

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram

1. Dr. Pramod Deo, Chairperson
2. Shri R. Krishnamoorthy, Member
3. Shri S. Jayaraman, Member
4. Shri V. S. Verma, Member

Petition No. 163/2008

In the matter of

Neyveli Lignite Corporation Ltd., Chennai

Petitioner

Vs

Tamil Nadu Electricity Board, Chennai

Respondent:

And in the matter of

Accumulation of dues – seeking Commission's intervention and direction for TNEB to clear the income tax dues and excess rebate availed.

Following were present

1. Shri N.A.K. Sarma, Advocate, NLC
2. Shri E. Gnanaprakasam, AGM, NLC
3. Shri R. Suresh, DGM, NLC
4. Ms. Ratna Chowdhury, NLC
5. Shri P.H. Parekh, Advocate, TNEB
6. Shri Shekhar Sharma, Advocate, TNEB
7. Shri Shubhranshu Padhi, Advocate, TNEB
8. Ms. Ruchi Aggarwal, Advocate, TNEB
9. Shri Sameer Parekh, TNEB
10. Ms. V. Savitha, TNEB
11. Shri E.R. Kumar, TNEB
12. Shri S. Soumyanarayanan, TNEB

**ORDER
(Date of Hearing 24.3.2009)**

This application has been made by Neyveli Lignite Corporation Ltd, for short, NLC, seeking directions to the respondent, Tamil Nadu Electricity Board,

for short, TNEB, for refund of the excess rebate amounting to Rs 79.52 crore availed of by the latter, and also for reimbursement of the income-tax dues amounting to Rs 481.46 crore already deposited by NLC with the income-tax authorities, in accordance with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004, (the 2004 regulations).

2. At the outset learned counsel for TNEB stated that copy of the rejoinder filed by NLC was handed over to him in the Court and as such he sought short adjournment. Learned counsel for NLC stated that copy of the rejoinder was sent to TNEB by post. He, however, sought to argue the matter without reference to the rejoinder filed since, according to him, at least the issue of refund of the excess rebate was already settled by the earlier orders of the Commission and delay in settlement of the outstanding amount was causing undue hardship to NLC. Accordingly, we heard learned counsels for the parties limited to this issue.

Refund of Excess Rebate

3. NLC has claimed that TNEB had been making payments through cheques, after adjustment of rebate of 2.5% up to October 2004 and 2% thereafter, against its entitlement of rebate of 1%. According to NLC, TNEB has retained an excess amount of Rs. 79.52 crore and is liable to refund the said amount retained by it.

4. TNEB in its reply has stated that it had signed a Bulk Power Purchase Agreement (BPSA) for purchase of power from NLC TPS-I with NLC which was initially valid up to 31.3.2002. It has been stated that the validity of the agreement was extended up to 31.3.2004 by the Commission in its order dated 31.8.2004 in Petition No. 33/2004. According to TNEB, clause 11.4 of the agreement entitled it to avail rebate of 2.5% on payments made within 3 working days of the date of the presentation of the bill. Accordingly, TNEB has pointed out that a rebate at the rate of 2.5% was to be allowed by NLC since payments were being made within three working days of raising of the bill by NLC. TNEB in its reply has also relied upon letter dated 5.6.2003 from the then CMD, NLC to the then Chairman TNEB to support its claim that it was validly withholding rebate calculated at the rate of 2.5%. TNEB in its reply has sought review and revision of the order dated 19.10.2005 alleging that the petition filed before the Commission was based on false affidavits.

5. We heard learned counsel for the parties.

6. Learned counsel for NLC informed that this was the third round of litigation between the parties on the issue of refund of the excess rebate retained by TNEB. In this regard learned counsel brought to the Commission's notice order dated 19.10.2005 in Petition No. 97/2005 wherein TNEB was directed to refund or adjust the excess amount withheld by it within three months. Learned counsel pointed out that when the direction was not complied with, another petition being

Petition No. 17/2006 for fresh directions for refund of the excess amount was filed. Learned counsel brought out that this petition was disposed by order dated 14.9.2006, directing TNEB to refund or adjust the amount due within two months thereof, through a reasoned order. He submitted that even this direction had not been complied with and hence the present application was made. Learned counsel submitted that TNEB did not take any further proceedings after issue of the said order dated 14.9.2006 and, therefore, the order became final. Learned counsel argued that the two orders passed by the Commission held the field and not the BPSA and accordingly, these orders had to be complied with. According to his submission, the respondent is guilty of violation of the Commission's orders and unless it purges itself of the charge, it should not be heard by the Commission

7. Learned counsel for TNEB submitted that BPSA signed between NLC and TNEB and extended through the order of the Commission held the field and therefore, rebate was to be regulated in terms of para 11.4 of BPSA. In support of claim of TNEB that it was entitled to rebate of 2.5%, learned counsel submitted that in case payment was made within three days, it was as good as opening of LC. He submitted that payment within three days of raising of bills and claiming rebate of 2% was permissible under the tripartite agreement signed between the Central Government, the State Government of Tamil Nadu and the Reserve Bank of India. Learned counsel submitted that the former CMD, NLC in his letter dated 5.6.2003 had admitted that TNEB was being allowed rebate for direct

payment, instead of payment through LC, on settling the amount within three days of presentation of the bills as provided in BPSA and thereby accepted the validity of its relevant clause. . It was further pointed out by learned counsel that a meeting was held on 22.12.2003 to resolve the issue of payment of accumulated dues, attended to among others by the then CMD, NLC. In the said meeting it was agreed that a sum of Rs. 191.62 crore was outstanding. This amount was arrived at after accounting for rebate @ 2.5%. However, NLC did not raise any objection, implying thereby that NLC bonafide believed that TNEB was entitled to rebate of 2.5% when payment was made within three days. In this regard learned counsel brought to the Commission's notice minutes of the meeting held on 22.12.2003. Learned counsel further relied upon letter dated 26.10.2004 from General Manager (Commercial), NLC addressed to the Chief Financial Controller, TNEB, wherein the former had agreed to allow rebate of 2% in accordance with regulation 25 of the 2004 regulations for the payments made within three days from the date of presentation of bills. In the light of these facts, learned counsel urged that NLC should not ask for anything more than what was agreed to between the parties, more particularly when the benefit had already been passed on the consumers of electricity within the State. Learned counsel clarified that the facts narrated in reply-affidavit filed by TNEB and the documents produced therewith could not be produced in the earlier proceedings as these were not within the knowledge of the respondent. He submitted that the documents were collected from other departments and were produced as a part of the reply-affidavit. He also submitted that pricing of electricity supplied by NLC

took care of rebate allowable. Learned counsel also submitted that TNEB had opened LC on 31.12 2007.

Analysis

8. In the first instance, it may be appropriate to have a look at the provisions made in the relevant regulations. In accordance with clause: 2.15 of the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2001 (applicable from 1.4.2001 to 31.3.2004) for payment of bills through letter of credit, a rebate of 2.5% was allowed. It was further provided that if the payment of bill was made within one month of its presentation by any mode other than letter of credit, rebate of 1% was to be allowed. A similar provision has been made in the 2004 regulations (applicable from 1.4.2004 to 31.3.2009), except that rebate of 2% is allowed when payment of bills is made through the letter of credit.

9. As the rebate of 2.5% or 2% being claimed by TNEB was not in accordance with the regulations on the terms and conditions of tariff notified by the Commission, NLC filed Petition No. 97/2005 seeking direction, *inter alia*, for repayment of rebate deducted from the bills raised by NLC in excess of the rebate allowed under the Commission's regulations. This petition was disposed of by order dated 19.10.2005. The Commission directed that –

“On the question of opening of the letter of credit, it is noted that the Commission’s regulations on terms and conditions of tariff do not mandate opening of the letter of credit by a beneficiary. In terms of

these regulations, liberty is granted to the beneficiaries to make payment by any mode other than the letter of credit. In such cases, the beneficiaries can claim a rebate of 1% in case the payment is made within a period of one month and in case the payments are withheld beyond 60 days the beneficiaries become liable to pay late payment surcharge. It is, however, made clear that in case payment is made through a mode other than the letter of credit, the respondent as a beneficiary cannot claim rebate @ 2.5% or 2% even if the payment of bill is made within 3 days of its raising by the petitioner or earlier. Therefore, in future the respondent will be entitled to claim rebate strictly in accordance with the Commission's regulations on the subject. We further direct that the respondent shall refund or adjust the excess amount of rebate withheld for the past period, in variance with the Commission's regulations, within a period of three months from the date of this order."

10. It is noted that there is a categorical direction to TNEB to refund or adjust the excess amount of rebate withheld for the past period, which was at variance with the Commission's regulations, within a period of three months from the date of the order. As TNEB did not comply with the Commission's order dated 19.10.2005, NLC filed another petition, registered as Petition No. 17/2006. In the order dated 14.9.2006 in this petition, the Commission observed that TNEB could not claim rebate at the rate of 2.5% or 2% unless the payment was made through LC. It was clarified that TNEB in the past was entitled to claim 1% rebate on all payments made within one month from the date of raising of the bill by NLC, till such time it opened LC. Accordingly, the Commission directed TNEB to refund or adjust the excess amount withheld within a period of two months from the issue of the order. The Commission further observed that any default or non-compliance with the directions could lead to penal action against TNEB. The relevant portion of the direct is extracted below:

“27. In the light of the above order which leaves no room for any doubt, we find the respondent’s contention and reliance on the expired BPSA is wholly unjustified. We once again make it clear that the respondent in the past was entitled to claim 1% rebate on all payments made within one month from the date of raising of the bills by the petitioner, till such time it opens LC. Accordingly we direct the respondent to refund or adjust the excess amount withheld within a period of two months from the issue of this order. Any default or non-compliance may be a cause for invoking penal provisions under the Electricity Act, 2003.”

11 The issue that arises for our consideration is whether plea of admissibility of rebate at the rate claimed by TNEB, based on BPSA or the communications from the officers of NLC including its CMD is tenable in background of above facts. As noted above, the issue was first raised in Petition No. 97/2005. In that petition, TNEB had submitted that since payment of bills was being made within three days of their presentation, TNEB was entitled to claim rebate at the rate of 2.5% for the period up to 31.3.2004. It was further submitted that from 1.4.2004, TNEB was entitled to rebate at the rate of 2%. TNEB had argued that NLC could not insist on opening of LC in view of the fact that the system in the past had worked smoothly and satisfactorily. In the reply in that petition TNEB did not bring to the Commission’s notice that in terms of the agreement it was entitled to rebate of 2.5%. Nor did TNEB claim that in view of various letters from NLC it was entitled to claim rebate of @ 2.5% or 2%. While dealing with the contention raised by TNEB in its reply that it was entitled to rebate of 2.5%, the Commission in its order dated 19.10.2005 held that TNEB could claim rebate of 1% when payment was made within a period of one month since it was not mandatory for a

beneficiary to open LC. It was further made clear that in case payment was made through a mode other than LC, TNEB was not entitled to rebate at a rate of 2.5% or 2% even though payments of bills was made within a period of 3 days. In the subsequent petition (No. 17/2006) TNEB relied upon BPSA to press that it was entitled to rebate of 2% without opening LC. This contention of TNEB was rejected by the Commission holding that TNEB's "contention and reliance on the expired BPSA is a wholly unjustified." It was further held that TNEB was entitled to claim rebate at the rate of 1% on all payments made within one month from the date of raising of the bill by NLC. Accordingly, the Commission directed TNEB to refund or adjust the excess amount withheld within two months. It is seen that the Commission in its orders unequivocally directed TNEB to settle the amount of rebate withheld by it in a time bound manner. There is no dispute that no further proceedings were taken by TNEB after issue of orders dated 19.11.2005 and 14.9.2006. Thus, these orders have acquired finality.

12. Section 11 of the Code of Civil Procedure (the Code) bars a court to try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties in a court competent to try such issue or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. Explanation IV below section 11 provides that any matter which might and ought to have been made ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

The principle contained in Explanation IV *ibid* implies that a plea which might and ought to have been taken in the earlier proceedings, but has not been taken, such a plea is deemed to have been taken and decided against the person raising the plea in subsequent proceedings. Even where section 11 does not apply, the principle contained in the section has been applied for the purpose of achieving finality in litigation as held by the Hon'ble Supreme Court in *Satyadhan Ghoshal Vs Deorajin Devi* (AIR 1960 SC 941) in the following words, namely-

“7. The principle of res judicata is based on the need of giving a finality of judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter - whether on a question of fact or an a question of law - has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in s. [11](#) of the Code of Civil Procedure; but even where s. [11](#) does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct. “

13. Under the circumstances noted above and the settled position of law, in these proceedings TNEB cannot be permitted to rely upon the letters or events that predated the filing of Petitions Nos. 97/2005 and 17/2006, finally decided by the Commission. The issue is barred in any subsequent proceeding by applying the principle of constructive *res judicata* based as it is on public policy, and the equitable principle of equity, good conscious and justice. Learned counsel for

TNEB argued that the correspondence relied upon in the present proceedings was not within the knowledge of the respondent and was available in other Department from where it had been obtained and filed in the present proceedings. We are not convinced by the argument made. The letter dated 5.6.2003 from the then CMD, NLC was addressed to the then Chairman, TNEB, the present respondent. The next letter is dated 7.2.2004 under which minutes of the meeting held on 22.12.2003 were forwarded. This letter is addressed to Chief Financial Officer, TNEB. The third letter that has been relied upon by the respondent is dated 26.10.2004, which is also addressed to Chief Financial Officer, TNEB. It is difficult to accept that these communications were not available with TNEB in the earlier proceedings and for this reason TNEB could not put them as ground of defence in those proceedings. It is of interest to note that in the reply filed by TNEB no such plea is taken. If the plea taken by learned counsel for TNEB is to be believed then this could be a ground for review of order under section 114 of the Code read with Order XLVII, Rule 1. However, no review proceedings have been taken by TNEB. The directions and decisions given earlier cannot be revisited in these proceedings initiated at the instance of NLC. We, therefore, reiterate the directions given in the order dated 14.9.2006 in Petition No. 17/2006.

14. Learned counsel for NLC sought to dispel the arguments made by TNEB as regards the import of the correspondence now relied upon. We do not

consider it necessary to advert to those arguments and record our findings thereon since we are not considering the matter afresh on merits.

15. NLC has claimed refund of an amount of Rs. 79.52 crore, said to have been worked out based on earlier directions of the Commission. TNEB in its reply-affidavit has not disputed the correctness of the amount claimed. We direct that this amount shall be refunded by TNEB latest by 30.4.2009. Whether or not NLC is entitled to claim any interest on the amount withheld by TNEB and if so, from which date is left open to be considered and decided subsequently in these proceedings as the petition is not being finally disposed of.

Refund of Income-Tax

16. NLC has stated that TNEB has not refunded the amount of Rs 481.46 crore, as on 30.11.2008. According to the petition, NLC was entitled to recover an amount of Rs. 626.14 crore against which a total sum of Rs 76.17 crore was paid, leaving an unpaid amount of Rs 481.46 crore. Accordingly, a prayer for refund of the amount by TNEB has been made.

17. TNEB in the reply-affidavit has stated that income-tax reimbursement is to be based on the tax paid by NLC on its core business. TNEB has pointed out that there are wide differences between the amount certified by the auditors and that claimed by NLC. TNEB has stated that it is liable to pay an amount of Rs 280.07

crore. TNEB has sought time to reconcile the NLC's claim on account of income-tax.

18. As we have not heard the parties on this issue, we direct that the petition be re-notified for hearing.

Contravention of orders of the Commission

19. As noticed above, the Commission in its order dated 19.10.2005 in Petition No. 97/2005 directed TNEB to refund or adjust the excess amount withheld by it within a period of three months. This direction was not complied with as a result of which NLC moved another application, Petition No. 17/2006. By the order dated 14.9.2006, TNEB was again directed to settle the amount within two months from the date of the order. In the said order dated 14.9.2006 it was made clear that non-compliance of the direct could invite penal action under the Electricity Act, 2003 (the Act). We are dismayed to note that even after lapse of 2 years and six months of the latter order, TNEB has defaulted to abide by the direction. There is no averment in the reply-affidavit that TNEB was not aware of the directions. Therefore, the default appears to be willful and deliberate. In these circumstances, it appears to us that TNEB is *prima facie* guilty of contravention of the Commission's orders and directions.

20 We, therefore, direct TNEB to show cause, latest by 30.4.2009, as to why penalty under section 142 of the Act be not imposed on it for contravention of

and non-compliance with the Commission's directions noted in the orders dated 19.10.2005 and 14.9.2006 *ibid*.

21. List this petition for further directions on 12.5.2009 for consideration of the reply to the notice to TNEB to show cause and other remainder issues left undecided in this order and adverted to above.

Sd/-	Sd/-	Sd/-	Sd/-
(V. S. VERMA)	(S. JAYARAMAN)	(R. KRISHNAMOORTHY)	(DR. PRAMOD DEO)
MEMBER	MEMBER	MEMBER	CHAIRPERSON

New Delhi dated 31st March 2009