2020	83,112 of 330 Wp each	27.42696	82,944	27.372
2	13/2020	80,160 of 335 Wp each	26.8536	80,000	26.600
3	16/2020	82,212 of 330 Wp each	27.12996	82,048	27.075
4	14/2000	77,820 of 340 Wp & 345 Wp	26.652	77,624	26.5860

The above figures would disclose that the number of modules installed in the above OP No.12/202, OP No.13/2020 & OP No.16/2020 and their corresponding capacity in MW, are little lower than the number of modules procured as per invoices and their corresponding capacity in MW.

g) From the above analysis the following are the total number of panels and their capacity to be considered in each of the above cases, for reimbursement of SGD & GST paid on it, as shown in the below table:

Sl. No.	OP No.	Total No of Modules asper Invoice	Total MW of Modules shown in Invoice	Amount claimed towards SGD effect in the petition (Amount in Rs.)	Total No of modules considered for reimbursement of SGD effect.	Total MW of Modules considered in column 6 (In MW)	Amount to be reimbursed towards SGD including GST (Amount in Rs.)
1	2	3	4	5	6	7	8
1	10/2020	83,591	27.71648	9,14,77,863	83,424	27.660	9,12,91,452
2	11/2020	80,609	26.60097	8,94,36,489	80,448	26.5478	8,92,57,723
3	12/2020	83,112	27.42696	9,38,86,713	82,944	27.372	9,36,98,576
4	13/2020	80,160	26.85360	9,28,27,732	80,000	26.600	9,19,51,085
5	14/2020	77,820	26.65335	9,20,74,722	77,624	26.586	9,18,42,060
6	15/2020	82,020	27.06660	9,15,92,863	81,856	27.0125	9,14,09,789
7	16/2020	82,212	27.12996	9,15,72,743	82,048	27.0750	9,13,87,234

h) On Issue No.3, we have already held that on DC side of the Project, the petitioners are entitled to install solar modules in excess of the number of modules required for arriving contracted capacity of 20 MW AC. As noted in the above table, the petitioners have installed 27.660 MW, 26.5478 MW, 27.372 MW, 26.600 MW, 26.586 MW, 27.0125 MW and 27.0750 MW capacity of panels on DC side of the Projects in OP No.10/2020 to OP No.16/2020 respectively, for which they are entitled to reimbursement of the SGD & GST paid on it as shown in the last column No.8 of sub-para (g) of para 15 above.

i) For the above reasons, we hold that the petitioners are entitled for the reimbursement of SGD & the GST paid on it to the extent of amounts shown column No.8 of the table shown in sub-para (g) of para 15 above.

j) Issue No.4 is held accordingly.

16. Issue No.5: What shall be the mode of reimbursement of the Safeguard Duty and GST found payable to the petitioners?

a) The petitioners have suggested to pay the amounts found due in a lump-sum with carrying cost or in the alternative to determine the incremental tariff for reimbursement of the amounts found payable to them by applying the technical and financial parameters considered in Solar Generic Tariff Order passed by this Commission. The respondents have suggested for reimbursement of the amounts payable by way of annuity with reasonable rate of interest without considering discounting factor etc., The respondents have also suggested that in the event of determining the incremental tariff the factors regarding the depreciation,

interest on working capital, degradation and discounting factor cannot be considered. The reasons stated are that such tariff components are to be applied only on the capital cost and not on any taxes which are to be compensated as per actuals as in the present cases.

- b) The respondents have not come forward to accept the offer of the petitioners to pay the amount found payable in a lump-sum with carrying cost. We are of the considered view that the petitioners are to be reimbursed for the amounts payable to them by the respondents in the form of payment of incremental tariff which would avoid the respondents from arranging the amounts in a lump sum. The determination of incremental tariff would take care of interest payable, time value of the money etc., therefore, there is no question of separately awarding carrying cost for the amounts spent towards SGD and GST paid on it. However, in the event the respondents willing to pay the amounts due in lump-sum, the petitioners may be awarded carrying cost at 11.50% per annum as considered by this Commission in Generic Tariff Order dated 01.08.2019.
- c) In earlier similar cases, this Commission has adopted the relevant parameters as per the applicable Generic Tariff Orders, in the matter of “Determination of Tariff and other Norms in respect of New Solar Power Project (Ground mounted and Solar Rooftop Photovoltaic Units)” issued by this Commission, considering the dates of purchase of panels and payment of SGD & GST on it due to Change in Law. On the same principle,

in the present case also the relevant parameters as per the Generic Tariff Order dated 01.08.2019, are to be applied.

d) The following are the relevant parameters adopted for computation of Generic Tariff in the Generic Tariff Order dated 01.08.2019:

- i) Debt: Equity Ratio;
- ii) Interest on capital loan;
- iii) Tenure for repayment of loan;
- iv) Return on Equity;
- v) Depreciation;
- vi) Interest on working capital at 2 months' receivables;
- vii) Discount Rate to factor in the time value of Money to arrive at levelled tariff for the life of the plant.
- viii) Degradation Factor; and
- ix) O&M Expenses.

e) Out of the above parameters, the Commission has not reckoned the following parameters for determination of incremental tariff for the reasons explained against each:

- (i) Degradation Factor & Auxiliary Consumption: While computing the generation of 45.552 MU in a contract year for determining the incremental tariff, the Degradation Factor and Auxiliary Consumption has been considered for the life of the project and hence, the same has not been factored in for determining the incremental tariff.
- (ii) As per the norms, the O & M expenses are linked to the capacity of the plant in MW (Rs.4.50 lakhs per MW) and not dependent on the capital cost of the project. Hence, the same has not been factored in for determining the incremental tariff.

f) Accordingly, the Commission has considered the following parameters for computation of incremental tariff as per the Generic Tariff Order dated 01.08.2019 issued by this Commission in the matter of "Determination of

Tariff and other Norms in respect of New Solar Power Project (Ground mounted and Solar Rooftop Photovoltaic Units)”:

Sl. No.	Parameters	Normative Values Adopted
1	Debt: Equity Ratio	70:30
2	Debt Repayment in years	13
3	Interest on capital loan	10.50% per annum
4	Return on Equity	14% per annum
5	Depreciation	5.38% for first 13 year and remaining Depreciation spread equally over the balance years of the useful life of the plant
6	Interest on working capital at two month's receivables	11.50% per annum
7	Discount Rate to arrive at time value of money	11.55% per annum (WACC)

- g) The quantum of generation of energy from a Solar Power Project in a contract year would be directly proportional to the CUF. In the Generic Tariff Order dated 01.08.2019, the normative CUF of 19% was considered. For the purpose of determining the incremental tariff in OP No.10/2020, OP No.12/2020, OP No.13/2020, OP No.14/2020 & OP No.16/2020, the maximum energy of 45.552 MU and in OP No.11/2020 & OP No.15/2020, the maximum energy of 40.9968 MU allowed to be sold to the respective respondents in a contract year as per Article 5.6 of the PPA, can be considered. In that event, the direction to pay the incremental tariff should be limited to 45.552 MU/40.9968 MU in a contract year from the date of commissioning of the Projects during the term of the PPAs, so that the claim of the petitioners towards Change in Law Event would be completely satisfied.
- h) Considering the additional capital cost incurred in respect of Projects as shown in column No.8 of sub-para (g) in para 15 of this Order and the

maximum energy of 45.552/40.9968 MU allowed to be sold to the respective respondents in a contract year, the incremental tariff is to be determined.

- i) The incremental tariff has been determined by this Commission on the basis of the above parameters, considering the Discount Rate – Weighted Average Capital Cost (WACC) of 11.55% per annum for 25 years for the life of the Projects. The computation sheets are enclosed to this Order at Annexures I & VII in respect of these Projects. The average tariff and the levelled tariff, so arrived are as shown below:

Sl. No.	OP No.	PPA with ESCOM	Installed capacity on DC Side of the Project (in MW)	Additional Capital Cost Incurred (in Rs.)	Average Tariff (Paise per unit)	Levelled Tariff (Paise per unit)
1	2	3	4	5	6	7
1	10/2020	MESCOM	27.660	9,12,91,452	20	26
2	11/2020	BESCOM	26.5478	8,92,57,723	22	28
3	12/2020	CESC	27.372	9,36,98,576	20	26
4	13/2020	CESC	26.600	9,19,51,085	20	26
5	14/2020	GESCOM	26.586	9,18,42,060	20	26
6	15/2020	BESCOM	27.0125	9,14,09,789	22	29
7	16/2020	CESC	27.0750	9,13,87,234	20	26

- j) For the above reasons, we hold Issue No.5 accordingly.

17. Issue No.6: To which reliefs the petitioners are entitled to?

- a) The respondents may be given liberty to pay the amounts found due to the petitioners in a lump-sum within a period of two months from the date of this Order along with carrying cost at 11.50% per annum as considered by the Commission in Generic Tariff Order dated 01.08.2019.
- b) The respondents have contended that the validity of the SGD Notification dated 30.07.2018, is challenged before the Hon'ble Supreme Court and

the matter is pending. It was requested to stay the present proceedings till the disposal of the matter before the Hon'ble Supreme Court. We are of the considered opinion that the stay of the present proceedings is not warranted, as the present proceedings involve decision on other issues apart from the validity of the SGD Notification dated 30.07.2018. In the event of the said SGD Notification is set aside, the petitioners are bound to refund the amount received from the respondents towards SGD & the GST paid on it. The learned counsel for the petitioners submitted that the petitioners undertake to reimburse such amounts received from the respondents, in the event the SGD Notification is set aside, without waiting for the refund of the same from the concerned Customs office. Further he submitted that in case of default, the respondents are at liberty to adjust the amount due to them in the monthly tariff bills. These statements are also written in the undertakings filed by way of affidavits dated 02.03.2021 of the petitioners. Therefore, a suitable direction may be issued in this regard in the operative portion of the Order.

c) During the course of the Order, we found that in OP No.12/2020 & OP No.13/2020 relating to the respondent (CESC), though the SCD for both Projects was on 03.11.2019, however, these two Solar Power Projects were commissioned on 08.11.2019 & 11.11.2019 respectively subsequent to the SCD. The effect of delay in commissioning a Solar Power Project is stated in Article 12.2 of the PPA. In the present OP No.12/2020 & OP No.13/2020 there is no pleading or issue raised regarding delay in commissioning the

Project. We reserve the liberty of agitating this issue by any of the parties as may be advised.

d) Hence Issue No.6 is held accordingly.

18. Issue No. 7: What order?

In view of the findings on the above issues, we pass the following:

ORDER

- a) It is declared that imposition of Safeguard Duty vide Notification No.01/2018-Custom (SG) dated 30.07.2018 issued by the Ministry of Finance, Government of India, on import of Solar Modules or Panels from China PR amounts to Change in Law as per Article 15 of the PPAs.
- b) The petitioners are entitled to an incremental levelled tariff as shown in column 7 of the tabular statement in sub-para (i) of para 16 above, of this Order in respect of projects in OP No.10/2020, OP No.12/2020, OP No.13/2020, OP No.14/2020 & OP No.16/2020 on the quantum of 45.552 MU and projects in OP No.11/2020 & OP No.15/2020 on the quantum of 40.9968 MU, energy supplied/to be supplied to the respective respondents during a contract year from the respective dates of COD till the expiry dates of the PPAs, in addition to the tariff discovered and adopted as shown in the column 6 of the tabular statement in para 4 above of this Order.
- c) It is made clear that for the energy supplied in excess of 45.552/40.9968 MU in any contract year, the concerned petitioners are not entitled to the incremental tariff, but only the reduced tariff as provided in 2nd para of Article 5.6 of the PPA.

- d) The petitioners are entitled to raise the supplementary bills for the arrears of the incremental tariff as ordered above in sub-para (b) of para 18 above, of this Order from the respective dates of COD till the last date of immediate previous monthly energy billing period. The amounts so found to be due under the supplementary bills shall be paid by the respective respondents in three equal monthly instalments, with single default clause.
- e) The respondents are at liberty to pay the amounts found due to the respective petitioners incurred towards SGD and the GST paid on it as shown in column 8 of the tabular statement in sub-para (g) of para 15 above, of this Order in a lump-sum within a period of two months from the date of this Order, with carrying cost at 11.50% per annum from the dates of payments of the SGD & GST, till the date of payments.
- f) Such option shall be exercised by the respondents within a period of three weeks from the date of this Order. In default such option is deemed to have been waived.
- g) The petitioners shall abide by the undertaking given before this Commission, to reimburse the amount received towards SGD & the GST paid on it from the respondents in the event, the SGD Notification dated 30.07.2018, is set aside by the Hon'ble Supreme Court of India in SLP No.24009-24010/2018, without waiting for the refund of the same from the concerned Customs office. In case of default, the respondents are at liberty to adjust the amount due to them in the monthly tariff bills.
- h) The original Order be kept in OP No.10 of 2020 and a copy of it, be kept in other connected cases.

sd/-

(H.M. MANJUNATHA)
Officiating Chairperson

sd/-

(M.D. RAVI)
Member

