

**THE APPELLATE TRIBUNAL FOR ELECTRICITY  
AT NEW DELHI**

**(APPELLATE JURISDICTION)**

**IA NO.561 OF 2017  
IN  
APPEAL NO.210 OF 2017**

**Dated : 13<sup>th</sup> SEPTEMBER, 2017.**

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson  
Hon'ble Mr. I. J. Kapoor, Technical Member.**

**IN THE MATTER OF:-**

**ADANI POWER LIMITED )  
9<sup>th</sup> Floor, Shikhar, Mithakali Six Road, )  
Navrangpura, Ahmedabad - 380 009, )  
Gujarat. ) ... Applicants**

**AND**

1. **CENTRAL ELECTRICITY )  
REGULATORY COMMISSION )  
(through its Secretary), 3<sup>rd</sup> & 4<sup>th</sup> )  
Floor, Chanderlok Building, 36, )  
Janpath, New Delhi - 110 001. )**
2. **UTTAR HARYANA BIJLI VITRAN )  
NIGAM LTD. (through its Managing )  
Director), Vidyut Sadan, Plot No.C- )  
16, Sector 6, Panchkula, Haryana - )  
134 112. )**
3. **DAKSHIN HARYANA BIJLI VITRAN )  
NIGAM LTD. (through its Managing )  
Director), Vidyut Nagar, Vidyut )  
Sadan, Hissar, Haryana - 125 005. )**

4. **GUJARAT URJA VIKAS NIGAM LTD.** (through its Managing Director), Sardar Patel Bhawan, Race Course Circle, Vadodara, Gujarat – 390 007. ) **... Respondents**

Counsel for the Applicant(s)	Mr. Amit Kapur. Ms. Poonam Verma, Ms. Abiha Zaidi
Counsel for Respondent(s)	Mr. G. Umapathy Mr. Aditya Singh for R-2 & R-3.  Ms. Swapna Seshadri Ms. Ranjitha Ramachandran Mr. Shubham Arya for R-4.

### **ORDER**

1. In this appeal, the Appellant (also referred to as “**Adani Power**”) has challenged Order dated 04/05/2017 passed by the Central Electricity Regulatory Commission (“**the Central Commission**”). By the impugned order, the Central Commission has decided on five ‘Change in Law’ events. The Appellant is aggrieved by following four findings of the Central Commission:

- “a) *Notifications dated 27/02/2009, 21/03/2012, 05/04/2015 and 16/02/2016 issued by the Ministry of Commerce and Industry under Section 26(2) of the Special Economic Zones Act, 2005*

(collectively referred to as “the SEZ Act Notifications”) not treated as Change in Law events.

- b) *Disallowance of certain Change in Law events under the PPA with Gujarat Urja Vikas Nigam Limited dated 06/02/2007.*
- c) *Denial of carrying cost.*
- d) *Disallowance of actual Station Heat Rate.”*

2. In this application, the Appellant has made following prayers:

- “(a) Expunge the observations in Para 35 of the Impugned Order during the pendency of the present Appeal.*
- (b) in the alternative:*
  - (i) direct that the observations in Para 35 are limited to the events which are part of the Petition No.235/MP/2015 in which the Impugned Order has been passed; and*
  - (ii) direct the Discoms/Respondent No.2 to 4 to not apply the observations of Para 35 to any other taxes, duties, etc. which are not part of Petition No.235/MP/2015 in which the Impugned Order has been passed;*
- (c) Pass any such other and further reliefs as this Hon’ble Tribunal deems just and proper in the nature and circumstances of the present case.”*

3. In paragraph 35 after taking into consideration guidelines dated 16/02/2016 issued by the Ministry of Commerce & Industry, Government of India, in supersession of all previous guidelines, the Central Commission has observed that the power plant developed by project developer and co-developer will be in the non-processing area of the Special Economic Zone (“**the SEZ**”) only. Such power plants can supply power to the Domestic Tariff Area (“**DTA**”) after meeting the power requirements of the SEZ subject to payment of custom duty, other duties and service tax. No O&M benefits including service tax exemption are allowed for power supplied to DTA. Therefore, the Appellant who is supplying power to DTA shall not be entitled to O&M benefits including service tax exemption as it shall be covered by supply of power to DTA. It is further stated that under Section 26 of the Special Economic Zones Act 2005 (“**the SEZ Act**”), the Appellant was entitled to benefits of duty and tax exemption during construction as well as operation period. The question is whether guidelines issued by the Government of India, Ministry of Commerce & Industry varying the manner and terms and conditions of these benefits amount to ‘Change in Law’ in terms of the PPA entered into between the Appellant with Gujarat &

Haryana Discoms. The Central Commission has then expressed the view that Section 26(1) permitted the duty exemption only for carrying out an authorised operation by the developer or entrepreneurs in the SEZ. The Central Commission has then referred to the letter dated 19/12/2016 issued by the Ministry of Commerce & Industry. It states that authorised operation is to set up a sector specific SEZ for power sector for supply of power to SEZs, EOUs in Gujarat or other SEZs, EOUs and Others. The Central Commission has further observed that the word “others” will take colour from the words preceding it and will refer to other units engaged in “export” of goods and cannot cover DTA. The Central Commission has referred to Section 26(2) of the SEZ Act which empowers the Central Government to prescribe the manner and terms and conditions under which the exemptions, concessions, drawbacks and other benefits would be granted to the project developer. It is further observed that supply of power from the generating station set up within the SEZ to the DTA can only be in variation of the terms and conditions of permission by Government of India, Ministry of Commerce & Industry. The Central Commission has further observed that the Appellant while quoting the bid to supply power from the power plant

located in SEZ to the DTA was aware of Section 26(2) of the SEZ Act. The Appellant was also aware that the duty concessions/exemptions are available for supply of power to SEZ or EOU or other exporting zone only and not to the DTA. Once the Appellant decided to supply power to DTA, it was expected of him to factor the taxes and duties prevailing as on the cut-off date while quoting the bid. The notification dated 27/02/2009 only gave effect to Section 26(2) of the SEZ Act. The concerned notifications ("**the SEZ Act notifications**", for convenience) would not amount to 'Change in Law' as they have been issued to give effect to the provisions of the SEZ Act. The Central Commission has, however, stated that the change in rates of custom duty, excise duty, withholding tax and service tax on taxable services which have been imposed pursuant to the Acts passed by the Parliament shall be covered by 'Change in Law'. The Central Commission has held that imposition of Green Energy Cess is also 'Change in Law'. We have already quoted the prayers made in this application. The Appellant wants the above observations made in paragraph 35 to be expunged during the pendency of this appeal or in the alternative direct that the above

observations are limited to the events which are part of the Appellant's petition being Petition No.235/MP/2015.

4. Mr. Amit Kapur, learned counsel for Adani Power submitted that the Central Commission has fallen into a grave error in holding that the SEZ Act Notifications would not amount to 'Change in Law' in terms of the Power Purchase Agreements ("**PPAs**") as these notifications have been issued to give effect to the provisions of the SEZ Act and that while quoting the bid, Adani Power was aware that under Section 26(2) of the SEZ Act, the Central Government can prescribe the manner and terms and conditions under which the exemptions, concessions, drawbacks and other benefits would be granted to Adani Power. Counsel further urged that the Central Commission erred in holding that once Adani Power decided to supply power to DTA, it was expected of it to factor the taxes and duties prevailing as on the cut-off date while quoting the bid. Counsel submitted that mere presence of Section 26(2) does not mean that Adani Power anticipated that the Government would deny it the benefits based on the SEZ Act and SEZ Rules. Counsel drew our attention to the order of the Gujarat Electricity Regulatory Commission

("GERC") dated 21/10/2011. Counsel submitted that Adani Power had bid for supply of power under the four PPAs on the premise that SEZ area is entitled to certain exemptions/benefits under the SEZ Act and this admitted position is recorded by the GERC in its order dated 21/10/2011. It is also recorded in the said order that the Appellant had on that basis agreed to reduce the tariff and accordingly tariff was raised. It was therefore wrong on the part of the Central Commission to take an inconsistent stand in the impugned order. Counsel further submitted that the Commission failed to take note of the fact that the SEZ Notifications deny benefits to the Appellant in relation to operation and maintenance, which benefits were available to Adani Power at the time of the bid. In fact, in paragraph 35 itself the CERC has observed that the Appellant was entitled to benefits of duty and tax exemption during the construction as well as operation period. Counsel submitted that under Section 26(2), the Central Government can only prescribe the manner in which and terms and conditions subject to which the exemptions, concessions, drawback or other benefits shall be granted to the Project Developer in the SEZ. Counsel pointed out that by order at 14/06/2007 passed by the office of the



Development Commissioner, Ministry of Commerce and Industry, the area identified by Adani Power for setting up of a power plant was identified as a Processing area. By notification dated 06/04/2005 it is stipulated that those power plants which are presently situated in processing areas shall be demarcated as situated in non processing areas and no operation and maintenance benefits will be available to them. Counsel submitted that the provisions of the SEZ Act and Rules have been misconstrued. It is possible that the Central Commission may wrongly apply the observations contained in paragraph 35 for other taxes and duties causing irreparable loss to the Appellant, hence either paragraph 35 be expunged or the alternative prayer be granted.

5. Ms. Swapna Sheshadri, learned counsel for Respondent No.4 submitted that granting interim relief to the Appellant would amount to virtually allowing the appeal at this stage which should not be done. Counsel submitted that reliance placed by the Appellant on GERC's Order dated 21/10/2011 is misplaced. Counsel submitted that it has all along been the case of the Appellant that the GERC has no jurisdiction to decide the matter.

The said contention has been upheld by the Supreme Court in **Energy Watchdog v. CERC**<sup>1</sup>. It is, therefore, not open to the Appellant to rely on the said judgment. Counsel drew our attention to the operative part of the impugned order and submitted that the Central Commission has granted almost all the claims of the Appellant, but has rightly rejected the 'Change in Law' claim of the Appellant based on the SEZ Act notifications. Counsel reiterated the reasoning of the Central Commission and submitted that the interim application be rejected.

6. In the present appeal, apart from the main prayer seeking setting aside of the impugned order, the Appellant has urged that it may be declared that the finding at paragraph 35 of the impugned order that the Appellant is not entitled for any O&M benefits including service tax exemption at the time of bid submission for power supplied to DTA is incorrect. The Appellant has also urged that it may be declared that the SEZ Act notifications should be considered as 'Change in Law' events under the PPAs. In this application, the Appellant is seeking expunging of the observations in paragraph 35 of the impugned

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<sup>1</sup> (2017) SCC Online SC 378

order during the pendency of the appeal. We have given the gist of the said paragraph hereinabove. If we grant this prayer, we would be allowing the appeal at this stage which we cannot do. Besides, prayer for expunging a part of the impugned order during the pendency of the appeal cannot be granted. The appeal will have to be finally heard before such a direction can be given. In our opinion, such an order is unknown to the normal procedure followed by a court. Assuming that in an extraordinary case, such an interim order can be passed, we do not think that it can be passed in this appeal because the issues involved are too intricate, which require a full-fledged hearing. Even the alternative prayer cannot be granted on the same reasoning.

7. We have carefully considered the rival submission on the merits of the case. We are prima facie unable to differ with the view taken by the Central Commission. Prima facie, the Central Commission's interpretation of the SEZ Act and the Rules appears to us to be proper. Besides in matters which may ultimately affect consumer interest, this Tribunal should be circumspect while dealing with interim applications praying for

stay. Having exercised the necessary caution and circumspection we are unable to grant the prayer made in this application. In the circumstances, the application is dismissed.

8. Before parting we wish to make it clear that all observations made by us in this order touching the merits of the case are *prima facie* observations made for disposal of this application.

9. List the main appeal on **26/10/2017**.

**I.J. Kapoor**  
**[Technical Member]**

**Justice Ranjana P. Desai**  
**[Chairperson]**