CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Review Petition No. 64/2010
against
Petition No. 129/2009

Coram
1. Shri S. Jayaraman, Member
2. Shri V.S.Verma, Member

DATE OF HEARING: 27.7.2010 **DATE OF ORDER: 27.9.2010**

In the matter of

Review of order dated 11.1.2010 in Petition No.129/2009 pertaining to the determination of impact of additional capital expenditure incurred during the period 2008-09 in respect of Feroze Gandhi Unchahar Thermal Power Station, Stage-I.

And in the matter of

NTPC Ltd, New Delhi ……**Petitioner**

Vs

1. Uttar Pradesh Power Corporation Limited, Lucknow
2. Jaipur Vidyut Vitran Nigam Ltd,Jaipur
3. Ajmer Vidyut Vitran Nigam Ltd, Ajmer
4. Jodhpur Vidyut Vitran Nigam Ltd, Jodhpur
5. North Delhi Power Ltd, Delhi
6. Haryana Power Purchase Centre, Panchkula
7. BSES-Rajdhani Power Ltd, New Delhi
8. BSES-Yamuna Power Ltd, Delhi
9. Punjab State Electricity Board, Patiala
10. Himachal Pradesh State Electricity Board, Shimla
11. Electricity Department, Union Territory of Chandigarh, Chandigarh
12. Uttarakhand Power Corporation Ltd, Dehradun
13. Power Development Department, Govt of J&K, Jammu …**Respondents**

The following were present

1. Shri V.K.Padha, NTPC
2. S.K.Mondal, NTPC
3. Shri A.K.Juneja, NTPC
4. Shri S.Saran, NTPC

ORDER

This application has been made by the petitioner, NTPC Ltd, a generating company, seeking review of the Commission's order dated 11.1.2010, in Petition No.129/2009, (hereinafter referred to as "the impugned order"), determining the impact of additional capital expenditure incurred during the period 2008-09 in respect of Feroze Gandhi Unchahar TPS, Stage-I (hereinafter referred to as "the generating station). The grievances of the petitioner against the impugned order are discussed in the succeeding paragraphs.

Disallowance of exclusion of de-capitalization amounting to Rs.9.16 lakh on capital spares

2. The Commission in order dated 11.1.2010 had observed as under:

> ***"De-capitalization of capital spares:*** *The petitioner has de-capitalized capital spares amounting to Rs.9.16 lakh in books during the year 2008-09 on their becoming unserviceable. The petitioner has submitted that the spares have been de-capitalized for accounting purposes only and are not to be de-capitalized for the purpose of tariff. The ground on which the exclusion has been sought by the petitioner is as under:*
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> *"The unserviceable spares have been de-capitalized for accounting purposes. However, as new purchase of capital spares is not being allowed to be capitalized for tariff purposes by the Commission (Rs.1.063 crs. in tariff period 2001-04), this de-capitalization may be excluded for tariff purposes."*
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> *The prayer of the petitioner for exclusion of de-capitalized spares is justified if the de-capitalized spares are the ones which were disallowed for the purpose of tariff. However, as per affidavit dated 10.09.2009, these spares were accounted for in the capital base of the generating station for the purpose of tariff since date of take over. Hence, exclusion of negative entries on account of de-capitalization of unserviceable spares not in use is not justified and not allowed for the purpose of tariff".*

3. The petitioner has submitted that the Commission while dealing with the additional capital expenditure for the period 2008-09, has not allowed the exclusion of negative entries towards de-capitalization of spares, despite the fact that the corresponding capitalization of the substituted assets have not been allowed. It has also submitted that it had capitalized spares worth Rs. 85.86 lakh during the year 2008-09 and has de-capitalized obsolete spares worth Rs. 9.16 lakh. If the capitalization of spares has not been allowed in substitution of the obsolete spares, there cannot be de-capitalization of such obsolete spares, not withstanding that in the books of accounts of the petitioner, there has been de-capitalization.

4. We do not accept the submissions of the petitioner. The Commission in its various orders pertaining to the generating stations of the petitioner had consistently taken a view that exclusion of de-capitalization of spares could be allowed only if the de-capitalized spares were the ones which were not allowed to be capitalized for the purpose of tariff or if the de-capitalization of spares was due to consumption of those spares which were not allowed to be capitalized for the purpose of tariff. In some of the generating stations of the petitioner, the Commission had directed the petitioner to certify if the de-capitalized spares were the ones which were not allowed to be capitalized for the purpose of tariff and in cases where it was certified, the exclusion of negative entries arising due to de-capitalization of capital spares has been allowed. In respect of this generating station, certificate was not called for since the in terms of the

affidavit dated 10.9.2009, filed by the petitioner, it could be ascertained that the de-capitalized spares were the ones which were considered in the in capital base for the purpose of tariff. Based on the above, these unserviceable assets, which do not provide any useful service to the beneficiaries, were removed from the capital base. Hence, the exclusion of negative entries due to unserviceable spares which form part of the capital base for the purpose of tariff was not allowed. Thus, the review of the order on this count is not maintainable in terms of Rule 1, Order 47 of the Code, in view of the findings recorded by the Commission after considering the submissions of the petitioner.

Disallowance of exclusion of de-capitalization amounting to Rs. 150.44 lakh on miscellaneous assets when corresponding capitalization of substituted assets have not been considered.

5. The Commission in its order dated 11.1.2010 has observed as under:

*"**De-capitalization of vehicles, school equipment, hospital equipment, furniture, IT equipment in books**: The petitioner has de-capitalized MBOA as mentioned above in books of accounts amounting to Rs.150.44 lakh during the year 2008-09 on its becoming unserviceable. However, the petitioner has prayed that negative entries arising out of de-capitalization of MBOA are to be retained in the capital base for the purpose of tariff. The ground on which the exclusion has been sought by the petitioner is as follows:*

> *"Vehicles and other miscellaneous assets have been de-capitalized. Since Hon'ble Commission is not permitting capitalization of same, when they are procured, decap. may also be excluded."*

The prayer of the petitioner for exclusion of de-capitalized MBOA is justified if the de-capitalized MBOA are the ones which were disallowed for the purpose of tariff. However, considering the fact that capitalization of minor assets for the purpose of tariff was disallowed for the tariff period 2004-09, it can be concluded that these de-capitalized assets are the ones which were procured prior to 01.04.2004. The petitioner in its affidavit dated 10.09.2009 has confirmed that these de-capitalized MBOA are in service from the date of takeover of the generating station i.e 13.02.1992. As such, the exclusion of negative entries arising due to de-capitalization of unserviceable MBOA is

not justified and cannot be allowed to remain in the capital base for the purpose of tariff."

6. The petitioner has submitted that in terms of the Central Electricity Regulatory Commission (Terms and conditions of Tariff) Regulations, 2004, (the 2004 regulations) the capitalization of Miscellaneous assets like school equipments, hospital equipments, IT equipments etc. has not been allowed and hence it was entitled to exclude an amount of Rs.150.44 lakh from the de-capitalization of miscellaneous items like vehicles, school equipment, hospital equipment, IT equipments etc.

7. We do not agree with the submissions of the petitioner. It has been the conscious decision of the Commission not to allow exclusion of de-capitalized MBOA for the purpose of tariff on account of the fact that the MBOA de-capitalized during 2008-09 were the ones which were capitalized prior to 1.4.2004 and were considered in the capital base for the purpose of tariff. Capitalization of minor assets was not allowed for the first time in the 2004 regulations. Prior to 1.4.2004 there was no bar on the capitalization of minor assets and the 2009 Tariff Regulations specified by the Commission do contain provision for allowance towards the expenditure on minor assets. It is pertinent to mention that vehicles, hospital machinery and major IT equipments are not covered under the list of minor assets, in terms of Note-3 under Regulations 18 of the 2004 regulations. The petitioner has not claimed the capitalization of vehicles, hospital machinery, major IT equipments like router etc, either under the replacement category or as new assets for the benefit of the employees, or

for ERP implementation respectively, as was being allowed to other generating stations. Also, in the absence of any justification by the petitioner, the exclusion of the negative entries due to de-capitalization of the vehicles, school equipment, hospital equipment, furniture, IT equipments, was not allowed. During the period 2004-09, only assets of minor nature were not allowed to be capitalized. This would be clear from the Statement of Reasons to the 2004 regulations, wherein, it was categorically stated that the expenditure on minor assets brought after the cut-off date may be met by the utilities from their own resources. In the instant case, there was no corresponding capitalization of minor assets during the year 2008-09 which could be disallowed in terms of Note-3 under Regulation 18. This would also suggest that these assets were over and above the requirements of the generating station and on it being unserviceable, were removed from the capital base. We have, after careful consideration disallowed the exclusion of de-capitalization of miscellaneous assets, as explained above and there is no justification to re-consider the decision. There is no error apparent on the face of the record and the prayer of the petitioner for review on this ground is rejected.

8. With regards to the petitioner's submission that the corresponding adjustment in cumulative depreciation due to these de-capitalized assets had not been effected in the calculation of revised tariff of the generating station on account of additional capital expenditure during 2008-09, we clarify that the cumulative depreciation of the generating station has been adjusted/reduced to

the tune of 90% of the de-capitalized amount (i.e. Rs.444.19 lakh against the de-capitalization of Rs.493.54 lakh).

9. Under Order 47 Rule 1 of the Civil Procedure Code (CPC), a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be reheard and corrected. A review petition, it must be remembered has a limited purpose and cannot be allowed to be an appeal in disguise. An error which is not self evident and has to be dictated by a process of reasoning can hardly be said to be an error apparent on the face of the record. The Supreme Court in the case of Lily Thomas etc. vs. Union of India & Ors., JT 2000 Vol.5 SCC 617 held that in exercise of power of review, the Court may correct the mistake but not to substitute the view. The mere possibility of two views on the subject is not a ground for review.

10. We are of the considered opinion that the application does not satisfy the onditions for review laid down under Rule 1, Order 47 of the Code. It cannot be the case of the petitioner that there is an error apparent on the face of record, since the decision has been arrived at after elaborate discussion. Also, it is not the case that some new evidence not within the knowledge of the petitioner earlier or which could not be earlier produced by it after exercise of due

diligence has come to its knowledge. Similarly, there does not exist some other sufficient cause analogous to the other grounds enumerated in Rule 1, Order 47 of the CPC. The application is, therefore, barred under Rule 1, Order 47 of the CPC as well.

11. For the foregoing reasons, the application for review of order dated 11.1.2010 is not maintainable and is accordingly dismissed at admission stage.

Sd/-
(V.S. VERMA)
MEMBER

Sd/-
(S.JAYARAMAN)
MEMBER