

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 253/2009

**Coram: Dr Pramod Deo, Chairperson
Shri S.Jayaraman, Member
Shri V.S.Verma, Member
Shri M Deena Dayalan, Member**

Date of final hearing: 9. 3. 2010

Date of Order: 27.4.2010

In the matter of

Petition under Section 62 of the Electricity Act, 2003.

And

In the matter of

Tamil Nadu Electricity Board, Chennai

.....

Petitioner

Versus

NTPC Limited, New Delhi

Power Grid Corporation of India Ltd, New Delhi

.....

Respondents

The following were present:

1. Shri.P.H. Parekh, Senior Advocate for TNEB
2. Shri. Ashis Vaid, Advocate, TNEB
3. Shri E R Kumar, Advocate for TNEB
4. Shri. MG Ramchandran, Advocate for NTPC and PGCIL

ORDER

Tamil Nadu Electricity Board, the Petitioner herein, has filed this petition under Section 62 of the Electricity Act, 2003 with the following prayers:

- “ a) Declare that NTPC and PGCIL are not entitled to recover grossed up tax while claiming reimbursement of income tax from TNEB; and
- b) Declare that NTPC and PGCIL are entitled to recover income tax only in accordance with the Regulations of this Hon'ble Commission as well as the Orders dated 21.12.2000 and 26.3.2004 passed in Petition No. 4/2000 and other connected matters and Petition No.67/2003 respectively; and
- c) Direct NTPC and PGCIL to refund the amount of grossed up tax, if any, recovered from TNEB for the period from 1.4.2001 to 31.3.2009 by way of reimbursement of income tax, alongwith interest thereon at 18% p.a.; and
- d) Pass any other or further order(s) as the Hon'ble Commission may deem fit and proper in the facts and circumstances of the case.”

2. The Petitioner has submitted that the issue raised in the petition pertains to the question whether the generating companies/transmission licensees while claiming reimbursement of income tax are entitled to gross up the tax. As per the Petitioner, the issue is not *res-integra* and has been finally resolved by at least two orders of the Commission i.e. orders dated 21.12.2000 in Petition No. 4/2000 and other connected matters and order dated 26.3.2004 in Petition No. 67/2003 (Suo Motu). Despite the authoritative pronouncements by the Commission, Neyveli Lignite Corporation Ltd., a generating company, has grossed up taxes while claiming reimbursement of income tax from the Petitioner. On coming to know about this, the

Petitioner addressed letters to the respondents to ascertain whether they had grossed up the income tax while claiming reimbursement. While no reply has been received from Second Respondent, replies dated 7.9.2009 and 20.8.2009 received from the First Respondent do not answer the issues raised by the Petitioner. The Petitioner claims that the Respondents have grossed up the tax while seeking reimbursement of income tax from the Petitioner and has sought a declaration that the Respondents are not entitled to gross up the tax while claiming reimbursement of income tax and are entitled to claim reimbursement of income tax only in line with the regulations of the Commission as well as the orders dated 21.12.2000 in Petition No.4/2000 and 26.3.2004 in Petition No.67/2003(Suo Motu).

3. The Petitioner has made the following submissions in support of its contention:
 - a) Under Section 43 of the Electricity (Supply) Act, 1946 (Supply Act), the tariff for supply of electricity was determined through mutual negotiations and Section 43A of the Supply Act, tariff for sale of electricity by the generating company to the Boards was determined in accordance with the rates of depreciation and reasonable return and such other factors as may be determined from time to time by the Central Government by notification in the official gazette. As per Schedule 6 of the Supply Act, corporate income tax has been included as appropriation and is to be deducted from the income, before arriving at the clear profits for assessment of income tax. According to Petitioner, the Supply Act did not contemplate any grossing up of tax.

- b) The Petitioner entered into a Bulk Power Supply Agreement (BPSA) with the First Respondent on 22.3.21985 for supply of power from Ramgundam STPS for the period 1984-1988. Subsequently, power is being supplied from other power stations of the First Respondent to the beneficiaries including the Petitioner by entering into BPSAs. As per the provisions of BPSA, NTPC was entitled to receive reimbursement of income tax from the beneficiaries including TNEB but grossed up income tax was not included.
- c) In 1989, the Government of India appointed a Committee under the chairmanship of Dr KP Rao to formulate principles and normative parameters for working out the tariff for sale of power from Central Sector Power Stations. The Committee recommended that tax on profits would be reckoned as an expense as per the provisions of Supply Act and any over or under recoveries would be adjusted on year to year basis. The allocation of tax liability to the respective STPS would be in proportion to the capacity commissioned as at the beginning of the year. Based on the KP Rao Committee Report, the Government of India notified the terms and conditions of tariff for supply of power from the various stations of the First Respondent.
- d) In the year 1992, the Government of India came out with a policy to permit private participation in power sector. The notification dated 30.3.1992 laid

down the broad guidelines to determine the tariff and norms for working out tariff. By an amendment dated 9.6.1998 to the said notification, the reimbursement of income tax on the assured return on equity and foreign exchange rate variation (FERV) on the foreign equity employed in the projects and grossed up tax thereon was allowed. However, this notification was applicable to Independent Power Producers only.

- e) The Electricity Regulatory Commission Act, 1998 came into force with effect from 2.7.1998. Section 13 of the said Act enumerated the functions of the Central Commission which included determination of tariff of the generating companies owned or controlled by the Central Government and inter-State transmission of energy. Consequently, by a notification dated 22.3.1999, Section 43 of the Supply Act was omitted and power was vested in the Regulatory Commissions to determine the tariff.
- f) The Central Commission circulated a consultation paper in 2000 on the proposed terms and conditions of tariff and invited comments thereon. Subsequently, the consultation paper was treated as suo motu petitions and were numbered as Petition Nos. 4, 31, 32, 34, 85, 86, 88 of 2000. The Petitioner filed Petition No. 30/2000 before the Commission with NTPC, NLC, PGCIL and NPCIL as respondents, praying that the income tax that may be passed on to the beneficiaries should not be based on gross profits but should be proportionate to the tax attributable to the assured return on equity portion only. The Commission in its order dated 22.6.2000 disposed of the said petition

holding that issues raised therein were the subject matter of financial norms being separately considered by the Commission and further directed that the said petition be treated as part of the submission made on behalf of the Petitioner.

g) The Commission in its order dated 21.12.2000 in Petition No.4/2000 and other related matters considered the provisions of recovery of income tax as followed by NTPC as per the recommendations of the KP Rao Committee which was accepted by the Government of India and the computation of income tax as per the tariff notification dated 30.3.1992 applicable to IPPs. The Commission concluded that grossing up of tax was contemplated in 30.3.1992 notification applicable in case IPPs whereas in case of PSUs, the actual tax liability including tax on incentives excepting in non-core activity is passed on to the beneficiaries. According to the Petitioner, the Commission after considering the two systems favoured the system without grossing up as simpler and justifiable system and accordingly decided that the practice of recovery of grossing up of tax was not to be followed by the Central Power Suppliers and consequently the beneficiaries were liable to pay tax without grossing up.

h) On 26.3.2001, the Central Commission notified the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001 (hereinafter "2001 regulations") for the period 2001-04. As per Clause 2.12 of 2001 regulations, the tax on income from core activity of a generating company

is to be computed as an expense and shall be recovered from the beneficiaries and does not provide for grossing up of tax.

- i) The Commission in its order dated 26.3.2004 in Petition No.67/2003 (Suo Motu) while rejecting the submission for change in the methodology for income tax, directed that the prevailing specified post tax ROE norms be retained and switchover to an appropriate pre-tax ROE norms would be permitted from a prospective date after initiating the discussion on the issue at an appropriate time. The Commission has continued the practice of not grossing up the tax by the said order till the end of the tariff period 2004-09.

- j) The Commission in its regulations on terms and conditions of tariff for the period 2009-14 has switched over to another method of grossing up of tax. According to the Petitioner, the said notification is prospective in nature and is not applicable to the present dispute which pertains to the period 1.4.2001 to 31.3.2009.

- k) While preparing its reply to Petition No.163/2008 filed by NLC claiming outstanding income tax dues from TNEB, the Petitioner verified its records to ascertain whether other generating companies were claiming grossed up tax. It was noticed that the First Respondent had been claiming reimbursement of income tax from the Petitioner by furnishing such documents as Income Tax Challan for having paid tax; Auditor's Certificate apportioning the tax between core and non-core business; station-wise allocation of tax on core business;

and beneficiary-wise apportionment of the tax. As per the Petitioner, scrutiny of the said documents did not reveal whether NTPC had been grossing up the income tax or not.

- l) The Petitioner has been pursuing with the respondents for a categorical reply as to whether the respondents are grossing up the income tax while claiming reimbursement from the beneficiaries. While the Second Respondent has not sent any reply, the First Respondent in its letter dated 20.8.2009 has provided a statement of accounts and by its letter dated 7.9.2009 has stated that it has paid income tax for its various stations under the provisions of Income Tax Act, 1961 and billed/recovered the actual tax pertaining to generation activities from various beneficiaries including the Petitioner without any grossing up of the rate of return.

- m) The Petitioner has submitted that First Respondent's right to claim reimbursement flows from the regulations made by the Commission. Unless the regulations provide for the grossing up of tax, it cannot be claimed by the respondents. The Petitioner has further submitted that the contention that grossed up tax is permissible under the Income Tax Act is wholly erroneous and misconceived. The Income Tax Act is least concerned with the reimbursement of tax or tax paid on reimbursement, known as grossing up. The Commission in its orders dated 21.12.2000 and 26.3.2004 has clearly held that Central Sector Power Generating Companies are not entitled to claim reimbursement of grossed up tax. The said orders are binding on the

Respondents being parties to the said orders. The Petitioner has accordingly sought a direction to the respondents to claim reimbursement of income tax only in line with the regulations and orders of the Commission and refund the grossed up tax if any included in the income tax reimbursed by the Petitioner, based on their bills for the period 2001-09.

4. The First Respondent has filed preliminary reply to this petition. During the hearing of the case, the counsel appearing for both the respondents submitted at the bar that PGCIL was adopting the reply filed by NTPC. The First Respondent in its reply has submitted that the issue of grossing up of income tax stands settled by the Commission in the order dated 7.1.2010 in Petition No.163/2008. The Petitioner is once again seeking to reopen the same issue of methodology of income tax for the period 1.4.2001 to 31.3.2009 which has already been settled. It has been further submitted that as per the tariff regulations of 2001 and 2004, income tax payable on the core business of the generating company/transmission licensee is to be treated as an expense and recovered from the tariff payable by the beneficiaries. The quantum of tax liability upon the generating company/transmission licensee should be recovered from the beneficiaries and the generating company/transmission licensees ought not to be put to any loss or expenditure payable on the income stream from its core business. The income earned by the generating company/transmission licensee is net of tax and the tax payable is treated as a separate expenditure recoverable from the beneficiaries in accordance with Section 195A of the Income Tax Act, 1961. The Respondent has further submitted that the Petitioner is seeking to confuse the

issue of grossing up of rate of return and the recovery of tax as an expenditure in tariff. In the order dated 21.12.2000, the Commission while analyzing the two methods for treatment of income tax in tariff, namely, the practice of grossing up of return and the passing through of actual tax, has observed that both the methods become neutral and decided to apply the methodology of recovery of actual tax paid as a pass through in tariff. By way of application of Section 195A of the Income Tax Act, 1961, NTPC does not gain any extra income on account of Income Tax. The Respondent has further submitted that the High Court of Allahabad, in Writ Petition No.5034(MB)/1993 (Akhil Bharatiya Vidyut Upbhokta Kalyan Parishad V Union of India) has considered and upheld the charging of income tax payable by NTPC to the beneficiaries.

5. The Petitioner in its written submission dated 12.1.2010 and rejoinder dated 26.2.2010 has submitted that the order of the Commission dated 7.1.2010 in Petition No.163/20008 does not lay down the correct law on account of not considering the recommendations of Dr KP Rao Committee which was accepted and implemented by the Government of India and for not dealing with the binding orders of the Commission such as order dated 21.12.2000 passed by a bench of four members in Petition No.4 of 2000 and the order dated 26.3.2004 passed by a bench of three members of the Commission in Petition No.67 of 2003 on the issue whether while claiming the reimbursement of income tax from the beneficiaries the generating companies and transmission licensees are entitled to

gross up the tax. The Petitioner has submitted that the order dated 7.1.2010 in Petition No.163/2008 is liable to be ignored as per incuriam.

6. We have considered the documents on record and submission of the parties during the hearing. The following issues arise for our consideration:

a) What is the true nature of the orders of the Commission dated 21.12.2000 in Petition No. 4/2000 and other connected matters and order dated 26.3.2004 in Petition No. 67/2003 (Suo Motu), and whether the tariff and other incidental matters like income tax are to be determined in accordance with these orders?

b) Whether reimbursements of Income Tax from the beneficiaries are being claimed by the Central Sector Utilities in accordance with the provisions of 2001 and 2004 regulations?

Issue No.1

6. Prior to the enactment of the Electricity Regulatory Commission Act, 1998 (hereinafter 1998 Act), the tariff for supply of power from the Central Sector Generating Stations to the State Electricity Boards were being determined by the Government of India by issuing notification under Section 43A(2) of the Supply Act. The Central Government in exercise of the powers under Section 51 of the 1998 Act notified deletion of Section 43A(2) of the Supply Act w.e.f. 15.5.1999 and from the

same date the Central Commission assumed jurisdiction under Section 13(a), (b) and (c) of the 1998 Act which vested power and functions in the Central Commission to regulate (a) the tariff of the generating companies owned or controlled by the Central Government; (b) the tariff of generating companies other than those owned or controlled by the Central Government, if such generating companies enter into or have a composite scheme for generation and sale of electricity in more than one State; and (c) the tariff of transmission utilities engaged in inter-State transmission of energy. Under Section 28 of the 1998 Act, the Commission was required to determine by regulations the terms and conditions for fixation of tariff under clauses (a),(b) and (c) of Section 13. Section 55 of the 1998 Act empowered the Commission to make regulations consistent with the said Act and the rules to carry out purposes of the Act. Further Section 37 of 1998 Act stipulated that the Commission shall ensure transparency while exercising its powers and discharging its functions. In exercise of the powers vested in the Commission under Section 28 of 1998 Act, the Commission proceeded to determine the terms and conditions of tariff through regulations. The Commission issued a consultation paper on bulk electricity tariff in September 1999 to generate widespread discussion and comments before finalising the terms and conditions for determination of tariff. The Commission also called for written comments from all concerned and initiated studies by consultants on the major elements of tariff and operating norms. These were converted into suo motu petitions issue-wise and heard by the Commission and were disposed in a common order dated 21.12.2000.

The purpose of the order dated 21.12.2000 and other related orders was elucidated in para 10.2 of the said order as under:

“10.2 This order has to be read along with our orders on petitions 85/2000 and 86/2000 on operational norms for hydro power stations and for inter-State transmission respectively. This order along with the order dated 4th January, 2000 on Availability Based Tariff read with our order on review petition No.13/2000 on availability based tariff will constitute the frame work for notifications on terms and conditions of tariff to be regulated under section 13(a)(b) and (c) of the ERC Act. Separate notifications shall be issued by the Commission incorporating these findings in accordance with section 28 of the ERC Act, 1998.”

7. Therefore the purpose of the order dated 21.12.2000 was to provide a framework for notification of terms and conditions of tariff under Section 13(a),(b) and (c) of the 1998 Act. In other words, these orders are in the nature of Statement of Objects and Reasons for the regulations, and not in the nature of regulations. The Appellate Tribunal for Electricity (Appellate Tribunal) in its judgement dated 6.12.2006 in Appeal Nos. 51 of 2006 and other appeals had explained the scope of the order dated 21.12.2000 in Petition No.4/2000 and other related matters in the following terms:

“3. We have considered the submissions of the learned counsel for the parties. It is not in dispute that the CERC under Section 58 of the Electricity Regulatory Commissions Act, 1998 has framed Regulations called CERC (Terms and Conditions of Tariff) Regulations, 2001 (for short ‘Regulations of 2001) which were notified on March 26, 2001. The tariff is, therefore, to be determined in accordance with the Regulations of 2001. The orders dated January 4, 2000, December 15, 2000 and December 21, 2000 cannot be utilized and even in the past were not utilized for the purposes of determining the tariff. The orders dated January 4, 2000, December 15, 2000 and December 21, 2000 were pro tempore in nature and held the field till the Regulations were framed. After the Regulations were framed the aforesaid orders lost their efficacy and utility. In the circumstances, the challenge to the orders is academic in nature. The appellant, in fact by an indirect way, is challenging the Regulations of 2001 in the guise of attacking the aforesaid Orders. This cannot be permitted.”

8. The Electricity Act, 2003 (2003 Act) came into force with effect from 10.6.2003 repealing 1998 Act, Supply Act and Indian Electricity Act,1910. Section 61 of the 2003 Act enjoined upon the Commission to specify by regulations the terms and conditions of tariff. Section 178 of 2003 Act empowered the Commission to frame regulations on terms and conditions of tariff after previous publication. The Commission published a staff discussion paper in June 2003 containing tariff related issues and invited comments thereon. Based on the responses received, the Commission prepared the draft regulations on terms and conditions of tariff for the period 1.4.2004 to 31.3.2009 and published the same on 1.1.2004 for focused responses from the stakeholders on the various provisions. After a public hearing on 9.3.2004 and 10.3.2004, the Commission considered all suggestions and objections received on the draft regulations and finalized and notified the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 (hereinafter “2004 regulations”). The Commission in its order dated 26.3.2004 in Petition No.67/2003(Suo Motu) recorded the reasons for the changes made in the draft regulations while finalizing the 2004 regulations. The order dated 26.3.2004 in Petition No.67/2003 was in the nature of Statement of Reasons for the 2004 regulations. After the 2004 regulations are notified, the tariff of the generating companies and transmission licensees coming within the jurisdictions of the Commission is to be determined by the provisions of the said regulations and not by the discussions and reasoning contained in the Statement of Reasons.

9. The findings of the Appellate Tribunal in its judgement dated 6.12.2006 in Appeal Nos. 51 of 2006 and other related appeals as extracted in para 7 of this order are equally applicable to the order dated 26.3.2004 in Petition No.67/2003. It therefore emerges that the orders dated 21.12.2000 in Petition No.4/2000 and other related petitions and the order dated 26.3.2004 in Petition No.67/2003 were pro tempore in nature and they have lost their efficacy and utility after the regulations were notified. Moreover, the tariff of the generating stations and transmission systems was never determined by the Commission in terms of these orders. The Hon'ble Supreme Court in Bhajji v Sub-divisional Officer, Thandla {(2003) 1 SCC 692}, summarised the relevance of the Statement of Objects and Reasons to a statute as under:

“11. Reference to the Statement of Objects and Reasons is permissible for understanding the background, the antecedent state of affairs, the surrounding circumstances in relation to the statute, and the evil which the statute sought to remedy. The weight of judicial authority leans in favour of the view that Statement of Objects and Reasons cannot be utilized for the propose of restricting and controlling the plain meaning of the language employed by the Legislature in drafting statute and excluding from its operation such transactions which it plainly covers.”

10. It follows from the above judicial authority that the Statement of Reasons has limited use for understanding the background, antecedent state of affairs and surrounding circumstances to the statute and cannot be used for the purpose of restricting and controlling the plain meaning of the language of the statue. We are not in agreement with the contention of the learned counsel for the Petitioner that the computation of income tax for the purpose of reimbursement should be decided in accordance with the orders dated 21.12.2000 and 26.3.2004 as these orders have

been translated into statutory regulations which can alone hold the field in the matter of determination of tariff including reimbursement of income tax.

Issue No.2

11. The reimbursement of income tax by the beneficiaries to the Central Sector Utilities like NTPC and PGCIL etc. are governed by the relevant provisions of 2001 regulations for the period 1.4.2001 to 31.3.2004 and 2004 regulations for the period from 1.4.2004 to 31.3.2009. Clause (12) of Regulation 2 of 2001 regulations dealing with the tax on income is extracted hereunder:

“2.12 Tax on income

Tax on income from core-activity of the Generating Company, if any, is to be computed as an expense and shall be recoverable by the Generating Company from the beneficiaries. Any under or over recoveries of tax shall be adjusted every year on the basis of certificate of statutory auditors.

Provided that:

- i) Tax on any income streams other than income from core-activity, if any, accruing to the Generating Company shall not constitute as a pass through component in the tariff. Tax on such other income shall be payable by the Generating Company.
- ii) The station-wise profit before tax as estimated for a year in advance shall constitute the basis for distribution of the Corporate tax liability to all the stations.
- iii) The benefit of Tax Holiday where applicable as per the provisions of the Income Tax Act, 1961 shall be passed on to the respective stations.
- iv) The credit for carry forward losses, if any, shall be given in an equitable manner for all stations.
- v) The tax allocated to stations shall be charged to the beneficiaries in the same proportion as annual fixed charges.”

Regulation 7 of 2004 regulations is extracted as under:

“7. Tax on Income: (1) Tax on the income streams of the generating company or the transmission licensee, as the case may be, from its core business, shall be computed as an expense and shall be recovered from the beneficiaries.

(2) Any under-recoveries or over-recoveries of tax on income shall be adjusted every year on the basis of income-tax assessment under the Income-Tax Act, 1961, as certified by the statutory auditors.

Provided that tax on any income stream other than the core business shall not constitute a pass through component in tariff and tax on such other income shall be payable by the generating company or transmission licensee, as the case may be.

Provided further that the generating station-wise profit before tax in the case of the generating company and the region-wise profit before tax in case of the transmission licensee as estimated for a year in advance shall constitute the basis for distribution of the corporate tax liability to all the generating stations and regions.

Provided further that the benefits of tax-holiday as applicable in accordance with the provisions of the Income-Tax Act, 1961 shall be passed on to the beneficiaries.

Provided further that in the absence of any other equitable basis the credit for carry forward losses and unabsorbed depreciation shall be given in the proportion as provided in the second proviso to this regulation.

Provided further that income-tax allocated to the thermal generating station shall be charged to the beneficiaries in the same proportion as annual fixed charges, the income-tax allocated to the hydro generating station shall be charged to the beneficiaries in the same proportion as annual capacity charges and in case of interstate transmission, the sharing of income-tax shall be in the same proportion as annual transmission charges.”

12. From the above provisions of the regulations, it is evident that the tax on income from core business of the generating company or transmission licensee shall be computed as an expense and shall be recovered from the beneficiaries. The Petitioner is not aggrieved with the provisions of Regulation 2(12) of 2001 regulations and Regulation 7 of 2004 regulations. In fact the Petitioner has sought a

direction that reimbursement of income tax should be in accordance with the regulations as well as the orders dated 21.12.2000 and 26.3.2004. We have already held that the orders dated 20.12.2000 and 26.3.2004 cannot be relied for determination of tariff including reimbursement of income tax after the notification of 2001 regulations and 2004 regulations respectively.

13. There are two elements for computation of liability of income tax under the 2001 regulations and 2004 regulations i.e. tax on the income stream from the core activity or business to be treated as an expense, and liability of the beneficiaries to pay such tax. In other words, the generating companies and transmission licensees are entitled to income on core business net of tax. Since the tax liabilities are borne by the beneficiaries, the provisions of Section 195A of the Income Tax Act, 1961 (hereinafter "IT Act") shall be applicable. Section 195A of the IT Act is extracted hereunder:

`Income payable "net of tax"

195A. In a case other than that referred to in sub-section (1A) of section 192, the tax chargeable on any income referred to in the foregoing provisions of this Chapter is to be borne by the person by whom the income is payable, then, for the purposes of deduction of tax under those provisions such income shall be increased to such amount as would, after deduction of tax thereon at the rates in force for the financial year in which such income is payable, be equal to the net amount payable under such agreement or arrangement.'

14. Section 195A of the IT Act clearly provides that where liability to pay the tax is to be borne by the person by whom the income is payable, such income for the purpose of deduction of tax shall be increased to such amount which after the deduction of the tax shall be equal to the net amount payable under the

arrangement. The 2001 and 2004 regulations of the Commission provide for an arrangement under which the beneficiaries are liable to pay tax on income stream of the generating company or transmission licensee. In view of the provisions of Section 195A of IT Act, the income of the generating company or the transmission licensee shall have to be increased to such an amount that after payment of the tax, the generating company or transmission licensee is left with the net income to which it is entitled under the provisions of tariff regulations. Such notional increase of income in common parlance is known as grossing up of income. In view of the provisions of Section 195A of the IT Act read with 2001 and 2004 regulations of the Commission, the income on the core business of the generating company has to be grossed up before recovery from the beneficiaries so that after payment of the income tax, the generating company or transmission licensee is left with the income from its core business to which it is entitled. If such grossing up is not allowed, the generating company or transmission licensee will be left with less income than its entitlement from its core business which will be in violation of the regulations. We are of the view that the 2001 regulations and 2004 regulations do not have any provisions of grossing up of income. By virtue of operation of law, in this case Section 195A of the IT Act, the beneficiaries are required to reimburse grossed up income so that after deduction of the applicable tax, the generating company is left with the net income from its core business.

15. The Appellate Tribunal in its judgement dated 23.3.2010 in Appeal No.68/2009 (Torrent Power Limited v Gujarat Electricity Regulatory Commission)

while considering question of recovery of income tax as an expense has held as under:

“52. A conjoint reading of the Regulation 7, Regulation 66 of the State Commission and Section 195(A) of the Income Tax Act, 1961 leaves no doubt that the recovery of income tax paid as an expense from the beneficiaries requires to be grossed up in such a manner as to ensure that the actual tax paid is fully recovered through tariff. Grossing up of the return would ensure that after paying the tax, the admissible post tax return is assured to the Appellant. In this way the Appellant would neither benefit nor loose on account of tax payable which is a pass through in the tariff. This would ensure that the Appellant earns permissible return of 14% stipulated in Regulation 66 of the Regulations and mandate of Section 195A of the Income Tax Act is also complied with. The National Tariff Policy stipulates that the Regulatory Commission may adopt rate of return as notified by the Central Commission with appropriate modifications taking into view the higher risk involved in distribution and that a uniform approach is desired in respect of return on investment.

53. We agree with the contention of the Respondent Commission that CERC Regulations, 2009 are not applicable in this case of the Appellant. However, the provisions of CERC Tariff Regulations, 2004 will be of relevance. The relevant clause regarding tax on income of these CERC Regulations is extracted below:

“ 7. Tax on Income: (1) Tax on the income streams of *the generating company or the transmission licensee, as the case may be, from its core business shall be computed as an expense and shall be recovered from the beneficiaries.*

(2) Any under-recoveries or over-recoveries of tax on income shall be adjusted every year on the basis of income-tax assessment under the Income Tax Act, 1961, as certified by the statutory auditors.

Provided that tax on any income stream other than the core business shall not constitute a pass through component in tariff and tax on such other income shall be payable by the generating company or transmission licensee, as the case may be.

provided further that the generating station-wise profit before tax in the case of the generating company and the region-wise profit before tax in case of the transmission licensee as estimated for a year in advance shall constitute the basis for distribution of the corporate tax liability to all the generating stations and regions.

Provided further that the benefits of tax-holiday as applicable in accordance with the provisions of the Income-Tax Act, 1961 shall be passed on to the beneficiaries.

Provided further that in the absence of any other equitable basis the credit for carry forward losses and unabsorbed depreciation shall be given in the proportion as provided in the second proviso to this regulation.

Provided further that income-tax allocated to the thermal generating station shall be charged to the beneficiaries in the same proportion as annual fixed charges, the income-tax allocated to the hydro generating station shall be charged to the beneficiaries in the same proportion as annual capacity charges and in case of interstate transmission, the sharing of income-tax shall be in the same proportion as annual transmission charges.”

54. The above provisions of Regulations, 2004 also make it clear that income tax payable on the income from the core business of the company is to be treated as an expense and recovered from the tariff payable by beneficiaries. The income earned by the licensee is net of tax and the tax payable is treated as a separate expenditure recoverable from the beneficiaries.”

16. The First Respondent in its reply dated 5.2.2010 has submitted on affidavit that “NTPC has been strictly following the provisions of the Income Tax Act with regard to the recovery of income tax. The bills have been verified by the statutory auditors of NTPC.” The learned counsel appearing for both respondents stated at the bar that the Second Respondent was adopting the reply of First Respondent and it has been following the same procedure as NTPC for claiming reimbursement of income tax on the income from core business from the beneficiaries. The Petitioner has not brought to our notice any document or calculation which shows that NTPC and PGCIL have been claiming reimbursement of income tax in deviation of the provisions 2001 and 2004 regulations and Section 195 A of the IT Act. In fact, in para 6 (xxiv) of the petition, the petitioner has admitted that NTPC has been claiming reimbursement of income tax by furnishing the tax challan for having paid the tax, the Auditor’s

certificate apportioning the tax between the core and non-core business, station-wise allocation of tax on the core business, and beneficiary-wise apportionment of tax. In our view, NTPC and PGCIL have been claiming reimbursement of income tax strictly in accordance with the provisions of 2001 regulations and 2004 regulations read with Section 195A of the IT Act. Consequently, we have come to the conclusion that the Petition is devoid of any merit and is liable to be dismissed. We order accordingly.

Sd/-
[M DEENA DAYALAN]
MEMBER

Sd/-
[V S VERMA]
MEMBER

Sd/-
[S JAYARAMAN]
MEMBER

Sd/-
[Dr PRAMOD DEO]
CHAIRPESON