

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 47/2010

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

DATE OF HEARING: 23.9.2010

DATE OF ORDER: 7.10.2010

IN THE MATTER OF

Non-compliance of Commission's order dated 31.3.2009, 7.1.2010 and 27.1.2010 (Commission's direction to TNEB to clear the income tax dues and excess rebate availed with interest).

AND IN THE MATTER OF

Neyveli Lignite Corporation Ltd

...Petitioner

Vs

Tamil Nadu Electricity Board, Chennai

....Respondent

The following were present

1. Shri. N.A.K.Sarma, Advocate, NLC
2. Shri. R. Chandrachud, Advocate, NLC
3. Ms. Reji Joseph, Advocate, NLC
4. Shri N.Rathinasabapathy, NLC
5. Shri P.H.Parekh, Sr. Advocate, TNEB
6. Shri E.R.Kumar, Advocate, TNEB
7. Shri Debjyothi Bhattacharya, Advocate TNEB
8. Ms. Maheshwari Bai, TNEB
9. Shri Jameel Pasha, TNEB

ORDER

This application has been filed by the petitioner, Neyveli Lignite Corporation Ltd, alleging non-compliance by Tamil Nadu Electricity Board of the Commission's orders dated 31.3.2009, 7.1.2010 and 27.1.2010 in Petition No.163/2008, with regard to the refund of income-tax dues and excess rebate.

The petitioner has made the following specific prayers:

- (a) to take on record the present petition for consideration;*
- (b) to direct TNEB to refund the excess rebate availed to the tune of ₹ 79.52 crore with interest at 1.25% per month from 1.5.2009 till date of payment;*
- (c) to direct TNEB to reimburse the IT dues of ₹ 481.46 crore as on 30.11.2008 paid by NLC in advance with interest @1.25% per month from 7.1.2010 till date of reimbursement;*
- (d) to pass any such order as deemed fit by the Hon'ble Commission.*

2. Petition No. 163/2008 was filed by the petitioner seeking intervention of the Commission for refund the excess rebate of ₹ 79.52 crore retained by TNEB from 1.4.2001 to 30.11.2008 and for reimbursement of outstanding income-tax dues of ₹ 481.46 crore as on 30.11.2008. After hearing the parties, the Commission by its order dated 7.1.2010 disposed of the petition, with the following directions:

- (a) TNEB is liable to refund ₹ 79.52 crore towards refund of excess rebate availed by it, by 15.1.2010;

(b) TNEB is liable to reimburse by 15.1.2010 the income tax dues

of ₹ 481.46 crore as determined by the statutory auditor;

(c) TNEB is to pay interest @ 1.25% per month from 1.5.2009 till the date of payment on the rebate amount of ₹ 79.52 crore and interest @ 1.25% per month from the date of the order till the date of payment of outstanding income tax dues;

3. It was also clarified in the said order that if the respondent failed to comply with the above directions by the due date, the Commission would be constrained to initiate proceedings *suo motu* under Section 142 of the Electricity Act, 2003 ('the Act').

4. The order dated 7.1.2010 in Petition No.163/2009 was challenged by the respondent in Appeal No. 49/2010 before the Appellate Tribunal for Electricity (hereinafter 'the Appellate Tribunal') along with an application for stay of the said order. The appeal was admitted and no stay was granted by the Appellate Tribunal.

5. During the pendency of the appeal, the petitioner filed the present petition for ensuring compliance of the directions of the Commission in terms

of the prayer extracted in para 1 above. The petition was admitted but was not taken up on account of pendency of the appeal in the Appellate Tribunal.

6. The Appellate Tribunal in its order dated 10.9.2010 in Appeal No.49/2010 has issued the following directions:

“64. SUMMARY OF OUR FINDINGS:

(i) Challenging the jurisdiction of the Central Commission to adjudicate upon the disputes with reference to the reimbursement of income tax or refund of Excess Rebate is not tenable. The Central Commission while adjudicating upon the dispute has to act in conformity with the applicable clauses contained in Regulations. In this case the Central Commission, while adjudicating the dispute in respect of reimbursement of income tax has acted in conformity with the clauses 2.12 of Regulation, 2001 and clause 7 of Regulation, 2004 and while adjudicating upon the dispute in respect of refund of Excess Rebate, the Central Commission has acted in conformity with clause 2.15 of Regulation 2001 and Clause 25 of Regulation 2004. Admittedly, the dispute presently raised by the Respondent NLC before the Central Commission is a dispute involving a Generating Company, the Respondent and the Electricity Board, transmission and distribution licensee. Hence the Central Commission has the competence and jurisdiction to adjudicate upon the dispute raised by the generating company as against the transmission and distribution licensee.

(ii) Section 195A of Income Tax Act is a provision which comes into play in all cases where an employer/purchaser makes payment net of tax as in the present case. The concept of grossing up is restatement of basic proposition that where any part of income tax, which is due to the Government, is borne by the purchaser, then the tax borne by the said purchaser has to be necessarily treated as further income in the hands of seller, thereby making it eligible for income tax again. A reading of section 195A of Income Tax Act 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 so as to ensure that the actual tax paid is fully recovered through tariff. Under those circumstances, the finding given by the Central Commission in regard to grossing up is

perfectly valid. The contention of the Counsel for the Appellant contrary to the concept of grossing up is misconceived.

(iii) The order passed by the Central Commission on 31.03.2009 with reference to refund of Excess Rebate was challenged by the Appellant in Appeal No. 78/09 before the Tribunal. The said order was set aside by this Tribunal on 20.05.2009 directing the Central Commission to re-hear the matter on this issue afresh. Therefore, the order dated 31.03.2009 passed by the Central Commission was no longer in existence. In the present case, the Central Commission did not decide the said issue afresh as directed by the Tribunal. Instead it simply constituted a fresh Bench and heard the matter on other issue namely reimbursement of income tax and gave finding only on that issue and retained its earlier order dated 31.03.2009, ignoring the directions of the Tribunal. Therefore, the impugned order dated 07.01.2010 is set aside on this issue and the matter remanded to the Central Commission to hear the matter on the issue of refund of Excess Rebate afresh and decide the matter according to law. However, it is made clear that we have not considered the issue on merits and as such we are not expressing any opinion on this issue. Consequently, it is open to the Central Commission to decide the issue on the basis of the submissions and materials placed by the parties and pass the order in accordance with law.

65. In view of the above findings, We conclude that we reject the contention urged by the learned counsel for the Appellant in respect of the jurisdiction as well as the reimbursement of income tax. However, we remand the matter to the Central Commission for considering the issue of refund of Excess Rebate afresh.”

7. During the hearing, the learned counsel for the petitioner submitted that the Appellate Tribunal in its judgment dated 10.9.2010 in Appeal No.49/2010 while setting aside the order of the Commission regarding refund of excess rebate, has confirmed the order of the Commission with regard to reimbursement of income tax. He further submitted that the respondent was

bound to comply with the order of the Commission as regards reimbursement of income tax dues after the directions of the Commission on the issue was confirmed by the Appellate Tribunal. The learned counsel for the petitioner filed a memo of dues on account of income tax during the course of the hearing and submitted that the sum of ₹ 481.46 crore was reckoned as on 30.11.2008 while filing the Petition No.163/2008. Subsequent thereto, the respondent has made certain payments towards income tax including ₹33.7962 crore on 10.3.2010 and certain adjustment by way of set off has been carried out. Consequently the net amount due exclusive of interest as on 31.3.2009 after taking into account payments received and set-off and adjustments made till 20.9.2010 is ₹ 306.8239 crore. The petitioner has submitted a working sheet at Annexure 1 to the memo showing the statement of outstanding income tax dues of ₹ 306.8239 crore and a calculation sheet at Annexure II showing interest of ₹ 33.84 as on 22.9.2010. The learned counsel for the petitioner submitted that time was given to the respondent till 1.2.2010 in terms of the Commission's orders dated 7.1.2010 and 27.1.2010 to settle the outstanding income tax dues. Despite there being no stay on the operation of the order dated 7.1.2010 during the pendency of the Appeal No.49/2010 and even after the order of the Commission with regard to income tax was upheld by the Appellate Tribunal, the respondent has not settled the outstanding income tax dues as yet. The learned counsel submitted that

directions be issued to the respondent to make payment of IT dues forthwith, at least 50% of the total amount outstanding, pending further orders in the petition.

8. The learned counsel for the respondent submitted that the petitioner has filed the present petition for execution of two directions of the Commission, namely, the refund of excess rebate and reimbursement of IT dues by the respondent. Since the Appellate Tribunal has set aside the order of the Commission on the issue of refund of excess rebate and remanded the matter to the Commission for fresh hearing, the direction of the Commission with regard to refund of excess rebate cannot be enforced. As regards the outstanding income tax dues, the learned counsel for the respondent raised the question of jurisdiction of the Commission to adjudicate the dispute with regard to recovery of IT dues. The learned counsel further submitted that the Appellate Tribunal in para 18 (C) of its judgment has recorded the following with regard to outstanding dues of income tax:

“(C) The total amount which has been claimed towards Income-tax by the Corporation is ₹ 481.46 crores. In the reply, the Appellant disputed the amount and submitted that specified various amounts have got to be adjusted against the alleged income-tax dues. None-the-less, the Central Commission, without considering any of the above objections, allowed the claim of NLC in total. This is not a judicial approach. As a matter of fact, when this Appeal is pending before the Tribunal, the Corporation itself has written a letter mentioning that the figure of ₹ 481.46 crores mentioned in impugned order is not correct and that that correct figure would be ₹ 306 crores after all adjustments. Therefore, the Central Commission without considering the

correctness of the figure projected by the Corporation before the Central Commission, has simply passed the order directing the said amount to be paid. This is non-application of mind.”

9. In reply to our query as to whether the issue of jurisdiction of the Commission was still being contended upon by the respondent, the learned counsel for the respondent replied in the negative and clarified that the respondent was only disputing the exact amount of IT dues payable. In reply to another query as to whether the Appellate Tribunal has recorded a concrete finding in its judgment, in relation to the respondent’s submissions in para 18(c) of the said judgment as quoted above, the learned counsel for the respondent replied that there is no direction to that effect in the operative portion of the judgement. He further submitted that as per respondents’ calculations, the outstanding income tax dues would be less than ₹ 306 crore and respondent may be allowed time to submit its own calculations on the IT dues payable to the petitioner.

10. We have heard the parties. In para 17 of our order dated 7.1.2010 in Petition No.163/2009, we had considered and decided in the affirmative on the issue of our jurisdiction to adjudicate the dispute regarding settlement of outstanding income tax dues between the petitioner and the respondent. The Appellate Tribunal in para 64(i) of its judgement has upheld the jurisdiction of

the Commission. Therefore the issue of jurisdiction is no more open to the respondent to be raised before the Commission as it is barred by res judicata.

11. The present petition has been filed for ensuring compliance with our directions in order dated 7.1.2010 by the respondent. Out of the two issues, the matter of refund of excess rebate has been remanded to the Commission to be considered afresh. Since the Appellate Tribunal has upheld our order regarding reimbursement of outstanding income tax dues, our directions with regard to reimbursement of income tax is required to be complied with by the respondent. However, as it emerged during the hearing there is considerable difference between the parties with regard to the exact amount of outstanding income tax payable by the respondent as on date.

12. In para 21 of our order dated 7.1.2010 in Petition No.163/2009, we had directed for reimbursement of IT dues as under:

“21. In view of our finding in the preceding paragraph that grossing up is mandatory in terms of Section 195 A of IT Act, and since the bills have been prepared by the statutory auditor after grossing up, the respondent is liable to pay the income tax dues as determined by the statutory auditor. Since the only objection of the respondent pertains to grossing up income tax which has been decided as above, we direct that the respondent shall reimburse ₹ 481.46 crore to the petitioner by 15.1.2010.”

The Commission had gone by the income tax statement prepared by the statutory auditor and directed the respondent to pay ₹ 481.46 crore. Both the

petitioner and the respondent had filed their respective calculation before the Appellate Tribunal. Though the Appellate Tribunal has recorded the submission of the respondent on the exact amount of income tax dues payable by it in para 18(C) of the judgement dated 10.9.2010, no finding or observation has been recorded by the Appellate Tribunal regarding the disputed amount in the operative portion of the judgement. The petitioner after adjusting the payments received from and any other amount payable to TNEB has submitted a calculation sheet showing that the outstanding amount payable by the respondent is ₹ 306.8239 crore as on 20.9.2010 and interest of ₹ 33.84 crore as on 22.9.2010. The respondent in its reply has submitted that if all the credits due from NLC to TNEB are taken into account, then the amount payable by TNEB to NLC would be much less than ₹ 306 crore. TNEB has therefore prayed that both the parties should be heard in order to arrive at the actual figure due from TNEB to NLC on account of reimbursement of income tax.

13. Taking into consideration the claim and counter-claim by the parties, we are of the view that the actual amount due on account of reimbursement of income tax needs to be determined by the Commission. Accordingly, we direct the petitioner to submit the following information, for reconciliation, latest by 18.10.2010:

- (a) Year-wise income-tax (grossed up) amount payable and actually paid to the tax authorities, on the income attributable to its core business for the period from 2001-02 to 2009-10;
- (b) Year-wise income-tax (grossed up) amount for the corresponding years claimed from the respondent;
- (d) Amounts received from the respondent and the balance amount payable by the respondent;
- (e) Any other adjustment made on account of amount payable to the respondent;
- (f) Detailed calculation of the interest claimed.

14. The respondent, TNEB, is also directed to submit by 18.10.2010 the details of the payments made to the petitioner so far and the amount outstanding on account of income tax dues and interest thereon as per its calculation.

15. The petitioner has already paid the income tax as per the statutory requirement under the Income Tax Act, 1961. As the income tax is a pass through, the respondent was required to settle the income tax dues on year to year basis. By withholding payment of outstanding income tax dues to the petitioner, the respondent has adversely affected the liquidity position of the petitioner. Even after our order dated 7.1.2010 deciding the issue of grossing

up of income tax, the respondent has not cleared the outstanding amount in full. Therefore, we are of the view that a direction needs to be issued to the respondent to make a payment of at least 50% of the outstanding dues claimed. Accordingly, we direct the respondent to make a payment of ₹150 crore to the petitioner by 15.10.2010 which will be adjusted against the final outstanding dues that will be worked out by us based on the details to be filed by the petitioner and respondent in terms of our order.

16. Petition No. 163/2008 shall be listed for hearing on the issue of refund of excess rebates on 28.10.2010. Both petitioner and respondent are directed file their submissions by 18.10.2010.

**Sd/
[M.DEENA DAYALAN]
MEMBER**

**sd/
[V.S.VERMA]
MEMBER**

**sd/
[Dr. PRAMOD DEO]
CHAIRPERSON**