

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 02/MP/2014

Coram:

Shri A.K. Singhal, Member

Shri A.S. Bakshi, Member

Date of Hearing: 21.10.2014

Date of Order: 09.09.2016

In the matter of

Claim of Kerala State Electricity Board regarding quantum of adjustment for Income tax pursuant to the Commission's order dated 20.9.2012 in Petition No.15 of 2010 and judgment of the Appellate Tribunal for Electricity dated 3.7.2013 in Appeal No. 250 of 2012

And

In the matter of

Neyveli Lignite Corporation Limited
Neyveli House,
135, EVR Periyar Road,
Kilpauk, Chennai - 600010

.... Petitioner

Vs

1. Kerala State Electricity Board,
Vaidyuthi Bhavanam,
Pattam Thiruvanathapuram - 695004
2. Tamil Nadu Generation and Distribution Company Ltd
800, Anna Salai, Chennai – 600002
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

.....Respondents



Parties present

Shri M.G. Ramachandran, Advocate, NLC
Ms. Anushree Bardhan, Advocate, NLC
Ms. Poorva Saigal, Advocate, NLC
Shri R. Venkatachalam, NLC
Shri Siddhartha Jha, Advocate, KSEB
Shri S. Vallinayagam, Advocate, TANGEDCO
Shri N. Mahendiran, TANGEDCO
Shri Anand. K. Ganesan, Advocate, Karnataka Discoms
Ms. Mandakini Ghosh, Advocate, Karnataka Discoms

ORDER

This petition has been filed by the petitioner, NLC with specific prayer as follows:

- (a) *Entertain the petition and adjudicate upon the disputes raised by KSEB, Respondent No. 1 herein in regard to the implementation of the Orders passed by this Hon'ble Commission dated 20.9.2012 in Petition No. 15 of 2010 and upheld by the Appellate Tribunal for Electricity vide Order dated 3.7.2013 in Appeal No. 250 of 2012;*
- (b) *Declare that KSEB and other Respondents are entitled to the adjustment of an amount of ₹5829.27 lakhs and in the proportion as contained in the statement attached and KSEB and other Respondents are not entitled to any further or other amounts, as claimed by KSEB or otherwise;*
- (c) *pass such further order or orders as this Hon'ble Commission may deem just and proper in the circumstances of the case.*

Background

2. Petition No.15/2010 was filed by the petitioner seeking Commission's direction on the respondent, KSEB to reimburse the outstanding income tax dues amounting to ₹119.09 crore as on 31.3.2009 and the Commission by order dated 20.9.2012 disposed of the said petition observing as under:

"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. 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.

17. 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.

18. 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-IL 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."

3. Aggrieved by the said order dated 20.9.2012, the petitioner had filed Appeal No.250/2012 before the Hon'ble Appellate Tribunal for Electricity (the Tribunal) and the Tribunal by its judgment dated 3.7.2013 dismissed the said appeal thereby confirming the findings of the Commission in the said order. The relevant portion of the judgment is extracted as under:

"19. Even if the Appellant has availed tax benefit under Section 80-I A in respect of TPS-I Expansion from FY 2007-08, there was no taxable income for TPS-I Expansion during 2004-05 to 2006-07. Thus, the tax paid by the Appellant during these years as generating company could not be distributed to TPS-I Expansion for recovery from the beneficiaries of TPS-I Expansion as per the Tariff Regulations.

20. The Appellant might have set off the profit of its other generating station during the period 2004-05 to 2006-07 for computing its tax liability under the Income Tax Act for payment of tax as a generating company, but the total tax has to be distributed amongst the various generating stations as per the Tariff Regulations i.e. as per the station-wise profit before tax. Since there was no profit in TPS-I Expansion in the years from 2003-04 to 2006-07 in view of the huge accumulated loss in FY 2003-04, there is no question of any income tax being apportioned to TPS-I Expansion during this period."

4. Based on the judgment dated 3.7.2013 of the Tribunal, NLC has reworked the amount of income-tax to be reimbursed by the beneficiaries in respect of TPS-I Expansion project and communicated the same to the beneficiaries, including the respondent, KSEB by its letter dated 28.11.2013. However, the respondent, KSEB by its letter dated 7.12.2013 has disputed the claim of NLC for dues amounting to ₹20.31 crore and has contended that the claim of NLC amounts to non-compliance of the order of the Commission which has been confirmed by the Tribunal. Accordingly, the petitioner has filed this petition with the prayer for adjudication of the disputes under Section 79(1)(f) of the Electricity Act, 2003.

5. The petition was admitted on 13.3.2014 with directions to the parties to complete pleadings in the matter. The respondents KSEB, TANGEDCO and PCKL & the Discoms of Karnataka have filed replies in the matter. The matter was finally heard on 21.10.2014 and the Commission after directing NLC to submit certain additional information reserved its orders in the petition. In compliance with the said directions, NLC has filed the additional information vide affidavit dated 11.11.2014 and the respondent, KSEB has filed its written submissions vide affidavit dated 13.11.2014. Based on the submissions of the parties and documents available on record, we proceed to examine the matter as stated in the subsequent paragraphs.

Submissions of the Petitioner

6. NLC in its petition has submitted as under:

(a) The decision of the Commission and the Tribunal on the non-liability of KSEB to reimburse tax to NLC is confined to the power component of TPS-I Expansion and not any other component, namely, mining component of TPS-I Expansion and also other power projects or mining projects including TPS-I and II. The tax holiday has been for the power component of TPS-I expansion and it does not extend to the mining operation i.e. sourcing of lignite to TPS-I expansion. The profit including and in particular to the return accruing to NLC from the mining operation has been subject to tax without any tax holiday and the income accruing there from is taxable income. Accordingly to the extent of the lignite sourcing KSEB as well as other beneficiaries were required to reimburse the tax as per Income Tax Regulations, 2004 for the period 2004-05 to 2006-07.

(b) The liability of the respondent beneficiaries to reimburse the tax as per the provisions of Regulation 7 of the 2004 Tariff Regulations has to be determined taking into account the applicability of tax holiday provided under Section 80 IA of the Income Tax Act, 1961 for TPS-I Expansion project, namely, wholly relating to the advantage of tax holiday for TPS-I expansion to the beneficiaries of power from TPS-I Expansion Project. Such beneficiaries of TPS-I Expansion project are not required to pay the tax for the period 2003-04 to 2006-07 in terms of Regulation 7 of the 2004 Tariff Regulations.

(c) The petitioner had filed the petition No. 15/2010 on the ground that KSEB failed to reimburse the outstanding income tax dues to ₹119.0935 crore as on 31.3.2009 to NLC. The Commission vide order dated 20.9.2012 held that NLC is not entitled to recovery of income tax dues in respect of TPS-I Expansion. The Commission directed KSEB to release withheld income tax dues amounting to ₹ 57 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.

(d) Aggrieved by the said order dated 20.9.2012, NLC filed an Appeal No. 250 of 2012 before ATE which was upheld. In the decision of the Commission and ATE, there is a finding of non-existence of taxable income related only to TPS-I Expansion project and the tax holiday has been for the said project only and it does not extend to other projects of NLC. Accordingly, the liability of the beneficiaries to reimburse the tax as per the provisions of Regulation 7 of the Tariff Regulations, 2004 has to be determined taking into account the applicability of the tax holiday provided under Section 80IA of the Income Tax Act, 1961 for TPS-I Expansion project, namely wholly relating the advantage of tax holiday for TPS-I Expansion to the beneficiaries of power from TPS-I project. Such beneficiaries of TPS-I Expansion project are not required to pay the tax for the period 2003-04 onwards up to 2006-07 in terms of Regulation 7 of the Tariff Regulations, 2004.

(e) NLC re-worked the amount to be reimbursed in terms of the order of the Commission and ATE and by letter dated 20.11.2013 requested the respondents including KSEB to reimburse the amount to the extent the same is related to TPS-I Expansion project. In response, KSEB by its letter dated 7.12.2013 has disputed the claim of NLC in regard to the determination of the amount due from KSEB of ₹20.31 crore and has contended that the said determination is not in accordance with the order of the Commission and ATE.

(f) The petition has been filed to adjudicate the disputes raised by KSEB in regard to implementation of the order of the Commission as upheld by ATE.

(g) The petitioner has submitted the Original reimbursement claim and the revised claim after taking out the IT reimbursement dues in respect of TPS-I Expansion. The following tables indicate the original claim and revised claim submitted on 03-01-2014 by the petitioner.

(i) Original IT reimbursement Claim

(Rs. in lakh)

| EB's | * 2001-02 to 2005-06 | 2006-07 | 2007-08 | 2008-09 | Total |
|--------------|----------------------|-----------------|-----------------|-----------------|-----------------|
| APTRANSCO | 10200.39 | - | 2153.11 | 2979.09 | 15332.59 |
| KARNATAKA | 8689.13 | 2619.43 | 6441.57 | 3307.42 | 21057.55 |
| KERALA | 4951.57 | 2285.47 | 3355.19 | 1732.67 | 12324.90 |
| TNEB | 15350.11 | 13122.95 | 8938.87 | 6909.69 | 44321.62 |
| PUDUCHERY | 2261.90 | - | 1423.92 | 848.30 | 4534.12 |
| TOTAL | 41453.10 | 18027.85 | 22312.66 | 15777.17 | 97570.78 |

(ii) Revised IT reimbursement claim pursuant to order of the Commission and the Tribunal taking out TPSI Expansion component.

(Rs. in lakh)

| EB's | *2001-02 to 2005-06 | 2006-07 | 2007-08 | 2008-09 | Total |
|--------------|---------------------|----------------|-----------------|-----------------|-----------------|
| APTRANSCO | 10200.39 | - | 2153.11 | 2979.09 | 15332.59 |
| KARNATAKA | 12434.89 | - | 3239.71 | 3307.42 | 18982.02 |
| KERALA | 6796.30 | - | 1764.92 | 1732.67 | 10293.89 |
| TNEB | 24944.94 | 3350.16 | 7660.16 | 6909.69 | 42864.95 |
| PUDUCHERY | 2834.70 | - | 585.07 | 848.30 | 4268.07 |
| TOTAL | 57211.22 | 3350.16 | 15402.97 | 15777.17 | 91741.52 |

*Difference claim between CERC regulations and Bulk power supply agreement terms.

TANGEDCO counter dt.28.05.14 & 11.06.14

7. TANGEDCO, in its counter dt.28.05.14 has averred the following

- (a) Non availing the tax holiday benefit for year 2004-05 to 2007-08 was the lapse on the part of NLC; the beneficiaries should not be penalized for the lapses of NLC by passing on the income tax of NLC TPSI Expansion for the tax holiday eligible period for the financial year 2004-05-2007-08.
- (b) The Income tax returns filed by NLC have also not shown any carry forward of losses of TPSI Expansion for the financial years 2004-05 to 2007-08.
- (c) However based on the order of the Commission and Tribunal, NLC had provided a credit note for Rs1456.67 lakhs to TANGEDCO.
- (d) The NLC action of withdrawing the loss during the year 2003-04 (which is adjusted against the profit of other TPS) is not in line with CERC direction.
- (e) Disputed the tax calculation made by NLC on the Mines on various grounds viz. CERC regulations applicable for thermal only; Mines cost/profit are regulated by the Ministry of Coal; the grossed tax on ROE or actual tax whichever is lower can be reimbursed from

the beneficiaries; NLC claimed tax on entire profit of the Mines instead of profit at 85% capacity that is on ROE

- (f) TANGEDCO filed additional counter on 11.06.14 stating that taxable income in SEB claim statement and furnished for APTEL is different; the profits are higher; profit amount shown not tallying *and TANGEDCO had requested the petitioner vide letter dated 8-5-14 to clarify the facts but till date no reply have been received.*
- (g) *The respondent prayed that the present petition is not maintainable and against the order dated 20-9-12 of the Hon'ble Commission and Judgment dated 3-7-13 of the Hon'ble ATE.*

KSEB Counter dt.02.06.14

8. KSEB had filed its counter stating the following
- (a) The said orders having attained it's finality in law, the present petition is not maintainable and therefore deserves to be dismissed at threshold.
- (b) The present claim of NLC is that the tax holiday to which it is entitled under the provisions of Income Tax Act does not extend to its mining activities. Assuming without conceding that this stand of NLC in the present petition is to be accepted, then NLC is not entitled to seek reimbursement from its beneficiaries, income tax, if any which it has paid in respect of mines under the terms of CERC Regulation; Mining is not core business which is defined as regulated activity.
- (c) *It is most pertinent to mention that NLC has not provided any supporting evidence or expert opinion of the tax consultant that tax holiday benefit under section 80 IA is not available for mines.*
- (d) *It may not be out of place to mention that NLC has not been claiming fixed charges in respect of Mines like the fixed charges claimed for power plants. The cost of mining is being charged from beneficiaries in the form of energy charge. More precisely, Hon'ble Commission has been approving the transfer price of lignite based on the norms approved by Ministry of Coal.*

- (e) It was the specific case of NLC that the tax on income from TPS I Expansion inclusive of its mine was a pass through component to be recovered from KSEB; it is settled case and now NLC cannot be allowed to re open the issue.
- (f) The present claim of NLC is that as per the orders of CERC and APTEL, the tax holiday benefits admissible under sec 80 IA has been allowed only for the component of TPSI Expansion and it does not extend to the mining operation connected with the power station. Accordingly, NLC had again revised the Income Tax payable by KSEB and other beneficiaries of NLC TPS I Expansion
- (g) The generating company was bound to avail tax holiday benefits for NLC Mines; the contention of the petitioner that there can be no tax holiday on tax on income from mining operations is bereft of merits.
- (h) KSEB had objected to the quantum of credit of **₹20.31 Cr** due to the above revised computation of IT reimbursement dues pertaining to TPS I Expansion IT dues removal and sought for the entire amount of **₹62.09Cr.** and hence this petition was filed by the petitioner on the quantum of adjustments to be given by NLC to various beneficiaries of TPS I Expansion for adjudication under the provisions of Section 79(1) (f) of the Electricity Act 2003.
- (i) *NLC has to provide certificates of their statutory auditors for settling IT liabilities, but NLC has failed to furnish the same.*

Karnataka Discom Counter dt.16.07.14

9. Karnataka Discoms filed its counter stating the following
- (a) Any income tax recovered by the petitioner from the beneficiaries w.r.t TPS I Expansion is to be refunded in the same manner as was recovered; interest is liable to be paid by the petitioner for the incorrect recoveries
- (b) KSEB is seeking to apportion the entire recovery of Income Tax to itself, the same is incorrect; refund to be made to all the respondents

(c) The petitioner is entitled to recover the Income Tax as reimbursement only to the extent of core business of the petitioner, which is the generation business of the petitioner and not on mining business.

(d) The petitioner ought to render true and full accounts as certified by its statutory auditors.

It is also noted that NLC has not submitted any rejoinder to any of above counter affidavit.

Analysis of the Case

10. We have considered the submissions of the petitioner and the respondents. The petitioner has filed the present petition for adjudication of the disputes and differences between NLC and KSEB in regard to implementation of the Commission's order dated 20.9.2010. The petitioner had filed Petition No. 15/2010 seeking direction to KSEB to reimburse the outstanding income tax dues as on 31.3.2009. In that petition, KSEB contended that NLC had not availed the benefit of 80IA for TPS-I expansion from the years 2004 to 2009. Accordingly, KSEB retained the amount in respect of TPS-II to ensure that NLC availed the benefit of 80IA and to pass on that benefit to the consumers. The Commission, after considering the submission of the parties, vide order dated 20.9.2012 in Petition No. 15/2010, observed that since NLC has no tax liability during 2004-09, the claim of 80 IA benefit does not survive and directed KESB to refund the withheld amount of Rs. 57 crore in respect of TPS-II Expansion. Aggrieved by the Commission's decision dated 20.9.2012, the petitioner filed an appeal before the Appellate Tribunal for Electricity. Appellate Tribunal vide its judgment dated 3.7.2013 in Appeal No. 250/2012 dismissed the appeal and upheld the Commission's order dated 20.9.2012.

11. The petitioner re-worked out the amount to be reimbursed in terms of the Commission's order dated 20.9.2012 and judgment of Appellate Tribunal dated 3.7.2013 after taking out the TPS-I Expansion component. The petitioner vide its letter dated 20.11.2013 requested the respondents including KSEB to reimburse the amount to the extent the same related to TPS-I Expansion. The respondents disputed the claim of the petitioner and have stated that quantum of reimbursement are not supported with statutory auditor's certificate.

12. The petitioner has placed on record the statutory auditor's certificate for the reimbursement of original claim and revised claim after taking out the IT reimbursement dues

in respect of TPS-I Expansion. The petitioner vide affidavit dated 12-11-2014 has submitted the original claim and revised claim as certified by the statutory auditors as under:

(iii) Original IT reimbursement Claim

(₹ in lakh)

| EB's | * 2001-02 to 2005-06 | 2006-07 | 2007-08 | 2008-09 | Total |
|--------------|----------------------|-----------------|-----------------|-----------------|-----------------|
| APTRANSCO | 10200.39 | - | 2153.11 | 2979.09 | 15332.59 |
| KARNATAKA | 8689.13 | 2619.43 | 6441.57 | 3307.42 | 21057.55 |
| KERALA | 4951.57 | 2285.47 | 3355.19 | 1732.67 | 12324.90 |
| TNEB | 15350.11 | 13122.95 | 8938.87 | 6909.69 | 44321.62 |
| PUDUCHERY | 2261.90 | - | 1423.92 | 848.30 | 4534.12 |
| TOTAL | 41453.10 | 18027.85 | 22312.66 | 15777.17 | 97570.78 |

(iv) Revised IT reimbursement claim duly certified pursuant to order of the Commission and the Tribunal taking out TPSI Expansion component.

(₹ in lakh)

| EB's | *2001-02 to 2005-06 | 2006-07 | 2007-08 | 2008-09 | Total |
|--------------|---------------------|----------------|-----------------|-----------------|-----------------|
| APTRANSCO | 10200.39 | - | 2153.11 | 2979.09 | 15332.59 |
| KARNATAKA | 12434.89 | - | 3239.71 | 3307.42 | 18982.02 |
| KERALA | 6796.30 | - | 1764.92 | 1732.67 | 10293.89 |
| TNEB | 24944.94 | 3350.16 | 7660.16 | 6909.69 | 42864.95 |
| PUDUCHERY | 2834.70 | - | 585.07 | 848.30 | 4268.07 |
| TOTAL | 57211.22 | 3350.16 | 15402.97 | 15777.17 | 91741.52 |

*Difference claim between CERC regulations and Bulk power supply agreement terms.

13. The difference between the original claim and the revised claim drawn up in compliance with the Commission's order and judgement of Appellate Tribunal, amounting to ₹5829.26 lakh (₹97570.78 lakh-₹91741.52 lakh) was appropriated between the beneficiaries according to their allocation of power.

14. In view of the above, in our opinion the points raised by KSEB and other respondents do not warrant any intervention as the same is in line with APTEL judgement dated 03.07.2013 in Appeal No. 250/2012 Accordingly, the parties should act in accordance with Revised IT reimbursement claim duly certified by auditor as submitted by the petitioner.

15. The petition is disposed of in terms of the above.

Sd/-
A. S. Bakshi
(Member)

Sd/-
A. K. Singhal
(Member)

