

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 294/MP/2019

Subject : Petition under Section 79(1) (f) of the Electricity Act, 2003 read with Regulations 54 and 55 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 for adjudication of dispute between NHPC Limited and Punjab State Power Corporation Limited regarding payment of 'Deferred Tax Liability Materialized' during the financial year 2017-18.

Petitioner : NHPC Limited

Respondent : Punjab State Power Corporation Limited

Date of Hearing : 18.6.2020

Coram : Shri P. K. Pujari, Chairperson
Shri I. S. Jha, Member
Shri Arun Goyal, Member

Parties present : Shri Ved Jain, Advocate, NHPC
Shri M. G. Gokhale, NHPC
Ms. Swapna Sheshadri, Advocate, PSPCL
Shri Amal Nair, Advocate, PSPCL
Shri Ankit Bansal, PSPCL

Record of Proceedings

The matter was listed for hearing through video conferencing.

2. Learned counsel for the Petitioner, NHPC Limited, submitted that the instant Petition has been filed, *inter-alia*, seeking clarification/interpretation on the 'Deferred Tax Materialization' and direction to the Respondent, Punjab State Power Corporation Limited (PSPCL) to release the outstanding payment of Rs. 31,87,98,691 comprising of Rs.19,34,62,481 towards original Deferred Tax Materialized, Rs.10,23,87,900 towards grossing -up amount and applicable surcharge thereon. Learned counsel further submitted as under:

(a) As per Regulation 7 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 (in short 'the 2004 Tariff Regulations'), for the control period 2004-09, the tax on the income stream of the generating company from its core business is required to be computed as an expense and is recoverable from the beneficiaries.

(b) The Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (in short 'the 2009 Tariff Regulations') and the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (in short 'the 2014 Tariff Regulations') provide that the



beneficiaries are not liable to pay the actual income tax on the generation income streams of the generating company and the liability of the beneficiaries was limited to paying a rate of return on equity duly grossed up with the applicable/effective tax rate. However, the said Regulations provide that deferred tax liability for the period upto 31.3.2009, whenever it materialises, shall be recoverable directly from the beneficiaries.

(c) Accordingly, the Petitioner had raised supplementary bill on PSPCL for Rs. 31,87,98,691 for the financial year 2017-18 relating to tariff period upto 31.3.2009, which, *inter-alia*, comprised of Rs.19,34,62,481 towards original Deferred Tax Materialized and Rs. 10,23,87,900 towards grossing-up amount. However, PSPCL denied the payment on the ground that the Commission's Tariff Regulations do not provide for grossing up of 'Deferred Tax Materialized' with tax rate and the additional burden of grossing up is not in accordance with the Tariff Regulations.

(d) When the recovery of Deferred Tax Materialization is required to be made through 'Sales', the additional income tax liable to be paid on the above amount (i.e. 'grossing-up amount') is required to be recovered from the beneficiaries. In this regard, reliance has been placed on 'Observations of Comptroller & Auditor General of India during Phase-I Audit of the financial year 2010-11' and 'Opinion of Expert Advisory Committee of the Institute of Chartered Accountants of India'.

(e) Except PSPCL, none of the other beneficiaries have objected to the supplementary bills raised by the Petitioner nor have raised any question on the methodology adopted by the Petitioner. PSPCL itself had never raised any such objection/contention prior to the financial year 2017-18.

3. Learned counsel for the Respondent, PSPCL, submitted as under:

(a) Deferred tax claims of the Petitioner pertain to control period 2004-09. Accordingly, claims are required to be dealt as per provisions of the 2004 Tariff Regulations. Regulation 7 of the 2004 Tariff Regulations does not provide for grossing up of deferred tax liability as claimed by the Petitioner.

(b) While the Commission has changed the manner of recovery of income tax subsequently in the 2009 Tariff Regulations and the 2014 Tariff Regulations, these Regulations specifically provide that any deferred tax liability for the period till 31.3.2009 would be directly recoverable from the beneficiaries. Accordingly, there is no basis for the Petitioner to claim the deferred tax for the period till 31.3.2009 after grossing-up.

(c) Reliance on 'Observation of the Office of CAG' and 'Opinion of Expert Advisory Committee of ICAI' is misplaced as it cannot overrule the factum that the Commission's Regulations do not provide for relief of 'grossing up' as sought by the Petitioner.

(d) The Petitioner has filed the instant Petition under Regulation 54 and Regulation 55 of the 2014 Tariff Regulations. However, under the garb of praying for removal of difficulties and relaxation, the Petitioner cannot seek to override the provisions of the Regulations. It is a settled position of law that 'power to remove difficulties' is a limited power and the same cannot be used to imply the presence of a provision which did not form part of the Regulations



in the first place. In this regard, reliance has been placed on the judgment of Hon'ble Supreme Court in the case of *Madeva Upendra Sinai v. Union of India* [(1975) 3 SCC 765].

(e) It is well settled that once Regulations are notified, they are binding on the parties including the Commission. In this regard, reliance has been placed on the judgment of Appellate Tribunal for Electricity dated 11.5.2018 in Appeal Nos. 86 of 2014 and 102 of 2014 (*Chhattisgarh State Power Distribution Co. Ltd. v. CERC and Ors.*)

4. In rebuttal, learned counsel for the Petitioner submitted that PSPCL has wrongly contended that provision of 'grossing-up' was not in the 2004 Tariff Regulations. During the tariff period 2004-09, the current tax on the core business of the generating companies was being recovered from the beneficiaries through sales by way of grossing up with actual tax rates. Accordingly, the same treatment ought to be continued for the subsequent control period for the deferred tax liability upto 31.3.2009.

5. After hearing the learned counsels for the parties, the Commission directed the Petitioner to file the following details/information on affidavit by 17.7.2020:

(a) Break-up of Rs.31,87,98,691.00 along with detailed calculations duly certified by the Auditor supported by the documentary evidence;

(b) Auditor's certificate apportioning the tax between the core and non-core business of the Petitioner;

(c) Auditor's certificate in respect of station-wise and beneficiary-wise allocation of tax on the core business;

(d) Accounting treatment followed in the books as regards the deferred tax liability along with relevant excerpt from the final accounts.

(e) Documentary evidence to show that PSPCL had been earlier paying supplementary bills of 'Deferred Tax Materialization' of the period prior to 01.04.2009 after grossing up.

6. The Commission further directed the Respondent, PSPCL, to file on affidavit by 10.7.2020, the details regarding the deferred tax liability paid against the bills raised by the Petitioner before the financial year 2017-18, along with the explanation whether the same was billed and paid with grossing up or otherwise.

6. Subject to above, the Commission reserved order in the Petition.

By order of the Commission

**Sd/-
(T.D. Pant)
Deputy Chief (Law)**

