

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. MP/521/2014

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri A.K. Singhal, Member

Shri A.S. Bakshi, Member

Date of hearing: 24.3.2015

Date of Order: 5.8.2015

In the matter of

Adoption of corporate tax for grossing up Return on Equity for the financial year 2012-13 and to claim Return on Equity with grossed up corporate tax rate for financial year 2012-13 (assessment year 2013-14) considering the implied disallowance of contribution towards superannuation fund under Section 43B of IT Act in Financial year 2011-12 and allowance of the same in Financial year 2012-13.

And in the matter of

Neyveli Lignite Corporation,
Neyveli House,
135 EVR Periyar Road, Kilpauk,
Chennai -600 010

...Petitioner

Vs

1. Tamil Nadu Generation and Distribution Company
800, Anna Salai, Chennai – 600002
2. Kerala State Electricity Board,
Vaidyuthi Bhavanam,
Pattam Thiruvananthapuram - 695004.
3. Puducherry Electricity Department
Beach Road, Puducherry - 605001
4. Bangalore Electricity Supply Company (BESCOM)
2nd Floor, II Block, KR Circle,
Bangalore – 560001
5. Chamundeswari Electricity Supply Company (CESCOM),
927, LJ Avenue, New Kantharaj Urs Road,
Saraswathipuram, Mysore – 570009
6. Hubli Electricity Supply Company (HESCOM),
2nd Floor, Eureka Junction, Navanagar,
P.B. Road, Hubli – 570025



7. Mangalore Electricity Supply Company
Corporate Office, Paradigm Plaza,
A.B. Shetty Circle, Mangalore – 575001

8. Gulbarga Electricity Supply Company
Station Road, Gulbarga

9. Jaipur Vidyut Vitran Nigam Limited,
400kV GSS Control Room, Ground Floor,
Heerapura, Jaipur – 302024

10. Jodhpur Vidyut Vitran Nigam Limited,
400kV GSS Control Room, Ground Floor,
Heerapura, Jaipur – 302024

11. Ajmer Vidyut Vitran Nigam Limited,
400kV GSS Control Room, Ground Floor,
Heerapura, Jaipur – 302024

12. APPCC/ APTRANSCO
Room No. 447, A Block,
Vidyut Soudha, Hyderabad – 500049

13. TSPCC/ TSTRANSCO
Room No. 447, A Block,
Vidyut Soudha, Hyderabad – 500049

.....Respondents

Parties present:

Shri M.G. Ramachandran, Advocate, NLC
Ms. Anushree Bardhan, Advocate, NLC
Shri Ranjitha Ramachandran, Advocate, NLC
Shri S. Gnanaprabhakaran, NLC
Shri K. Muthu, NLC

ORDER

The petitioner, Neyveli Lignite Corporation Limited (NLC) has filed this petition claiming the following reliefs:

- (a) Exercise “Power to Relax” and allow the reimbursement of actual tax paid by the petitioner treating period 2011-12 and 2012-13 cumulatively, namely, twice the tax rate admissible to Corporate Tax subject to maximum of the actual tax paid relating to the financial years 2011-12 and 2012-13 instead of restricting the tax paid during the financial year 2012-13 to Minimum Alternate Tax;
- (b) Pass such further Order or Orders as this Hon’ble Commission may deem just and proper in the circumstances of the case.”



2. NLC is a Central Public Sector undertaking engaged in the business of Lignite Mining cum Lignite based thermal power at its power generating stations in Neyveli and Rajasthan. The power generated by NLC is supplied to the respondents based on the tariff determined by the Central Commission in exercise of the power under Section 79 read with Section 62(1)(a) of the Electricity Act, 2003 (the 2003 Act).

Submissions of the petitioner

3. The petitioner in this petition has submitted as under:

(a) NLC is an assessee under the Income Tax Act and has been regularly assessed in regard to its revenues from the business of generation and sale of electricity for the financial year 2011-12 (assessment year 2012-13). In the tax assessment proceedings there was substantial disallowance of the provisions made in the accounts of NLC as per Section 43 B of the Income Tax Act, 1961. A sum of ₹369.29 crore was disallowed due to non-funding of the expenses like the contribution made to superannuation fund and as a result, the taxable income of NLC increased and during the financial year 2011-12 (assessment year 2012-13), NLC paid Income tax much higher than the Income tax related to the Return on equity determined by the Commission under the 2009 Tariff Regulations.

(b) In the subsequent financial year 2012-13 (assessment year 2013-14) NLC's tax liability was subject to Minimum Alternate Tax (MAT) under Section 115 JB of the Income Tax Act, 1961. This was due to the fact that the contribution to the superannuation fund which was disallowed in the previous year i.e. FY 2011-12 was duly considered by the income tax authorities in the financial year 2012-13, such amount was duly paid into the respective trust



maintaining such funds. The tax rate on MAT basis during the relevant year was 20.008% including surcharge and cess as against the normal corporate tax rate of 32.445% including surcharge and cess.

(c) The tax allowed under the provisions of the 2009 Tariff Regulations is different than the tax determined for the purpose of the Income Tax Act. The tax allowed under the 2009 Tariff Regulations is restricted to the regulated return on equity of 15.5% and not on the taxable income as determined under the provisions of the Income Tax Act. The circumstance leading to the payment of MAT in the assessment year 2013-14 after paying substantially higher amount of tax in the earlier assessment year 2012-13 was on account of the special provisions of Section 43B of the Income Tax Act. This has nothing to do with the determination of tax on return on equity for the purpose of the 2009 Tariff Regulations.

(d) NLC has paid ₹67.05 crore more tax in regard to the financial year 2011-12 on account of the disallowance of superannuation fund contribution under Section 43B of the Income Tax Act in the financial year 2011-12 and allowance of the same in the subsequent financial year 2012-13. Effectively NLC has paid more quantum of tax than the corporate tax rate. The basic working details of income tax for the financial years 2011-12 and 2012-13 and the income tax returns for the said years have been annexed to the petition.

(e) In the circumstances above, if the two financial years, namely 2011-12 and 2012-13 are considered in a cumulative manner, NLC would have paid Corporate Income Tax in relation to both the years and would have been reimbursed the tax paid being the Corporate Tax on the return on equity. This



would have been the consequence if the contribution to the trust had been accounted for in the financial year 2011-12 instead of 2012-13. As a result of the decision of the income tax authorities to disallow the contribution in the year 2011-12, though tariff allowed included such contribution, there has been a significant increase in the taxable amount in one year and a significant decrease in the taxable amount in the subsequent years.

(f) NLC has paid substantial higher tax during the assessment year 2012-13 on account of the entire provisioning for superannuation fund being disallowed in the said year and subsequently, lower tax in the subsequent assessment year 2013-14 on account of the entire provisioning being allowed in the later assessment year. If the two assessment years 2012-13 and 2013-14 are considered together and the provisioning is treated as related to the expenditure of both the years, NLC would have been entitled for ROE at the Corporate Tax Rate.

(g) For the above reasons an anomaly has arisen on account of the difference in the treatment of taxable income under Income Tax Act and the methodology followed for determination of revenues and expenditure under the Electricity Act, 2003. It is therefore, necessary for the Commission to consider the tax on return on equity admissible to the petitioner after taking into account the implication of the excess taxable income in one year and reduced taxable income in the subsequent year primarily on account of the difference in the methodology followed.

4. In the above background, the petitioner has submitted that it has not been fully reimbursed the tax as per Regulation 15 of the 2009 Tariff Regulations and has



prayed that the Commission may exercise the Power to Relax and treat the part of excess tax paid over and above the tax admissible as related to the return on equity for the financial year 2011-12 as admissible reimbursement in the financial year 2012-13 or consider the tax reimbursement on accumulative basis i.e. for the years 2011-12 and 2012-13 to the extent twice the tax admissible on the return on equity subject to maximum of the tax actually paid during the said years.

5. After hearing the learned counsel for the petitioner on 6.2.2015, the petition was admitted and notice was ordered on the respondents with directions to complete pleadings by the parties.

6. The respondents KSEB and TANGEDCO have filed their replies vide affidavits dated 25.2.2015 and 16.3.2015 respectively. Pursuant to the hearing on 24.3.2015, the Commission reserved its order in the petition. The petitioner vide affidavit dated 25.4.2015 has filed response to the replies of the respondents.

Reply of KSEB

7. The respondent KSEB has submitted that in compliance with the provisions of the Regulation 15 of the 2009 Tariff Regulations, all beneficiaries including KSEB has been promptly reimbursing the tax on return on equity of NLCs project in each tariff period and duly truing up the tax reimbursed with the actual tax rate of the relevant year while truing up. Moreover, the 2009 Tariff Regulations have been notified after considering the comments of all stakeholders and utilities. In this background and since the application period for the 2009 Tariff Regulations is over, the prayer of the petitioner for exercise of Power to Relax by the Commission may be rejected.



Reply of TANGEDCO

8. The respondent TANGEDCO has submitted as under:-

(a) The power of relaxation under the Tariff Regulations is in general terms and its exercise is discretionary. It is settled law that exercise of discretion must not be arbitrary, must be exercised reasonably consistent with justice, equity and good conscience, keeping with the given facts and circumstances of the case. In West Bengal State Electricity Board Vs Patel Engg Co. Ltd. (2001) 2 SCC, 451, the Hon'ble Supreme Court held that where power to relax or waive a rule or a condition exists under the Rules, it has to be done strictly in compliance with the Rules.

(b) Section 43B of the Income Tax Act, 1961 provides that the contribution towards superannuation fund will be considered for deduction only in the event of actual payment of the fund. The disallowance made by the tax authorities during 2011-12 is due to the fact that NLC has made provisions during 2011-12 and actual payment was made only during 2012-13 and the same is allowed for deduction by tax authorities for the financial year 2012-13.

(c) As per Section 115JB of the Income Tax Act, 1961, the income tax payable by a company shall be higher of the Corporate tax rate or the MAT rate. Hence, the tax calculated under MAT for 2012-13 is on the higher side when compared with the corporate tax rate. Also, due to disallowance of provisions made towards the contribution to pension fund in 2011-12, the taxable income of the petitioner increased thus resulting in excess tax outgo.



(d) The petitioner's claim of ROE on Corporate Tax rate due to excess payment of tax when compared to MAT rate is not in line with the Regulation 15(5) of the 2009 Tariff Regulations and hence the same be negated.

(e) No amendments were made in the Income tax Act during the year as claimed by the petitioner. Hence, the claim of the petitioner is devoid of merits.

(f) NLC cannot claim Corporate tax rate for grossing up of ROE when it is covered under MAT rate for the year 2012-13

(g) NLC is challenging the provisions of the Income tax Act 1961 and hence the petitioner may be directed to furnish the details with regard to the appeal, if any made to the revenue for disallowance of superannuation contribution for 2011-12 and submit the same to the Commission for prudence check. The difference in tax liabilities should not be passed on to the beneficiaries unless there is amendment to the Income tax Act with retrospective effect. The terms and conditions specified by the Commission under the Tariff Regulations cannot be categorized as unreasonable so as to justify the exercise of the general power of relaxation and there cannot be a omnibus relaxation as sought by the petitioner.

(h) The 2009 Tariff Regulations notified by the Commission in exercise of power conferred under the 2003 Act are part of the statute and partake the character of legislation.

Accordingly, the respondent TANGEDCO has submitted that the prayer of the petitioner may be negated.



Analysis and Decision

9. NLC has submitted that its tax liability increased in the financial year 2011-12 (assessment year 2012-13) due to the disallowance of the contribution made to the superannuation fund by the Income tax authority. The tax liability during the financial year 2012-13 (assessment year 2013-14) reduced as the income tax authorities has allowed such deduction towards the contribution made to the superannuation fund in 2012-13. Accordingly, NLC has submitted that as a result of the decision of the Income tax authorities to disallow the contribution in the financial year 2011-12 though tariff allowed was towards such contribution, there has been a significant increase in the taxable income in one year and a significant decrease in the taxable income in the subsequent year which has led to the additional tax liability during financial year 2012-13. The respondent TANGEDCO has submitted that in terms of Section 43 B of the Income Tax Act, 1961, the contribution towards superannuation fund has been disallowed by the Income tax Authorities in the financial year 2011-12, as the expenditure was on projected basis only and the expenditure has been allowed in the financial year 2012-13 when the actual payment was made.

10. The matter has been examined. It appears from the above submissions that NLC is aggrieved by the methodology adopted by the income tax authorities for computation of taxable income by disallowing the contribution towards superannuation funds in the financial year 2011-12 and allowing the same in the financial year 2012-13 in terms of Section 43 B of the Income Tax Act. In that view of the matter, the proper course for NLC is to seek appropriate remedy under the provisions of the Income Tax Act, 1961. However, no details have been furnished by NLC in this regard before us. Be that as it may, from the plain reading of Section 43B of the Income tax Act, 1961, it is clear that deductions for the purpose of computation



of taxable income are to be made based on the actual payments made by the assessee as an employer by way of contribution to any provident fund or superannuation fund etc. The said section is extracted as under:-

“43B. Certain deductions to be only on actual payment notwithstanding anything contained in any other provisions of this Act, a deduction otherwise allowable under this Act in respect of:

(a) any sum payable by the assessee by way of tax , duty, cess or fee, by whatever name called under any law for the time being in force; or

(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees, or

(c) xxxx”

NLC has not explained the reasons for not making the payments towards superannuation funds during the financial year 2011-12 while tariff on account of expenditure towards contribution to superannuation funds has been recovered as part of O&M expenses. Since actual payment towards superannuation fund contribution was made by NLC only during the financial year 2012-13, the said amount (which was disallowed during 2011-12) was allowed by the income tax authorities under Section 43 B of the Income Tax Act during the financial year 2012-13. Hence, the contention of NLC that the contribution towards superannuation fund was disallowed by the income tax authorities during the financial year 2011-12 and therefore, its case requires special consideration has no merit as NLC itself has failed to comply with the provisions of Section 43B of the Income Tax Act, 1961 in order to claim the benefit of the said section during the financial year 2011-12.

11. NLC in the table under Para 7 of the petition has furnished the working details of income tax for the financial years 2011-12 and 2012-13 and has also enclosed copies of the IT returns for the said years. Referring to the workings in the said table, NLC has submitted that it has paid ₹67.05 crore more tax in regard to the financial



year 2011-12 on account of disallowance of superannuation fund contribution under Section 43 (b) of IT Act and allowance of the same in the subsequent financial year 2012-13. NLC has submitted that if the two assessment years i.e. 2012-13 and 2013-14 (Financial years 2011-12 and 2012-13) are clubbed together and the provisioning for superannuation fund is treated as related to the expenditure of both the years, NLC would have been entitled for ROE at Corporate Tax rate. The respondent, TANGEDCO has submitted that the NLCs claim of ROE on Corporate Tax rate due to excess payment of tax when compared to MAT rate is not in line with Regulation 15(5) of the 2009 Tariff Regulations. Regulation 15 (3) and proviso to Regulation 15 (4) of the 2009 Tariff Regulations which are relevant to the issue in present petition are extracted as under:

“(3) The rate of return on equity shall be computed by grossing up the base rate with the Minimum Alternate/Corporate Income Tax Rate for the year 2008-09, as per the Income Tax Act, 1961, as applicable to the concerned generating company or the transmission licensee, as the case may be.

(4) Rate of return on equity shall be rounded off to three decimal points and be computed as per the formula given below:
Rate of pre-tax return on equity = Base rate / (1-t)

Where t is the applicable tax rate in accordance with clause (3) of this regulation

(5) The generating company or the transmission licensee, as the case may be, shall recover the shortfall or refund the excess Annual Fixed charges on account of Return on Equity due to change in applicable Minimum Alternate/Corporate Income Tax Rate as per the Income Tax Act, 1961 (as amended from time to time) of the respective financial year directly without making any application before the Commission:

Provided further that Annual Fixed Charge with respect to tax rate applicable to the generating company or the transmission licensee, as the case may be, in line with the provisions of the relevant Finance Acts of the respective year during the tariff period shall be trued up in accordance with Regulation 6 of these regulations.”

12. Thus as per Regulation 15 (3) of the 2009 Tariff Regulations, Return on Equity shall be computed by grossing up of the base rate with the Minimum Alternate/ Corporate Income Tax for the year 2008-09 as per the Income Tax Act, 1961 as applicable to the generating station or transmission licensee as per regulation 15 (3)



the ROE shall be trued-up in line with the provisions of the relevant Finance Act of the respective year of the tariff period. Therefore, there is provision for year wise computation for truing up of ROE with the applicable tax rate. The petitioner has prayed for relaxation of the regulation treating the financial years 2011-12 and 2012-13 cumulatively in order to gross up the ROE with corporate tax rate. This in our view is not a fit case for exercise of the power of relaxation under Regulation 44 of the 2009 Tariff Regulations for the following reasons:

(a) Power to relax shall be exercised in extreme cases where the operation of the regulation causes hardship to a person. The Appellate Tribunal for Electricity in its judgment dated 20.9.2012 in Appeal No. 189/2011 has observed as under;

“28.The learned Counsel for the State Commission has cited the following authorities in order to show that the power of relaxation must be exercised sparingly. The decisions are as follows:

(a) Pragati Power Corporation Limited (PPCL), New Delhi V. Delhi Electricity Regulatory Commission (DERC) and Ors reported in 2011 ELR (APTEL) 0679

(b) R K Khandelwal Vs State of Uttar Pradesh and Ors reported in (1981) 3 SCC 592.

(c) Indraprastha Power Generation Co Ltd. V Delhi Electricity Regulatory Commissions and Ors reported in 2011 ELR (APTEL) 0669

(d) Damodar Valley Corporation Vs Central Electricity Regulatory Commissions & Ors in 2010 ELR (APTEL) 0668.

29. The principles relating to the exercise of power of relaxation laid down in the above decisions referred to above are as follows:

(a) The Regulation gives judicial discretion to the Commissions to relax norms based on the circumstances of the case. Such a case has to be one of those exceptions to the general rule. There has to be sufficient reason to justify relaxation which has to be exercised only in the exceptional case where non-exercise of the discretion would cause hardship and injustice to a party.



(b) If there is a power to relax the regulation, the power must be exercised reasonably and fairly. It cannot be exercised arbitrarily to favour some party and to disfavour some other party.

(c) The party who claims relaxation of the norms shall adduce valid reasons to establish to the State Commission that it is a fit case to exercise its power to relax such Regulation. In the absence of valid reasons, the State Commission cannot relax the norms for mere asking. When the State Commission has given reasoned order as to why the power for relaxation cannot be exercised, the said order cannot be interfered with by the Appellate Forum.

(d) The power of the Appellate Authority cannot be exercised normally for the purpose of substituting one subjective satisfaction with another without there being any specific and valid reasoning for such a substitution.””

In the present case the petitioner is not subjected to any hardship on account of the operation of the 2009 tariff Regulations. The petitioner had higher taxable income during the financial year 2011-12 as it included the contribution towards superannuation fund under deductible income without incurring the actual expenditure for the same which was not admissible under Section 43B of the Income Tax Act and was accordingly disallowed. Therefore, the situation has arisen on account of the failure of the petitioner to incur the expenditure towards contribution to superannuation fund in the year in which it is claimed and it cannot be said that the operation of the regulation has caused any hardship to the petitioner. Moreover, allowing the prayer of the petitioner will increase the liability of the respondent beneficiaries who are not responsible for the additional tax liability on the petitioner. In fact, the beneficiaries have serviced the contribution towards superannuation fund through tariff which has not been actually paid by the petitioner in the relevant year.

(a) If the prayer is allowed there will be an anomaly between the rate of tax used for grossing up of the Return on Equity and the income tax actually paid to the Income tax authority. While the petitioner has actually paid the tax at



corporate tax rate in the financial year 2011-12 and MAT rate in the financial year 2012-13, granting the prayer would amount to grossing up of the Return on Equity with the Corporate tax rate for both the years. This will be against the regulation which provides for grossing up with applicable tax rate.

(b) As per the examples cited by the NLC in the table under para 7, the tax liability during the financial year 2012-13 calculated at the rate of corporate tax (32.445%) is ₹342.98 crore and the total income calculated under the applicable MAT rate (20.008%) is ₹410.03 crore and as per Section 115JB of the Income Tax Act, 1961, the liability of NLC during 2012-13 is ₹410.03 crore. Section 115 JB of the Income Tax Act, 1961 is extracted as under:-

“(1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2012, is less than eighteen and one-half per cent of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of eighteen and one-half per cent.”

As per the above provision, if the income tax payable on the total income as computed is less than eighteen and one-half per cent of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of eighteen and one-half per cent. Accordingly, the tax rate calculated under MAT for the year the financial year 2012-13 is higher in comparison to the tax calculated under the Corporate Tax Rate for the financial year 2012-13, which has resulted in excess tax outgo to NLC amounting to ₹67.05 crore.

Therefore, the applicable tax rate including surcharge is 20.008% during the financial year 2012-13. NLC is entitled to grossing up the RoE at 20.008%



during the financial year 2012-13 at the rate at which it is paying to the Income tax Authorities. NLC cannot be allowed to gross up RoE at Corporate tax rate of 32.445% which NLC is not paying to the Income tax authorities. The prayer of NLC if considered will allow NLC to retain a part of tax which is not entitled under the law.

(c) Under the 2009 Tariff Regulations, management of portfolio is in the exclusive domain of the generating company and the beneficiaries are required only to revise the ROE grossed up at applicable tax rate. The Generating Companies are expected to recover the tax from the consumers to the extent of Return on Equity and the tax paid over and above the Return on Equity is to be borne by them. Accordingly, the petitioner's claim regarding the reimbursement of excess tax paid for FY 2011-12 and FY 2012-13 or consideration of tax on cumulative basis for FY 2011-12 (assessment year 2012-13) and FY 2012-13 (assessment year 2013-14) is not admissible.

13. Based on the above discussions, the prayer of the petitioner is rejected and is accordingly disposed of.

-Sd/-
(A. S. Bakshi)
Member

-Sd/-
(A. K. Singhal)
Member

-Sd/-
(Gireesh B. Pradhan)
Chairperson

