CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 15/2010

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

Date of Hearing: 31.3.2011

Date of Order: 20.09.2012

In the matter of

Outstanding dues from KSEB towards Income tax reimbursement seeking Commission`s intervention and direction to KSEB, to clear the Income tax dues

And In the matter of

Neyveli Lignite Corporation Ltd, Neyveli **Petitioner**

Vs

Kerala State Electricity Board, Thiruvanathapuram **Respondent**

The following were presents:

1) Shri A.K. Sharma, Advocate, NLC
2) Shri R. Suresh, NLC
3) Shri A.K.J. Nambiar, KSEB
4) Shri Siddhartha Jha, KSEB

ORDER

Feeling aggrieved by the refusal of the respondent Kerala State Electricity Board (KSEB) to reimburse the outstanding income-tax dues amounting to ₹119.0935 crore as on 31.3.2009, the petitioner Neyveli Lignite Corporation Ltd (NLC) has filed this petition.

2. NLC, a generating company owned and controlled by the Central Government has established the generating stations which include Thermal Power Station-II (TPS-II) and Thermal Power Station-I Expansion (TPS-I Expansion) with the States in Southern Region as the beneficiaries. The respondent KSEB is having 10% share in TPS-II and 14% share in TPS-I Expansion. While TPS II is an old generating station, TPS-I Expansion was commissioned on 5.9.2003.

3. The Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2001 and the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 (collectively referred to as 'the regulations'), contained the terms and conditions for determination of tariff applicable from 1.4.2001 to 31.3.2004 and 1.4.2004 to 31.3.2009 respectively. The provisions of the regulations for recovery of income-tax are in *pari materia*. Under the regulations, the generating company was allowed post-tax Return on Equity. The regulations provided that the tax on the income paid by the generating company from its core business was to be computed as expense and the generating company was allowed to recover the tax paid, from the beneficiary States in the same proportion as the annual fixed charges. Similarly, in the absence of any other equitable basis, the credit for carry forward of losses and unabsorbed depreciation was also directed to be given generating station-wise. Under the regulations, the generating station-wise profit before tax as estimated in advance in each year constituted the basis for distribution of the corporate tax liability. Under the regulations, the benefit of tax-holiday applicable in accordance with the Income-Tax Act, 1961 (hereinafter 'IT Act') was passed on to the beneficiaries. The Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (hereinafter '2009 regulations'), effective from 1.4.2009, made a departure on the issue of recovery of

income-tax. The 2009 regulations introduced the concept of pre-tax recovery of Return on Equity. With the introduction of the concept of pre-tax recovery of Return on Equity, the benefit of tax-holiday available to the generating station is not passed on to the beneficiaries but is retained by the generating company.

4. The provisions relating to tax holiday enacted in Section 80–I A of the IT Act, are applicable with effect from 1.4.1984. Sub-section (1) of Section 80 IA provides that where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise engaged, *inter alia,* in generation of power, in computing the total income the assessee shall be allowed a deduction of full amount of the profits and gains derived from such business for ten consecutive assessment years. Sub-section (2) lays down that the deduction specified in sub-section (1) may, at the option of the assessee, be claimed for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise begins to generates power. Sub-section (5) provides that the profits and gains of an eligible business under sub-section (1), for the purposes of determining the quantum of deduction under that sub-section, are to be computed as if such eligible business were the only source of income of the assessee. In other words, profits and gains of other business of the assessee do not qualify for deduction under sub-section (1). The provisions of the IT Act, so far as they are relevant are extracted hereunder:

> ***"Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.***
>
> ***80-IA.****(1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.*

(2) The deduction specified in sub-section (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility or starts providing telecommunication service or develops an industrial park [or develops a special economic zone referred to in clause (iii) of sub-section (4)] or generates power or commences transmission or distribution of power 95[or undertakes substantial renovation and modernisation of the existing transmission or distribution lines or lays and begins to operate a cross-country natural gas distribution network :

Provided that where the assessee develops or operates and maintains or develops, operates and maintains any infrastructure facility referred to in clause (a) or clause (b) or clause (c) of the Explanation to clause (i) of sub-section (4), the provisions of this sub-section shall have effect as if for the words "fifteen years", the words "twenty years" had been substituted.

(5) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of sub-section (1) apply shall, for the purposes of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made."

5. TPS-I Expansion which was commissioned during the year 2003 was entitled to benefit of income-tax holiday under Section 80-IA of the IT Act. NLC, at its option, could avail benefit of tax holiday either from the date of commissioning or any subsequent assessment year, in view of sub-section (2) Section 80 IA.

6. NLC has explained that TPS-I Expansion had accumulated depreciation of ₹657.13 crore as on 31.3.2004, depicting taxable loss. TPS-I Expansion earned profit of ₹22.25 crore during the year 2003-04, leaving unabsorbed depreciation of ₹634.88 crore. NLC claims to have adjusted part of this loss against the profits and taxable income of TPS-II and other units for the year 2003-04. NLC has urged that with the adjustment of loss of TPS-I Expansion against the profit of TPS-II and other units the liability of the beneficiaries for reimbursement of income-tax for those generating units was reduced. It has been explained that taxable loss amounting to ₹634.88 crore(₹63487.84 lakh) for the year 2003-04 for TPS-I Expansion was carried forward and set off in subsequent

assessment years, till the year 2006-07. NLC has stated that it did not claim benefit of tax holiday in respect of TPS-I Expansion till the year 2006-07 as there were no taxable profits till that year after setting off of the unabsorbed depreciation for the year 2003-04. NLC has stated that at the end of year 2006-07, there was still a net loss of ₹46.10 crore which was absorbed against the book profit of ₹180.84 crore in the year 2007-08. The net taxable income of ₹147.37 crore accrued during the year 2007-08 only and NLC opted to avail the benefit of tax holiday starting that year. NLC has pointed out that benefit of tax holiday availed was passed on to the beneficiaries.

6. It has been stated that KSEB questioned NLC's decision to defer tax holiday benefit from the year 2007-08 onwards on the ground that it was disadvantageous to the beneficiaries. KSEB is said to have insisted that NLC should have availed of the benefit from the date of commercial operation of TPS-I Expansion. In view of the differences, KSEB stopped reimbursing the income-tax claims of NLC which, according to NLC, included differential income-tax for the period from 2001-02 to 2006-07 in respect of TPS-II, but claimed/raised in June 2007.

7. Upon KSEB withholding reimbursement of income-tax, NLC took some steps to recover the outstanding tax dues including taking up the matter before the Southern Regional Power Committee (SRPC). NLC did not succeed in persuading KSEB to refund the dues. In a meeting at SRPC, it was suggested that the mater be resolved bilaterally and amicably or the issue be taken up with the appropriate authority.

8. In an effort to resolve the dispute bilaterally, a meeting was held on 10.8.2009 when Member (Finance), KSEB decided to obtain advice of the tax consultant on the issue

whether the benefit of tax holiday availed by NLC subsequent to the year of commissioning of TPS-I Expansion was in the interest of the beneficiaries of the generating station. Pursuant to the decision, KSEB sought the opinion of its tax consultant, M/s Verma and Verma on whose advice KSEB in its letter dated 3.12.2009 requested NLC to obtain the independent expert opinion from its own tax consultant by providing him with all necessary details as examination of the question involved complicated facts. NLC has not obtained the opinion of tax consultant as requested by KSEB, resulting in the stalemate.

9. NLC has approached this Commission for direction to KSEB for refund of the outstanding income-tax dues of ₹ 119.0935 crore as on 31.3.2009. The amount includes ₹57.00 crore for TPS-II. It is submitted by NLC that the dispute raised by KSEB has all along been with respect to claiming tax benefit under Section 81 I A of the Income Tax Act, 1961 in respect of TPS-I Expansion. But KSEB has deliberately omitted to reimburse even the IT dues in respect of TPS-II.

10. KSEB in its reply dated 12.10.2010 has stated that NTPC Ltd, another generating company owned or controlled by the Central Government, was availing the benefit of tax holiday from the very beginning, the date of commercial operation of its generating stations and was passing on the benefit to the beneficiaries. KSEB has alleged that the measure taken by NLC was contrary to the practice followed by NTPC, which has thrown huge financial liability on KSEB. KSEB has stated that NLC while seeking recovery of the income-tax liability has neither forwarded the certificate from its statutory auditors as mandated by the regulations nor did it produce the opinion of independent tax consultant. KSEB has alleged that NLC did not avail the tax holiday benefit in respect of its mines

which were part of its generating stations and whose entire cost is passed on to the beneficiaries.

11. KSEB has stated that NLC under its letter dated 30.6.2007 claimed an amount of ₹46.12 crore as income-tax dues for the years 2004-05, 2005-06 and 2006-07, which is contrary to NLC's claim that there was no tax liability during these years. KSEB has placed on record copy of the assessment sheet dated 19.6.2009 from the office of Assistant Commissioner, Chennai for the assessment year 2004-05 which, according to KSEB, showed that NLC had taken benefit of tax holiday of ₹87.20 crore. KSEB has averred that the benefit availed could not, but be related to TPS-I Expansion since none of the other generating stations of NLC qualified for tax holiday, all of them being older than 15 years. KSEB has acknowledged that it did not refund IT claim of ₹62.08 crore for the years 2004-05 to 2008-09, which included an amount of ₹25.12 crore for the first three quarters of the year 2007-08. According to KSEB, if NLC had availed benefit of tax holiday since the beginning, the beneficiaries would have been relieved of the burden of ₹438.0 crore and thus the exercise of that option would have been more beneficial to them. KSEB has filed a reconciliation statement as on 21.1.2009 which shows that KSEB was to receive the amount ₹54.99 crore against ₹ 43.79 crore payable as claimed by NLC. The difference is said to be on account of NLC's claim of income-tax for TPS-I Expansion.

12. NLC in its rejoinder has submitted that the claim for reimbursement of income-tax dues pertains to the period 2001 to 2009. However, while disputing the liability to refund income-tax in respect of TPS-I Expansion, KSEB has withheld income-tax dues in respect

of TPS-II as well, NLC has alleged. NLC has stated that under Section 80 IA, it could opt for the date from which it intended to avail the benefit of tax holiday and the beneficiaries have no *locus standi* to insist upon any particular date, more so when the regulations were silent on this aspect. NLC has denied any obligation to obtain opinion of independent tax consultant as requested by KSEB. NLC has clarified that tax holiday benefit referred to the assessment proceedings filed by KSEB concerns TPS-II for the Assessment Year 1999-2000 and not to TPS-I Expansion. NLC has stated that it preferred its claim for recovery of income-tax dues supported by all the required documents. With regard to the contention of KSEB to avail the tax holiday benefit under Section 80 IA in respect of the mines, it has been submitted that tax holiday provision was applicable to industrial undertaking which included mining. However, after restructuring of Section 80 IA with effect from 1.4.2000, mining is not covered under Section 80 IA of the IT Act.

13. We have heard the representative of the parties and have given our thoughtful consideration to the submissions made.

14. In terms of the regulations, while seeking refund of income-tax from the beneficiaries, the generating company was required to submit a certificate from the statutory auditors that the amount was immediately due and payable to the taxing authority. KSEB has alleged that NLC did not support its demand for income-tax with the certificate of its statutory auditors. In the rejoinder, NLC has denied the averment stating that the claims for reimbursement were made based on the advance tax remitted and that on completion of statutory audit, final income-tax adjustments were sent to KSEB along with statutory auditors' certificate. We have considered the allegation of KSEB. NLC has not averred that the demand for reimbursement of Advance Tax was supported by the

certificate issued by its statutory auditors, neither has it filed any evidence to that effect. In response to the request by KSEB, NLC has filed certain documents under its affidavit dated 17.2.2011. At pages 144 to 149 of Volume I of the booklet accompanying the affidavit, NLC has filed the details of income-tax in respect of each of its generating station. These details are unaudited. Even otherwise, from the reply of NLC it follows that demand was not supported by the statutory auditors' certificate. The procedure adopted by NLC is contrary to that prescribed under the regulations. The requirement for submitting the statutory auditors' certificate has been prescribed with a definite purpose. The liability for payment of Advance Tax was estimated for the generating company as a whole. The regulations provided for apportionment of liability of Advance Tax amongst all the generating stations owned by the generating company and thereafter amongst the beneficiaries of the generating station in the ratio of the fixed charges payable by each one of them. To obviate the possibility of under-recovery/over-recovery of the Advance Tax the regulations prescribed that the demand be accompanied by the statutory auditors' certificate. NLC's demands for refund of the income-tax did not adhere to the regulations, though the infringement was procedural.

15. NLC has claimed recovery of income-tax dues of ₹119 .0935 crore, details of which are contained in Annexure-II of the petition. As per these details, a total amount of ₹171.7569 crore became payable by KSEB up to 31.3.2009 towards income-tax. After adjusting the amount receivable by KSEB, the net dues have been arrived at ₹119.0935 crore. It is the case of NLC that there was no taxable income of TPS-I Expansion during these years after adjustment of unabsorbed depreciation for the year 2003-04. When there was no taxable income of TPS-I Expansion, there could be no justification for NLC to demand refund of income-

tax dues. The demand of NLC being unjustified, KSEB was under no obligation to pay the amount demanded. Even if at some stage Advance Tax was paid by NLC for the years in question, it must have received credit from the Income-tax Department against the income-tax dues for other generating stations as NLC did not have the liability to pay income-tax for TPS-I Expansion for reason of taxable income not accruing during these years. Therefore, NLC cannot raise demand on KSEB for refund of income-tax for the years 2004-05 to 2006-07.

16. NLC has claimed that it availed of the benefit of tax holiday under Section 80 IA of the IT Act with effect from the year 2007-08 and passed on the benefit to KSEB as mandated by the regulations. In view of this claim of NLC, no income-tax liability accrues on KSEB for the years 2007-08 and 2008-09. Therefore, the question of recovery of income-tax dues for these two years also does not arise.

17. We conclude our findings by stating that income-tax liability in respect of TPS-I Expansion did not accrue for the years 2003-04, 2004-05, 2005-06 and 2006-07 for want of taxable income and for the years 2007-08 and 2008-09 because of availing the tax holiday benefit. In view of these findings, the question whether NLC was obligated to avail the benefit of Section 80 IA from the date of commissioning of TPS-I Expansion does not survive for our examination.

18. During the course of hearing it was submitted on behalf of NLC that even though the tax benefit has already been passed on by NLC to the beneficiaries, the assessing officer in his assessment order dated 28.12.2010 has disallowed its claim for tax benefit under Section 80 IA in respect of TPS-I Expansion for the financial year 2007-08 on the

ground that the generating station was only an expansion of the then existing capacity and could not be considered as a separate undertaking as provided under Section 80 IA (4) (iv) of the IT Act. In case, NLC becomes liable to pay income-tax on account of unavailability of benefit under Section 80 IA, it shall be entitled to recover from KSEB the income-tax along surcharge, interest etc paid to the Income-tax Department.

19. We have held that NLC is not entitled to recovery of income-tax dues in respect of TPS-I Expansion up to 31.3.2009. In view of this, there is justifiably no reason for KSEB to withhold income-tax dues for TPS-II. NLC has alleged that KSEB has been withholding income-tax dues in respect of TPS-II amounting to ₹57.00 crore included in the total amount of ₹119.0935 crore. We direct that KSEB shall release such withheld income-tax dues amounting to ₹57.00 crore pertaining to TPS-II along with interest at the rate of 9% per annum from June 2007 within 30 days upon NLC furnishing the claim, duly supported by the statutory auditors' certificate.

20. With the above, the petition stands disposed of. There shall be no order as to costs.

Sd/-	**Sd/-**	**Sd/-**
(M. Deena Dayalan) **Member**	**(V.S.Verma)** **Member**	**(Dr. Pramod Deo)** **Chairperson**