भारतीय राष्ट्रीय राजमार्ग प्राधिकरण
(सड़क परिवहन और राजमार्ग मंत्रालय)
National Highways Authority of India
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NHAI/Policy Guidelines/ EPC & DBFOT Contracts//2019
No.2.5.11/2019 Dated the 17th May, 2019

[Decision taken on file no.NHAI/CMD/Misc./CIL/2018-Vol.II]

Sub: SOP/Guidelines on Reimbursement for increase/recovery for decrease in Royalty rates of minor minerals under Change in Law in EPC/DBFOT projects.

The matter regarding reimbursement of increase in royalty charges on Minor Minerals etc. due to subsequent legislation in Item Rate Contracts was decided by Hon'ble Supreme Court vide judgement dated 24.04.2015 and subsequently the review petitions filed against this judgement were also dismissed by Hon'ble Supreme Court vide order dated 13.10.2015. Accordingly NHAI vide Policy Circular Policy Matter-Technical(185/2015) dated 27.11.2015 (Annex-1) has decided to allow reimbursement of increase in Royalty charges on Minor Mineral etc. due to subsequent legislation in Item Rate Contracts.

2. An opinion dated 17.07.2018 (Annex-2) for applicability of above decision in respect of DBFOT (Toll/Annuity/Hybrid Annuity) & EPC contracts has been obtained from Ld. Additional Solicitor General of India and based on the same, Executive Committee of NHAI in its 360th and 365th meetings held on 12.09.2018 and 31.10.2018 agreed in principle to accept the claims received from the Contractors/Concessionaires on account of Change in the Rates of Royalty for Minor Minerals subject to issue of a detailed SOP/Guidelines in this regard.

3. In view of the above, following SOP/Guidelines are being issued after approval of Competent Authority:

3.1 Pre-conditions for validity of claim in respect of DBFOT/ EPC Projects:

(i) Change in royalty rate should be covered under the definition of Change in law and Taxes as provided in the respective Agreement/Contract and should have a direct effect on the Project. The change in royalty rate should have come into force post the Base Date in EPC Projects and post the bid due date in case of DBFOT projects.

(ii) In EPC Projects, the contractor should notify the Authority within 15 days of it becoming 'reasonably aware' of the additional cost due to Change in Law and within 30 days in respect of DBFOT projects by the Concessionaire, along with valid proof that they have suffered an increase in cost with a copy to AE/IE. As per Clause 19.17 of EPC Contract, the additional/reduction cost suffered by the Contractor due to Change in Law shall be examined and certified by the Authority's Engineer within 15 days from the receipt of notice from the Contractor. In respect of DBFOT projects, the increase in cost suffered by the Concessionaire due to Change

in Law (Change in Royalty Rates of Minor Minerals) shall be examined and certified by Independent Engineer, after the Statutory Auditor of the Concessionaire certified the claim and its supporting documents.

3.2. Documentary requirements/evidences for quantifying claim in DBFOT/EPC Projects:

(i) Concessionaire/Contractor has to submit valid proof for change of royalty rates post bid due date (DBFOT)/base date (EPC), i.e.:

a) Copy of notification effective on bid due date/base date,

b) Revised notification issued post Bid due date/base date citing change in regulation along with the list of minor minerals covered, and

c) Proof of payment (like challans in Original) containing the name of the project.

(ii) In case of DBFOT projects certain threshold parameters are prescribed in the Concession Agreements which reads as under:

(a) In case of BOT (Toll), if as a result of Change in Law, the Concessionaire suffers an increase in costs or reduction in net after-tax return or other financial burden, the aggregate financial effect of which exceeds the higher of Rs. 1 crore (Rupees one crore) and 0.5% (zero point five percent) of the Realisable Fee in any Accounting Year.

(b) In case of BOT (Annuity), if as a result of Change in Law, the Concessionaire suffers an increase in costs or reduction in net after-tax return or other financial burden, the aggregate financial effect of which exceeds the higher of Rs. 1 crore (Rupees one crore) and 2% (two percent) of total annuity payments in any Accounting Year.

(c) In case of HAM, if as a result of Change in Law, the Concessionaire suffers an increase in costs or reduction in net after-tax return or other financial burden, the aggregate financial effect of which exceeds the higher of Rs. 1 crore (Rupees one crore) or 2% (two per cent) of the total Annuity Payments in any Accounting Year (this amount may, in the discretion of the Authority, be suitably increased but in no case exceeding an amount of Rs. 1 Crore for every Rs. 500 Cr. of Estimated Project cost). A similar modification should also be made in clause 35.2 pertaining to reduction in costs.

(iii) Concessionaire/Contractor will not be entitled to any claim on account of "Price Adjustment" on that portion of claim on which compensation has been sought under Change in law.RO/PD/Authority Engineer/IE shall ensure that there is no duplication of payment of amount on account of increase in rates of minor minerals.

(iv) In case of Toll projects where provisional / final Commercial Operations Date has not been announced and the Concessionaire has not started collection of User Fee, the Realisable fee becomes zero and therefore, Rs. 1 Crore (Rupees one crore) in any accounting year shall be used as the threshold parameter for establishing increase in cost. No documentary evidence needs to be produced on the amount of user fee collected.

(v) In the event of Change in Law in Toll Projects where provisional / final Commercial Operations Date (COD) has been announced and the Concessionaire has started collection of User Fee, the higher of Rs. 1 crore (Rupees one crore) and 0.5% (zero point five percent) of the Realisable Fee in any Accounting Year shall be used as the threshold parameter for establishing increase in cost for which a documentary evidence as per Schedule M has to be provided.

(vi) To determine the quantities of minor minerals used in executing the Project for which Royalty was paid, the quantities of affected Minor Minerals certified by the IE/AE based on As-built drawings of the Project shall be submitted. In case the concessionaire/contractor has a common quarry for their projects or they supply minor mineral to market/ other projects, then such concessionaire/ contractor shall map the quantities despatched from the quarry site to various projects/market confirming the quantities for project under consideration duly certified by IE/AE.

(vii) To determine the quantities of work executed Pre and Post issuance of the Notification, change in the rates of Royalty, the actual Construction Schedule of the Project highlighting the quantities, duly certified by Independent Engineer/Authority's Engineer, of affected minerals consumed shall be submitted.

(viii) The onus of submission of the above details shall lie on the claimant Concessionaire/Contractor so as to ensure that any exaggerated/ misleading claims are not admitted on account of increase in the rates of royalty.

3.3 As the royalty is to be deposited with the State Mining Department, PD by providing copies of documents supplied by the concessionaire/contractor (in particular those at Para-3.2 (i) above) get verified from the concerned department on the additional royalty claimed/paid.

3.4 After certification of the claim by IE/AE, PD shall examine and take the approval of RO for making payment to the Concessionaire/Contractor.

3.5 Hon'ble Supreme Court has framed Nine judges bench for considering the issues risen out from conflicts of Hon'ble Supreme Court's decisions in the matters of India Cement Ltd. v/s. State of Tamil Nadu reported in (1990) and State of West Bengal vs Kesoram Industries Ltd. And Ors(2004) with respect to

nature of Royalty as a tax or cost of land. Decision in this matter is not yet announced by the Nine Judges Bench of Hon'ble Supreme Court of India and therefore in order to protect the interest of NHAI, pending decision an unconditional Indemnity Bond in favour of NHAI shall be obtained from the Concessionaire/Contractor as security against the amounts of payments made. It is clarified that the amounts so paid shall be finally governed in accordance with the final decision to be delivered by the Hon'ble Supreme Court.

3.6 If the project is delayed due to the reason attributable to concessionaire/contractor and the royalty increases during the delayed period of project implementation, then the increased cost is to be borne by the Concessionaire/Contractor.

3.7 In case of Contracts with provision(s), different than those mentioned above, the claim for reimbursement of increased costs due to Change in Royalty Rates under Change in Law shall be assessed on a case-to-case basis.

4. **Applicability:** These Policy Guidelines shall be applicable:

(i) In case of Item rate/EPC Contracts, where final bill is not yet settled & paid and the Contractor is not released from performance under the contracts.

(ii) In case of BOT/DBFOT/PPP projects (Toll/Annuity/HAM), PCOD/COD is not declared & project has not started generating the revenues;

(iii) In case of BOT/DBFOT/PPP projects (Toll/Annuity/HAM), where claims have been raised by the Concessionaires before PCOD/COD and these are under consideration of Authority or under litigation (Arbitration/Courts);

(iv) In case of BOT/DBFOT/PPP projects (Toll/Annuity/HAM), Concessionaire can notify such claims only if it exceeds the threshold parameters prescribed in the Concession Agreements. Further, the threshold amount is to be reduced from the claimed amount for payment by the Authority, as the concessionaire was supposed to absorb the increase in cost to the threshold amount.

5. The Policy circular dated 27.11.2015 (Tech 185/2015) stands modified to the above extent.

17/05

(V.K. Sharma)
CGM (Coord& Parl.)

Copy to:

(i) All Officers and employee of HQ/ROs/PIU/CMUs/ Site offices.
(ii) Hindi Officer for translation in Hindi.
(iii) Library- for hosting the circular library site.

ANNEX-1

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भारतीय राष्ट्रीय राजमार्ग प्राधिकरण
(सड़क परिवहन और राजमार्ग मंत्रालय)
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No.11041/218/2007-Admn

Dated: 27.11.2015

POLICY MATTERS-Technical (185/2015)

(Decision taken in file No. NHAI/DR &A Cell/ARB (RC-1)/2005)

Sub: Dispute with regard to reimbursement of royalty charges due to subsequent legislation. – Final Order of Hon'ble Supreme Court.

The matter regarding reimbursement of royalty charges on minerals etc due to Subsequent Legislation, was decided by Hon'ble Supreme Court vide judgment dated 24.04.2015. Review petitions were also filed before Supreme Court against that judgment. Now, final decision dismissing the review petitions, has been issued by Hon'ble Supreme Court vide Orders dated 13.10.2015. The copies of these Orders of Supreme Court are enclosed.

2. In view of the above, it is decided to withdraw the cases relating to royalty charges on minerals etc. due to Subsequent Legislation pending before any forum, i.e., DRB, Arbitration, various Courts/Tribunals etc.

3. Concerned CGMs(T) of HQ may please intimate Legal Cell about confirmation of withdrawal of cases and payment of requisite amounts by 31.12.2015.

4. This issues with the approval of Competent Authority.

(A.K. Singh)
CGM (Coord.)

To:
All Officers & Employees of HQ/ROs/ PIUs/ CMUs/ Site Offices

ANNEX-2

TUSHAR MEHTA

सत्यमेव जयते

अपर महा-सॉलिसटर
भारत
ADDITIONAL SOLICITOR-GENERAL
OF INDIA

Chamber No.25 A, 2nd Floor
Supreme Court of India
New Delhi, the 17th July, 2018
Ph.011-23384486

LEGAL OPINION

QUERIST:NATIONAL HIGHWAY AUTHORITY OF INDIA("NHAI").

1. The Querist, abovenamed has sought my opinion with respect to interpretation of certain clauses as contained in the Engineering, Procurement and Construction ("EPC") contracts and Build-Operate-Transfer ("BOT")Contracts /concession agreements executed by the Querist with various contractors/concessionaires regarding construction/maintenance of National highways. For the purpose of convenience, the queries raised by the Querist are bifurcated as follows:

The Queries raised with respect to "EPC" Contracts

A. *Whether change in the rate of royalty of minor minerals after the base date or the bid submission date, would be covered under the definition of "Change in law"ofthe EPC Contracts?*

B. *Whether change in the rate of royalty by way of a notification issued by the State Government under section 15 of the MMDRA Act,1957 would amount to "modification" of any existing Indian law as occurring in sub-*

clause (b) of the definition of "change in law" under definition clause of the EPC contracts?

C. Whether in the light of the advice of Sr. Economic Advisor on WPI, the royalties etc. paid by the contractor or its sub-contractor is covered under the price adjustment provided in the EPC Contract?

D. If answer to query No. (A) & (B) is in affirmative and if it is considered that price adjustment provided in the EPC Contractor does not cover change in royalty, whether the actual proof of payment of enhanced royalty is needed from the contractor and what kind of mode of proof can be insisted upon by NHAI from the Contractor?

The Queries raised with respect to "BOT/DBFOT"contracts

E. Whether change in rate of Royalty of minor minerals after the base date or the bid submission date, would be covered under the definition of "Change in Law" of BOT/DBFOT Contracts?

F. Whether change in the rate of royalty by way of a notification issued by the State Government under section 15 of the MMDR Act, 1957 would amount to modification of any existing Indian law" as occurring in sub-clause (b) of the definition of change in law under the definition clause of the BOT contracts?

G. What is the scope and interpretation of words "aggregate financial effect of which exceeds the higher of Rs. l crore (Rupees one crore) and 0.5% (zero point five percent) of the realizable fee in any Accounting Year" occurring in Clause 41.1 of the Concession Agreement?

H. *If answer to (E) and (F) is in affirmative, then when does the cause of action arise for the Concessionaire to raise demand under Clause 41.1 What is the purport and relevance of the words "accounting year" occurring in Clause 41.1 of the concession agreement?*

I. *If answer to (E) and (F) is in affirmative, whether the actual proof of payment of enhanced royalty is needed from the Concessionaire and what kind of mode of proof can be insisted upon by the Querist from the Concessionaire?*

J. *What kind of proof must be insisted by the Querist, if the actual payments on account of change in rate of taxes/royalties etc. are paid by the EPC contractor and not by the concessionaire under the BOT/DBFOT contracts?*

K. *Whether the claims of the concessionaire are to be entertained in case, EPC contractor(engaged by concessionaire) further engages sub-contractor and change in rate of taxes/royalties etc. are in fact paid by the sub-contractor?*

L. *Whether in case of BOT/DBFOT contracts, claims under clause 41.1 can be entertained unless proof of having paid such additional amounts to the EPC contractor has been given by the concessionaire?*

M. *What is the interpretation of clause 41.5 of BOT/DBFOT contracts? Is it feasible as per the abovesaid provisions of the Concessionaire agreement to say that the change in royalty under the provision of "change in law" is recoverable from the users?*

2. I have perused the "Brief for Opinion" placed before me along with the documents annexed thereto including the copy of the new standard EPC contract dated 17.01.2017 sent by the Querist vide email dated 08.06.2018 and the copy of a standard BOT contract/ concession agreement executed between the Querist and a company called T.D Toll Road Pvt. Ltd. dated 19.07.2007, provided to me on 30.05.2018 for the purpose of reference, during the conference held at my office with Mr. Manish Bishnoi, Advocate for the Querist, who comprehensively briefed me in the matter in the presence of officers of the Querist.

3. Before opining on the queries placed before me, it is relevant for me to refer to the brief background of the matter which has given rise to the queries quoted in Para No.1 above. The background in which the abovesaid queries arise is summarised as under:-

(i) That the Querist is a statutory body constituted under the National Highways Authority Act of India,1988(hereinafter referred as "NHAI Act") and is responsible for maintenance, management and development of the National Highways or stretch vested in or entrusted to it by the Central Government under section 11 of the NHAI Act.

(ii) That for the purpose of construction, expansion and maintenance of National Highways, the Querist has been executing different kinds of contracts such as Item rate contracts, also called Bill of Quantities contracts("BOQ"), Engineering, Procurement and Construction ("EPC") contracts and Build-Operate-Transfer ("BOT") or Design-Build-Finance-Operate-Transfer ("DBFOT") contracts also called "concession

agreement"(hereinafter interchangeably used as "BOT contracts" or "concession agreements") with Concessionaires through open and competitive bidding process.

(iii) That earlier BOQ contracts were being awarded, wherein the contractor was required to undertake construction/expansion of National Highways and the cost for such construction was fully borne by the Querist. After the completion of construction, the road project would be taken over by the Querist and the contractor would be discharged of the contractual obligation after such taking over as well as after successful completion of the defect liability period.

(iv) That under the EPC contracts, which are lump sum contracts, the work is executed by the contractor on the basis of a defined scope of work and its standards and specifications. The Querist, herein is required to make payments to the EPC contractor for the works on the basis of the lump sum price called "contract price" which covers all the Contractor's obligations for the works under the CONTRACT including all the duties, taxes, royalty, and fees that may be levied in accordance with the laws and all things necessary for the Construction of subject high Highway. This contract price is subject to adjustments on account of changes in the cost of indexed inputs as per Wholesale price Index ("WPI"), changes in law, or changes in scope of the project.

(v) That in the other kind of contracts i.e. the BOT or DBFOT contracts, a "Concession Agreement" is entered into between the Querist and the Concessionaire, which is normally a Special

Purpose Vehicle ("SPV") company, specifically incorporated by the successful bidders for the purpose of carrying out the obligations under the Concession Agreement. Under the aforesaid contracts, the project costs including payments towards statutory taxes and other fees leviable, barring the Grants given by the Querist, is borne by the Concessionaire which in turn on the competition of construction / expansion work, and the concerned National Highway being put to commercial operations is entitled to operate and maintain and collect toll as realisable fee from the users of the concerned National highway for a specific number of years as mentioned in the Concession Agreement.

(vi) It is pertinent to mention that such concessionaire agreements, permits the concessionaire to engage sub-contractors (EPC Contractors engaged by the Concessionaire) to carry out the Construction work. It is further pertinent to mention that, under the BOT contract, the concessionaire maintains an "Escrow account" in which the total project is credited and all the inflows and outflows of cash on the account of capital and revenue receipts and expenditures are made and deposited in this account. It is further to be noted that any increase or decrease in the project cost on the account of "change in law" leading to reduction or increase in net after tax return of the concessionaire is also adjusted in the total project cost, placing the concessionaire in the same financial position as he would have enjoyed if there was no change in law.

(vii) It appears that in all the road construction projects, the Contractor/Concessionaire as the case may be is required to

procure minor minerals which includes building stone, gravel, ordinary clay, ordinary stone, sand aggregates etc which also attracts payment of royalty as the aforesaid items fall under the category of "Minor Minerals" as provided under Section 3 (e) of The Mines and Minerals (Development and Regulations) Act, 1957 (in short "MMDR Act"). The royalty so applicable, is paid by the EPC contractor/concessionaire as part of the contract price/project cost including any modification in the rate of royalty that may occur from time to time after the concerned contact coming into force.

(viii) The Querist has also placed before me the findings of the senior Economic Advisor vide email dated 17.06.2015 on the issue of WPI which *inter-alia* states that the WPI which includes the construction inputs in its basket of items, fairly captures royalty amount paid on the extraction of minerals, therefore, price adjustment based on WPI, have made more than adequate compensation to the contractors/concessionaires on the account of change in the price of construction inputs.

(ix) The Querist has also put to my notice sub clause 70.8 of Conditions of Particular Application ("COPA") of Item rate Contracts. Sub-Clause 70.8 of the item rate contracts is reproduced hereinbelow for ready reference:

> "***Sub-clause 70.8: Subsequent Legislation***
> *If, after the date 28 days prior to the closing date for submission of bids for the Contract there are changes to any National or State Statute, Ordinance, Decree or other Law or any regulation or by-law of any local or other duly constituted authority or the introduction of any such State Statute, Ordinance, Decree, Law, Regulation or By-law in*

India or States of India which Causes additional or reduced cost to the Contractor, other than under the preceding Sub-Clauses of this Clause in the execution of the contract, such additional or reduced cost shall, after due consultation with the Employer and the Contractor, be determined by the Engineer and shall be added to or deducted from the Contract Price and the Engineer shall notify the Contractor accordingly with a copy to the Employer. Notwithstanding the foregoing, such additional or reduced cost shall not be separately paid or credited if the same shall already have been taken into account in the indexing of any inputs to the Price Adjustment Formulae in accordance with the provisions of Sub-Clause 70.1 to 70.7 of this Clause."

It is however to be noted that the present opinion relates to the interpretation of the provisions of EPC and BOT contracts, and thus, the aforesaid clause of the item rate contracts, has no relevance for the purpose of the present opinion.

4. The aforesaid narration encapsulates the factual matrix of the matter. It appears that the Queries raised in the present opinion primarily pertains to the issue as to whether the contactor/concessionaire would be entitled to price adjustment/reimbursement on the account of change in the rate of royalty by way of notification amounting to "change in law" as provided under the EPC and BOT contracts respectively. The other queries raised in the present opinion are ancillary to the aforesaid query. Thus, to correctly appreciate the legal position pertaining to the case at hand, it is necessary for me to first analyse the relevant provisions of law which govern the aforesaid subject matter in question, followed by the relevant clauses under the EPC and BOT contracts respectively.

5. Section 3(e) of the MMDR Act, defines "minor minerals" as under:

"(e) "minor minerals" means building stones, gravel, ordinary clay, ordinary sand other than sand used

for prescribed purposes, and any other mineral which the Central Government may, by notification in the Official Gazette, declare to be a minor mineral;"

6. Sub-section (1) and (3) of section 15 of the MMDR Act, further empowers the state Government to make rules in respect of minor minerals vide notification and to further amend it from time to time which includes modification in the rate of royalty. The relevant portion of Section 15 of the MMDR Act, is reproduced hereinbelow for ready reference:

*"Section 15 (1): **The State Government may, by notification in the Official Gazette, make rules for, regulating the grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals and for purposes connected therewith.***

(1A) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

****

***(g) the fixing and collection of rent, royalty,** fees, dead rent, fines or other charges and the time within which and the manner in which these shall be payable;*

****

*(3) The holder of a mining lease or any other mineral concession granted under any rule made under sub-section (1) shall pay royalty or dead rent, whichever is more in respect of minor minerals removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee **at the rate prescribed for the time being in the rules framed by the State Government in respect of minor minerals**:*

Provided that the State Government shall not enhance the rate of royalty or dead rent in respect of any minor mineral for more than once during any period of three years."

[Emphasis supplied]

Thus, section 15 of the MMDR Act, confers mandate on the State Government to impose royalty on the extraction of minor minerals by its users and to further revise the same from time to time. The same being a statutory due, the contractor/concessionaire being the users of minor minerals for construction purpose are liable to pay the same during the course of construction.

7. Considering the aforesaid position of law with respect to determination of royalty rates for extraction of minor minerals, I shall now consider the relevant provisions under the EPC contracts followed by the BOT contracts/concession agreements. However, before adverting to that, it is necessary to note that I've have been made to understand that all the relevant clauses, as would be mentioned hereinafter are identical across all the EPC contracts as well as BOT contracts/concession agreements executed by the Querist with various contractors/concessionaires respectively, as the case may be.

8. That under the EPC contracts, the Querist is required to pay the contractor, "contract price" as mentioned in the contract which includes the royalty paid by the contractor in accordance with existing laws and regulations. Clause 19.1.2 of the EPC contracts which defines "contract price" is reproduced hereinbelow:

> *"The Contract Price includes all duties, taxes, **royalty**, and fees that may be levied in accordance with the laws and regulations in force as on the Base Date on the Contractor's equipment, Plant, Materials and supplies acquired for the purpose of this Agreement and on the services performed under this Agreement. Nothing in this Agreement shall relieve the Contractor from its responsibility to pay any tax including any tax that may be levied in India on profits made by it in respect of this Agreement"*

It is to be noted that as per Clause 19.1.3, the Contract Price shall not be adjusted for any change in costs as stated hereinabove, except as stated in Clause 19.10 which provides for price adjustment of the works and Clause 19.17 i.e. change in law. It is therefore necessary to produce the aforesaid clauses to ascertain, as to whether change in the rate of royalty would fall in either of the aforesaid two clauses under the EPC contract.

9. That Clause 19.10 of the EPC contract, provides for "price adjustment" in the contract price on the account of change in price of inputs based on WPI. The relevant sub-clauses of clause 19.10 are reproduced hereinbelow for ready reference:

> *"19.10.2 Subject to the provisions of Clause 19.10.3, the amounts payable to the Contractor for Works, shall be adjusted in the IPC issued by the Authority's Engineer for the increase or decrease in the index cost of inputs for the Works, by the addition or subtraction of the amounts determined by the formulae prescribed in Clause 19.10.4.*
>
> *19.10.3 To the extent that full compensation for any increase or decrease in costs to the Contractor is not covered by the provisions of this or other Clauses in this Agreement, the costs and prices payable under this Agreement shall be deemed to include the amounts required to cover the contingency of such other increase or decrease of costs and prices.*
>
> *19.10.4 The Contract Price shall be adjusted for increase or decrease in rates and price of labour, cement, steel, Plant, machinery and spares, bitumen, fuel and lubricants, and other material inputs in accordance with the principles, procedures and formulae specified below....."*

Further, WPI has been defined in the EPC contract as under:

> *"WPI" means the wholesale price index for various commodities as published by the Ministry of Commerce and Industry, GOI and shall include any index which substitutes the WPI, and any reference to WPI shall, unless*

the context otherwise requires, be construed as a reference to the WPI published for the period ending with the preceding month".

10. Coming to clause 19.17 of the EPC contract pertaining to reimbursement to the contractor for increase in cost due to "Change in law", the relevant portion of clause 19.17 of the EPC contracts is reproduced hereinbelow:

> *"19.17.1 If as a result of Change in Law, the Contractor suffers any additional costs in the execution of the Works or in relation to the performance of its other obligations under this Agreement, the Contractor shall, within 15 (fifteen) days from the date it becomes reasonably aware of such addition in cost, notify the Authority with a copy to the Authority's Engineer of such additional cost due to Change in Law".*

It is relevant to note that, clause 28.1 of the EPC contracts defines "change in law" as under:

> ***"Change in Law"*** *means the occurrence of any of the following after the Base Date:*
>
> ***(a)*** *the enactment of any new Indian law;*
> ***(b)*** *the repeal, modification or re-enactment of any existing Indian law*
> ***(c)*** *the commencement of any Indian law which has not entered into effect until the Base Date;*
> ***(d)*** *a change in the interpretation or application of any Indian law by a judgement of a court of record which has become final, conclusive and binding, as compared to such interpretation."*

11. Furthermore, to correctly understand the aforesaid provision, it is necessary to consider the definition of existing "laws" of India as provided under the EPC contract. Clause 1.2.1 of the EPC contracts provides as under:

> *This Agreement, unless the context otherwise requires: references to laws of India or Indian law or regulation having the force of law shall include the laws, acts, ordinances, **rules**, regulations, bye laws or **notifications** which have the force of law in the territory of India and as from time to time may be amended, modified, supplemented, extended or re-enacted;*

A joint reading of aforesaid provisions, thus makes it clear that any "existing Indian law" as defined under the EPC contract *inter-alia* includes all the "Rules" and "notifications" issued by the Government of India as well as State Governments and thus, any amendment or modification in such rules would amount to "change in law" under clause 19.17 of the EPC contract.

12. I shall now advert to the relevant provisions under the BOT / DBFOT contracts/concession agreements. Clause 41.1 of the Concession Agreement which provides for the criteria, mechanism and the nature of relief that may be granted to the concessionaire in the event of "change in law" is reproduced hereinbelow:

> "***Change in law***
>
> *41.1* *If as a result of Change in Law, the Concessionaire suffers an increase in costs or reduction in net after-tax return or other financial burden, **the aggregate financial effect of which exceeds Rs. 10 crore (Rupees one crore) and 0.5% (zero point five percent) of the Realisable Fee in any Accounting Year**, the Concessionaire may so notify the Authority and propose amendments to this Agreement so as to place the Concessionaire in the same financial position as would have enjoyed had there been so such Change in Law resulting in the cost increase, reduction in return or other financial burden as aforesaid. Upon notice by the Concessionaire, the Parties shall meet, as soon as reasonably practicable but no later than 30 (thirty) days from the date of notice, and either agree on*

amendments to this Agreement or on any other mutually agreed arrangement:

Provided that if no agreement is reached within 90 (ninety) days of the aforesaid notice, the Concessionaire may by notice require the Authority to pay an amount that would place the Concessionaire in the same financial position that it would have enjoyed had there been no such Change in Law, within 15 (fifteen) days of receipt of such notice, along with particulars thereof, the Authority shall pay the mount specified therein; provided that if the Authority shall dispute such claim of the Concessionaire, the same shall be settled in accordance with the Dispute Resolution Procedure. For the avoidance of doubt, it is agreed that this Clause 41.1 shall be restricted to changes in law directly affecting the Concessionaire's costs of performing its obligations under this Agreement.

(Emphasis supplied)

The concession agreement defines an "accounting year" as the financial year commencing from 1st April of any calendar year and ending on 31st March of the next calendar year. It further defined "realisable fees" as under:

"Realisable Fee" means all the Fees due and realisable under this Agreement but does not include Fees that the Concessionaire has not been able to realise after due diligence and best efforts."

13. Further, Sub clause 41.5 of the concession agreement, imposes a rider on sub clause 41.1 and restricts the right of the concessionaire to raise a claim on the account of "change in law" under sub clause 41.1, if the claimed amount is recoverable from the users in the form of "user toll fee". Clause 41.5 of the concession agreement is reproduced hereinbelow:

"Clause 41.5: No claim in the event of recovery from Users:

Notwithstanding anything to the contrary contained in this Agreement, the Authority shall not in any manner be liable to reimburse to the Concessionaire any sums on account of a Change in Law if the same are recoverable from the Users"

In this regard it is pertinent to mention that, user toll fee as well as the annual revision of toll fee charged from the users is fixed on an annual basis as per the formula provided under the National Highways Fee(Determination of Rates and collection)Rules 2008 and any revision in fee is calculated on the basis of 40% of WPI.

14. The aforesaid clauses takes us to the definitions clause under the concession agreement which defines "change in law" as under:

> ***"Change in Law"*** *means the occurrence of any of the following after the Bid Date:*
>
> *(a) The enactment of any new Indian law*
>
> *(b) The repeal, modification or re-enactment of any existing Indian law;*
>
> *(c) The commencement of any Indian law which has not entered into effect until the bid date:*
>
> *(d) A change in the interpretation or application of any Indian law by a judgment of a court of record which has become final, conclusive and binding, as compared to such interpretation or application by a court of record prior to the Bid Date; or*
>
> *(e) Any change in the rates of any of the Taxes that have a direct effect on the Project;"*
>
> **(Emphasis supplied)**

15. It is relevant to note that clause 1.2(b) of the BOT contracts which provides for the definition of "existing Indian law" is similar to clause 1.2.1 of the EPC as mentioned herein above. As similar to clause 1.2.1 of the EPC contract, Clause 1.2(b) of the concession agreement also provides as under:

"1.2 In this agreement, unless the context otherwise requires:

(b) references to India law shall include the laws, acts, ordinances , rules, regulations, or bylaws which have the force of law in any state or Union Territory forming part of Union of India."

16. That with respect to clause(e) of the definition of "change in law" as mentioned hereinabove, it must be pointed out that the Querist has placed before me a judgment passed by a five judge constitution Bench of the Hon'ble Supreme Court in the matter of State of *West Bengal Vs. Kesoram Industries Ltd. reported in (2004) 10SCC 201*, wherein the Hon'ble Apex Court has "clarified" an earlier judgement passed by a seven judge constitution Bench of the Hon'ble Supreme Court in the matter of *India Cement Ltd. Vs. State of Tamil Nadu reported in (1990)1 SCC 12* holding that royalty is not a tax but a payment for the use of land. It necessary to point out here that the Hon'ble Supreme Court in the matter of *Mineral Area Development Authority and Others Vs. Steel Authority of India and Others reported in 2011 4 SCC 450,* has observed that *prima facie* there appears to be some conflict between the decision of the Hon'ble Supreme Court in the aforesaid two judgements i.e. India Cement Limited and Kesoram*(Supra)* , and thus the Hon'ble Supreme Court was pleased to frame several questions of law including the issue as to "whether Royalty determined under Section 9/15(3) of the MMDR Act, is in the nature of tax" and referred the matter to a nine judge bench. Therefore, the issue with respect to nature of royalty as a "tax" is pending consideration before a nine Judges Bench of the Hon'ble Supreme court.

17. Apart from the aforesaid provisions, it is also relevant to note clause 28 of the concession agreement, which pertains to "audit and accounts" under the concessionaire agreement. The same is reproduced hereinbelow for ready reference:

> *"28.1 The Concessionaire shall maintain full accounts of all Fees including Realisable Fees and other revenues derived/collected by it from and on account of use of the Project Highway and of O&M Expenses and other costs paid out of the Project Escrow Account and shall provide to NHAI copies of the said accounts duly audited and certified by the Concessionaire's Statutory Auditors within 120 (one hundred twenty) days of the close of each Accounting Year to which they pertain, during the subsistence of this Agreement. Such audited accounts shall form the basis of various payments by either Party under this Agreement. The Concessionaire shall also furnish, within one week of its publication, certified copies of the audited accounts and annual report published by the Company under the Applicable Laws".*

18. From the foregoing discussion of relevant provisions of EPC and BOT contracts/concession agreement, and keeping in view the relevant position of law with respect to "change in law", I opine as follows:-

A) So far as Query No. (A) & (B) are concerned, I am of the view that, considering clause (b) of the definition of "change in law" pertaining to "modification of any existing Indian law" read with the definition of "existing Indian laws" under the EPC contract and section 15 of the MMDR, Act, any change in the rate of

royalty after the base date or the bid submission date would fall under the definition of "Change in law" under the EPC contracts. Since any "Rules" or "notification" issued by the Government falls under the definition of "existing Indian laws", Rules issued by the State Government by way of a notification with respect to fixation of rate of royalty or a further amendment made thereunder including insertion of any new schedule changing the rate of royalty as provided under Sub-section (1) and (3) of Section 15 of the MMDR Act, would amount to "modification" of law as mentioned in clause (b) of the definition of "change in law" under the EPC contracts.

B) In so far as Query No. C is concerned, no legal opinion can be rendered on the advice of the senior economic advisor on WPI. However, in so far as the inclusion of royalty under the clause of "price adjustment" is concerned, even though minerals including "minor minerals" falls within the basket of indexed items under the WPI, and thus may also lead to some over compensation to the contractors subject to the actual accounts and audit reports that may be produced by the contractors under the provisions of EPC contracts, however, considering clause 19.10.3 of the EPC contracts, the "price adjustment" does not fully compensate the contractors of any increase or decrease in cost of inputs. Without prejudice to the aforesaid, I've already opined that change in the "rate of royalty" would amount to "change in law" under clause 19.17 of the EPC contract, and thus the contractors would be entitled to raise a claim for "increase in cost" due to change in law, specifically under clause 19.17 of the EPC contracts.

C) In so far as Query No. D is concerned, the same is not a legal query. The Querist may seek the actual proof of payment of enhanced royalty from the contractors as per its own adopted practices or any other procedure laid down with respect to submission of bills by the contractor for clearance of payments by the Querist. Further, no legal opinion can be given on the nature of proof that can be insisted upon by the Querist from the contractors. The Querist may decide upon the same after considering the annual audited accounts of the contractor or may take the assistance of competent statutory auditors and accountants under the provisions of the EPC contract as the case may be.

D) Coming to the Queries raised with respect to the BOT/DBFOT contracts/ concessionaire agreements, in so far as Query No. E & F are concerned, since clause (b) of the definition of "change in law" i.e. "repeal, modification or re-enactment of any existing Indian law" as well as the definition of "existing India law" under the BOT/concession agreement is the same as under EPC contracts, therefore as opined by me with respect to Query No. A & B hereinabove, any change in the "rate of royalty" of the minor minerals after the base date or bid submission date would be covered under the definition of "change in law" under the BOT/DBFOT contracts. Considering that the Rules formulated by the State Government falls under the category of "existing Indian laws", any "modification" carried out by the state government in the Rules pertaining to imposition of Royalty including amendment in the rate of royalty vide a

notification under section 15 of the MMDR Act, would amount to "modification of any existing Indian law" as occurring in clause(b) of the definition clause of "change in law" under the BOT contracts.

(e) In so far as Query No. G is concerned, I am of the opinion that, strict and literal interpretation must be given to the language of the BOT contract. Clause 41.1 of the concession agreement pertains to a claim that the concessionaire can raise with respect to increase in costs or reduction in net after-tax return or other financial burden on the account of change in law. It however imposes a rider on it by setting a minimum financial bench mark and states that such a claim can be raised only if the aggregate financial effect of such increase in cost exceeds Rs. 1 crore (Rupees one crore) and 0.5% (zero point five percent) of the "Realisable Fee" in any "Accounting Year". Meaning thereby, any increase in cost due to change in law, must be more than one crore and must also exceed 0.5 % of the realisable fee collected from the users of the Highway in any accounting year i.e. the period between 1st April of any calendar year and ending on 31st March of the next calendar year. However in case, the project has not been put to operations and thus, the concessionaire has not been allowed to collect the user fee, the minimum bench mark of 0.5% of the realisable may be considered as zero, and a claim can be raised if the increase in cost due to change in law exceeds Rs. 1 Crore in the concerned accounting year.

E) In so far as Query No. H is concerned, I am of the view that clause 41.1 of the concession agreement does not expressly lay down any time period for the concessionaire to raise a demand with respect to "increase in cost" on the account of change in law. The aforesaid clause, however makes it clear that the concessionaire can notify such a claim, only if it exceeds Rs. 1crore (Rupees one crore) and 0.5% (zero point five percent) of the Realisable Fee in any "accounting Year" i.e. the financial year commencing from 1st April of any calendar year and ending on 31st March of the next calendar year. Under clause 28 of the concession agreement, the concessionaire is required to maintain full accounts of all the revenue received which includes "realisable fee" and the payments made by it from the escrow account and it is required to furnish a copy of the said accounts duly audited by the concessionaire's auditors within 120 days of closing of each "accounting year" which forms the basis of various payments by either party under the contract, to raise any claim with respect to "increase in cost. The concessionaire therefore, can raise a demand under clause 41.1 by furnishing its accounts duly audited by its auditors, satisfying the aforesaid financial threshold at the closing of each accounting year.

F) In so far as Query No. I & J are concerned, the same are not legal queries and thus, no legal opinion can be given on the nature/mode of proof that must be insisted upon by the Querist with respect to payment of enhanced royalty. The Querist may decide upon the same after considering the annual audited

accounts of the concessionaire or may take the assistance of competent statutory auditors and accountants under the provisions of the concession agreement as the case may be. In so far as the query regarding actual payment of taxes/royalties being made by EPC contractors and not by the concessionaire are concerned, it is to be noted that the concession agreement permits the concessionaire to engage EPC contractors and all the payment are made to the EPC contractors by the concessionaire from the "escrow account". Thus, any payments made by the concessionaire to EPC contractor can be ascertained from the accounts of the concessionaire.

G) In so far as Query No. K is concerned, the Querist has not shown me any provision under the concession agreement with respect to sub-contractors. I am of the view that if the concession agreement permits the concessionaire to engage EPC contractors who further engages sub-contractors, who in carrying out the construction work incurs cost including payment towards taxes and royalties, and if such sub-contractors are not specifically barred under the concession agreement, any such payments made by the sub-contractors of the EPC contractors forms part of the "project cost" and are payable by the concessionaire to the contractors/sub-contractors, who in turn can raise a claim before the Querist under the concession agreement.

H) In so far as Query No. L is concerned, in view of the answer to the Query No. I & J, a separate opinion for Query No. L is not required. The Querist may seek the assistance of competent

accountants and auditors on the necessity of "proof" to consider the claims of the concessionaire under clause 41.1 and may take an executive decision to processes the claim of the concessionaire on its own merits.

I) In so far as Query No. M is concerned, Clause 41.5 of the concession agreement prohibits any reimbursement to the concessionaire on the account of "change in law" under clause 41.1, if the same is recoverable from the users. However, in so far as feasibility of recovering the change in rate of royalty from the users is concerned, the same pertains to the commercial aspects of the concession agreement. I've already opined that the change in the rate of royalty would fall under the category of "change in law" as mentioned under 41.5. No legal opinion can be given as to whether, it can be recovered from the users and the same can be ascertained by the competent accountants and auditors on the basis of measurement of WPI and calculation of revision of user toll fee under the provisions of the National Highways Fee(Determination of Rates and collection)Rules, 2008.

NOTE: This opinion is strictly limited to the matters stated in this opinion and is not to be read as extending by implication to any other matters not specifically referred to in this opinion. The present opinion is rendered only for advisory purpose and may not be relied upon by any other person or for any other purpose, nor may it be quoted or referred to in any judicial or quasi-judicial proceedings that

may be pending adjudication or to be instituted before any court of law/Tribunals or any other Quasi Judicial body.

I opine accordingly.

[TUSHAR MEHTA]