

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 115/MP/2016

Coram:

**Shri P. K. Pujari, Chairperson
Shri A. K. Singhal, Member
Dr. M. K. Iyer, Member**

Date of Order: 9.10.2018

In the matter of

Petition for determining excess income tax reimbursed by beneficiaries, accrued on account of calculating income tax on the total profit instead of tax on RoE for the period 2005 - 2009 and subsequently in respect of NLC's Power Stations, namely NLC TPS -1 (600 MW), NLC TPS-II, Stage-I (1x210 MW), NLC TPS II-Stage-II (4x210 MW) NLC TPS-I Expansion (2x210 MW under regulation 10 of Tariff Regulations, 2004) in pursuance of order dated 12.5.2015 in Petition No. 65/MP/2013.

And in the matter of

Recovery of the excess tax reimbursed by the beneficiaries of respective NLC thermal power stations with interest at prevailing SBI PLR.

And in the matter of

Tamil Nadu Generation and Distribution Corporation Limited,
144, Anna Salai,
Chennai-600 002

.....Petitioner

Vs

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

.....Respondent

Parties present:

For Petitioner : Shri G.Umapathy, Advocate, TANGEDCO
Shri S. Vallinayagam, Advocate, TANGEDCO
Shri R. Jayaprakash, TANGEDCO

For Respondent: Shri M.G.Ramachandran, Advocate, NLC
Ms. Ranjitha Ramachandran, Advocate, NLC
Ms. Anushree Bardhan, Advocate, NLC
Shri A.Ganesan Pradeep, NLC



ORDER

The present petition has been filed by the petitioner Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) in accordance with the liberty granted by the Commission vide order dated 12.5.2015 in Petition No. 65/MP/2013.

2. In the instant petition, the petitioner has made following prayer vide affidavit dated 6.6.2016:-

- i. Direct the first respondent to furnish details of accounts relating to all its income,
- ii. Direct the 1st Respondent to furnish details of accounts relating to income from the Petitioner;
- iii. Direct the 1st Respondent to furnish split up details of tax paid on RoE of all its mines and split up details of tax paid on profit;
- iv. Direct the 1st Respondent to refund the excess tax collected beyond the Tax applicable for the Return on Equity;
- v. Any other relief as this Hon'ble Commission may deem necessary in the facts and circumstances of the case.

3. Before addressing the issues in the instant petition, it is pertinent to view the facts of the Petition No. 65/MP/2013, which are discussed in the following section.

Facts in the petition no. 65/MP/2013

4. Neyveli Lignite Corporation (NLC, respondent-1 in the instant case), had filed petition No. 65/MP/2013 before this Commission for revision of O&M expenses and corresponding increase in transfer price of lignite in respect of NLC mines for the period 2006-2009 after inclusion of wage revision expenditure.

5. TANGEDCO, one of the respondents in Petition N0.65/MP/2013 (petitioner in the instant petition), had submitted in the reply to the said petition no. 65/MP/2013 contending that the payments accrued were during the actual tax reimbursement period of 2005-06 to 2008-09, accounted and paid, post tax with RoE, for the period of 2010-11; the benefit of income tax of ₹215.92 Cr. should be passed on to the beneficiaries.

6. NLC in its rejoinder submitted as below:-



"Lignite transfer price is determined on normative basis. Pricing is based on Net Fixed Asset (NFA) method for all Mines in the tariff period 2004-09. Return on Equity (RoE) is allowed on equity content considered in the lignite transfer price. Similarly, actual Income Tax (IT) reimbursement for the mining segment is claimed from the beneficiaries. There is no direct link between RoE considered in the lignite transfer price and IT reimbursement."

7. In reply vide affidavit dated 26.9.2014, TANGEDCO contended as below:-

"Even though there is no direct link between RoE considered in the lignite transfer price and IT reimbursement, the taxable profit collected could not be more than the return on equity. If the taxable profit is higher as shown above, then it is only due to escalated O&M claimed during the period 2004-09."

8. The Commission after hearing both the sides, passed an order dated 12.05.2015 in Petition No.65/MP/2013 observing as below:-

22. Arising out of the main prayer of the petitioner i.e. increase in O&M charges in the lignite transfer price, an incidental issue on income tax has been raised by TANGEDCO at para 11 of its submission dated 19.5.2014 which is extracted as under:

"As the payment accrued during the actual tax reimbursement period of 2005-06 to 2008-09 and accounted and paid in the post tax with RoE period of 2010-11, the income tax benefit of ₹215.92 crore to be passed on to the beneficiaries."

In reply to the above submission of TANGEDCO, the petitioner NLC, vide its rejoinder dated 23.06.2014 has submitted as below:

"Lignite transfer price is determined on normative basis. Pricing is based on Net Fixed Asset (NFA) method for all Mines in the tariff period 2004-09. Return on Equity (RoE) is allowed on equity content considered in the lignite transfer price. Similarly, actual Income Tax (IT) reimbursement for the mining segment is claimed from the beneficiaries. There is no direct link between RoE considered in the lignite transfer price and IT reimbursement."

IT reimbursement is claimed based on actual taxable profit calculated as per the provision of income tax act and same is duly certified by the auditor. Claim from the beneficiary is supported by audit certificate only which is a standard industrial practice. The provision for wage hike was made in the respective financial years (from 1.1.2007) and the same has been claimed as expenditure in tax assessment in the respective year. Thereby, the actual tax reimbursement only has been claimed in those year. Actual wage hike paid in excess of provision already created in respective years alone accounted in 2010-11.

As per 2009-14 guidelines Income Tax is grossed up on the equity content considered in the lignite price. Actual tax liability is borne by NLC only. In light of the above, passing on the tax benefit in the instant case does not arise."

23. Neither TANGEDCO nor the petitioner have given any details of ₹215.92 crore in absolutely clear terms on account of income tax benefit. In absence of complete details with regard to income tax benefit amounting to ₹215.92 crore either from the submission of



TANGEDCO or the rejoinder of the petitioner, no decision in the present petition is contemplated. However, TANGEDCO may approach the Commission with all relevant details with regard to above claim through a separate petition.

9. In accordance with the liberty granted by the Commission as above, TANGEDCO has filed the instant petition.

Submission made by petitioner and respondent in the instant petition:

10. The petitioner in the petition filed vide affidavit dated 6.6.2016 has submitted that the profit in respect of NLC mines during the period 2004-09 would be lesser than the return on equity of ₹137740.17 Lakh. But, the taxable profit for the period 2004-09 is ₹250234.54 lakh as detailed below:-

Return on Equity

(₹ in Lakh)

Year	Mine-IA	Mine-IE	Mine-II	Mine-I	Total
2004-05	5548.04	16336.25	7265.08	3079.21	29149.37
2005-06	4777.63	14602.19	7128.13	3487.90	26507.95
2006-07	6602.45	13297.74	7397.87	3785.01	27978.06
2007-08	8377.35	11853.17	7961.53	3961.86	28192.05
2008-09	7354.16	10767.18	8471.40	4080.00	26592.74
TOTAL	32659.63	66856.53	38224.01	18393.98	137740.17

Tax @ 33.99% on RoE of ₹137740.17 lakh: ₹46817.88 Lakh

Taxable Profit

(₹ in Lakh)

Year	Mine-IA	Mine-IE	Mine-II	Mine-I	Total
2004-05	6170.57	10878.04	8972.71	35939.95	61961.25
2005-06	7747.42	18218.80	14796.98	5720.59	46083.79
2006-07	6009.36	7475.68	29073.3	(9592.98)	32965.40
2007-08	5658.82	8961.39	25667.06	(785.97)	39501.32
2008-09	30639.92	5841.32	26310.56	6531.01	69322.78
TOTAL	56226.09	51375.21	104820.60	37812.60	250234.54

Tax on profit of ₹250234.54 lakh @ 33.99% = ₹85054.72 Lakh

Difference between Tax on RoE and Tax on Profit = ₹38236.84 Lakh

(85054.72-46817.88) i.e. the excess tax collected from the beneficiaries.



11. As stated by the petitioner, the tax calculated and collected by NLC is not in line with the Clause 6.2 of the Power Purchase Agreement entered between TANGEDCO and NLC in respect of TPS-II generating station which provides as below:-

6.2 The total tax liability of the recipient however shall be

(a) the tax payable on the RoE and internal resources relating to Mine-II and Power Station-II adopted in the tariff calculations and the grossed up tax thereon.

(or)

(b) the actual tax assessed for the above streams, whichever is less.

12. The petitioner has further submitted that he is not liable to pay anything contrary to what is agreed to under Clause 6.2 of the Power Purchase Agreement. Therefore NLC is liable to refund the tax excessively for the period 2004-09.

Reply by the respondent NLC dated 14.11.2016:

13. In its reply to the instant petition, respondent NLC has inter-alia submitted as follows:
- i. Claim made by TANGEDCO that NLC had recovered excess income tax from the beneficiaries w.r.t. mines, comparing RoE component and taxable profit is misconceived and liable to be rejected.*
 - ii. NLC has got the income tax reimbursement from the beneficiaries in accordance with the (MOC) guidelines, duly supported by corroborative evidence of auditor's certificate.*
 - iii. TANGEDCO's conclusion that the Income tax should have been restricted to RoE content is not correct. The income tax reimbursement is decided by the MOC, based on the scheme and parameters determined by MOC and cannot be reopened in these proceedings.*
 - iv. TANGEDCO has failed to take into cognizance that the tax component in the grossed up RoE, needs to be compared in relation to the tax reimbursement obtained from the beneficiaries based on the taxable profit.*

14. In support of the above, NLC has furnished following calculations:

(₹in crore)

FY Ending	2005	2006	2007	2008	2009	5 yrs total
RoE%	14.00%	14.00%	14.00%	14.00%	14.00%	-
Tax rate	36.59%	33.66%	33.66%	33.99%	33.99%	-
Grossed up RoE	22.08%	21.10%	21.10%	21.11%	21.11%	-
Average Equity	2302.04	2142.57	2220.24	2296.74	2190.94	-
Grossed up RoE	508.29	452.08	468.47	484.84	462.51	2376.19
RoE ₹in Cr.	322.29	299.96	310.83	321.54	306.73	1561.35
Tax portion (A)	185.97	152.2	157.71	165.57	157.94	819.39



Taxable Profit	619.61	455.8	329.75	395.01	419.58	2219.75
Tax amount (B)	226.72	153.42	111	134.26	142.62	768.02
Difference between taxable profit based on IT Reimbursement and RoE based I tax						-51.37

15. Details of unit-wise taxable income and tax payable from FY 2004-05 to 2008-09 based on the revised tax re-imburement claim:

(₹ in Lakh)

Taxable profit based on the revised tax re-imburement claim without TPS-I Expn					
FY	Mine-I	Mine-IA	Mine-IA	Mine-II	Total
2004-05	35939.95	6170.57	10878.03	8972.70	61961.25
2005-06	5720.59	7747.42	18218.8	13893.30	45580.11
2006-07	-9582.98	6009.36	7475.68	29073.34	32975.4
2007-08	-785.91	5658.82	8961.4	25667.07	39501.38
2008-09	6531.01	3275.38	5841.3	26310.55	41958.24
TOTAL	37822.66	28861.55	51375.21	103916.96	221976.38

(₹ in Lakh)

Taxable profit based on the revised tax re-imburement claim without TPS-I Expn				
FY	TPS-I	TPS-IE	TPS-II	TOTAL
2004-05	(685.94)	-	21075.74	20389.80
2005-06	(11445.01)	-	(9699.08)	(21144.09)
2006-07	21869.93	-	(63190.91)	(41320.98)
2007-08	(2845.7)	-	8206.00	5360.23
2008-09	(3606.09)	-	(7712.26)	(11318.35)
TOTAL	3287.12	-	(51320.51)	(48033.39)

(₹ in Lakh)

				As per Company's tax return		
FY	Mines	Thermal	Others	Total income	Tax rate	Tax payable
2004-05	61961.26	20389.80	37777.97	120129.03	36.59%	43958.21
2005-06	45580.11	(21144.09)	50614.28	75050.30	33.66%	25261.93
2006-07	32975.39	(41320.98)	96927.56	88581.97	33.66%	29816.69
2007-08	39501.30	5360.23	97838.17	142699.70	33.99%	48503.63
2008-09	41958.27	(11318.35)	49312.56	79952.48	33.99%	27175.85
TOTAL	221976.33	(48033.39)	332470.54	506413.5		174716.31

16. The petitioner TANGECDO vide affidavit dated 17.11.2016 has made a revised prayer as follows:-

- Consider the submission made in the petition and in the present rejoinder
- Direct the first respondent to arrive at the tax calculation as per Bulk Power Supply Agreement executed between the SEBs.
- Direct the first respondent to refund the excess tax collected beyond the tax applicable for the return on equity



- iv. Any other relief as this honorable commission may deem necessary in the facts and circumstances of the case.

17. KSEB vide affidavit dated 22.11.2016 submitted following prayer:

“The Honorable Commission may kindly intervene and direct NLC to provide the details of income tax claimed form the beneficiaries. It is also requested that Honorable Commission may issue appropriate direction to NLC to refund to the beneficiaries the excess income tax claimed.”

TANGEDCO’s rejoinder dated 19.12.2016 to NLC’s reply:

18. TANGEDCO in its rejoinder vide affidavit dated 19.12.2016, submitted as below:

- i. TANGEDCO has contended that the tax calculated by NLC is not in line with the PPA.
- ii. Clause 6.2 of the PPA in respect of TPS-II generating station executed between NLC and TANGEDCO provides as follows:

6.2 The total tax liability of the recipient however shall be the tax payable on the RoE and internal resources relating to Mine-II and Power Station-II adopted in the tariff calculations and the grossed up tax thereon.

(or)

The actual tax assessed for the above streams, whichever is less.

- iii. MOC guidelines dt. 30.1.2006 at para 4.7 states that the income tax reimbursement needs to be made as per existing BPSA.
- iv. Accordingly, NLC should have calculated tax on the basis of BPSA and not on total profit. Hence, contention of NLC is liable to be rejected.
- v. TANGEDCO is not objecting for calculation of tax on grossed up basis. TANGEDCO in its reply to the Draft Tariff Regulations, 2004 has submitted its views that the income tax should be calculated on grossed up basis.
- vi. NLC should follow GFA method as other central generating stations.
- vii. Information was sought by the Commission vide ROP dated 22.9.2016 from NLC, viz: accounts related to all its income, accounts related to its income from the petitioner and split up details of the tax paid on RoE and the split up details on mines. Regarding this TANGEDCO submits that NLC has failed to furnish the said details as below:
 - a) NLC has submitted the Annual reports of its entire business but failed to furnish the details of income from the beneficiaries.
 - b) In the revised tax reimbursement statement for 2004-09, the tax portion of TPS-1 expansion has been removed without citing any reason.
 - c) Details of tax in respect of mines have not been furnished.

viii. TANGEDCO submitted following tables showing Return on Equity for the period 2004-09



a. **Grossed up tax calculated on RoE for the period 2004-09**

(₹ in Lakh)

Year	Mine-IA	Mine-IE	Mine-II	Mine-I	Total	Gr. up tax (%)	Total
2004-05	5548.04	16336.25	7265.08	3079.21	32228.58	22.08%	7116.07
2005-06	4777.63	14602.19	7128.13	3487.90	29995.85	21.10%	5593.17
2006-07	6602.45	13297.74	7397.87	3785.01	31083.07	21.10%	5759.53
2007-08	8377.35	11853.17	7961.53	3961.86	32153.91	21.21%	5640.32
2008-09	7354.16	10767.18	8471.40	4080.00	30672.74	21.21%	
TOTAL	38207.67	83192.78	45489.09	21472.98	140819.17		30088.93

b. **Tax calculated on RoE for the period 2004-09 on pass through basis**

(₹ in Lakh)

Year	Total RoE	Tax %	Tax
2004-05	32228.37	36.59	11792.36
2005-06	26507.95	33.66	8922.57
2006-07	27298.06	33.66	9188.52
2007-08	28192.05	33.99	9582.47
2008-09	26592.74	33.99	9038.87
TOTAL	140819.17		48524.79

c. **Tax calculated on profit for the period 2004-09 on pass through basis**

(₹ in Lakh)

Year	Mine-IA	Mine-IE	Mine-II	Mine-I	Total	tax rate(%)	Total
2004-05	6170.57	10878.04	8972.71	35939.95	61961.27	36.59	22671.63
2005-06	14446.63	4777.63	7128.13	5720.59	32072.98	33.66	10795.77
2006-07	13282.75	47568	29073.33	(9582.98)	40248.78	33.66	13547.74
2007-08	17156.91	8961.39	25667.06	(785.97)	50999.39	33.99	17334.69
2008-09	11234.07	5841.32	26310.56	6531.01	49916.96	33.99	16966.77
TOTAL					235199.38		81316.60

Meeting between the Directors (Finance) of NLC and TANGEDCO

19. In the hearing dated 19.1.2017, the Commission directed the petitioner NLC and respondent TANGEDCO as follows:

"..Director (Finance) of NLC and Director (Finance) of TANGEDCO should meet and explore the possibility of resolving the differences and find out an amicable solution to the problem, by 16.2.2017 and file the Minutes of Meeting within one week thereafter."

20. Vide affidavit dated 02.06.2017, TANGEDCO has submitted that a meeting was held between Director (Finance)-TANGEDCO and Director (Finance)- NLC on 11.5.2017. Minutes of the Meeting (MOM) were communicated to NLC for signing and for filing before the Commission. However, NLC replied back with the revised MOM which are not



acceptable to TANGEDCO. In this scenario, TANGEDCO has furnished MOM signed only by TANGEDCO.

21. Following is the summary of the issues discussed between TANGEDCO and NLC as per the MOM submitted by TANGEDCO vide affidavit dated 2.6.2017:

Issue No. 1:

22. Excess income tax reimbursement in respect of Mines:

a) TANGEDCO's Contention:

- NLC has calculated tax on actual profit instead of tax on return on equity which is ₹230.95 Cr as per the revised Auditor's certificate and taxable income data furnished by NLC vide affidavit dated 14.11.2016 as follows:

₹in Cr

Tax on profits of Mines	768.015
Tax on RoE of Mines	537.064
Excess tax collected by NLC as per TANGEDCO	230.952

b) NLC's reply:

- Income tax reimbursement is as per MOC guidelines.
- NLC's claim is based on CERC regulations endorsed by one man commission Shri A.H. Jung in order dated 8.1.2007 in pet. no. 5/2002
- If income tax is to be calculated on Return on Equity on normative basis, grossed up tax is to be calculated which would be higher than the tax actually collected from the beneficiaries by ₹51.38 Cr as below:

₹in Cr

Tax portion in Grossed up RoE	819.392
Tax on profits of Mines (actually collected)	768.015
Difference (under recovery as per NLC)	51.38

c) TANGEDCO's final view on this issue:

- Clause 4.7 of the MOC guidelines for the period 2004-09 notified on 30.1.2006 provides that the present practice of reimbursement of tax which is as provided in the Bulk Power Supply Agreement (BSPA) between NLC and SEBs, may continue.
- The BSPA is valid upto 31.03.2001. After the CERC Tariff Regulation, 2001 notified on 21.9.2001, the Regulations laid down under CERC Tariff Regulations, is applicable.
- Regulation 7 of CERC Tariff Regulations, 2004 provides that



"Tax on the income streams of the generating company or the transmission licensee, as the case may be, from its core business, shall be computed as an expense and shall be recovered from the beneficiaries."

- The tax charged by NLC to the beneficiaries is on pass through mechanism. Concept of pass through is based on actual and hence it cannot be an abstract figure arrived through grossing up.
- NLC has calculated tax on grossed up RoE and compared with actual tax on RoE instead of actual tax on RoE.
- A.H.Jung Commission's order as cited by NLC is irrelevant in the instant case because that order was pertaining to the question of lignite transfer price and it is silent on the issue of quantum on which the tax is to be calculated. Further, it relates to the period 2001-04 only.

Issue No. 2:

23. Profit beyond 85% capacity utilization of Mines

a) TANGEDCO's Contention:

- Excavation of NLC mines is more than 85%, the level which is notified by MOC. The lignite excavated above 85% CUF is also charged at the same pooled transfer price in power tariff, which results in super profit to NLC. In addition, NLC is also collecting tax on the profit earned on the excess lignite excavations beyond 85% CUF. This resulting into excess tax reimbursement of 115.19 Cr.

₹ in Cr

	a	b	c	d	e	f	g	h	i	j	k	l
	Mine-I	Mine-I Exp	Mine-II	Mine-IA	Total Profit@85 % capacity (a+b+c+d)	Actual profit allocate d (NLC claim)	Diff (e-f)	tax rate for the year	Excess tax collect ed (g*h)	Tax on 85% Profit (e*h)	Tax on Actual Profit (f*h)	Diff. (k-j)
2004-05	305.49	92.46	76.27	52.45	526.67	619.61	92.94	36.59%	34.01	192.71	226.72	34.01
2005-06	48.63	154.86	118.09	65.85	387.43	455.80	68.37	33.66%	23.01	130.41	153.42	23.01
2006-07	-81.46	63.54	247.12	51.08	280.29	329.75	49.46	33.66%	16.65	94.35	110.99	16.65
2007-08	-6.68	76.17	218.17	48.10	335.76	395.01	59.25	33.99%	20.14	114.13	134.26	20.14
2008-09	55.51	49.65	223.64	27.84	356.65	419.58	62.93	33.99%	21.39	121.22	142.62	21.39
Total	321.49	436.69	883.29	245.32	1886.80	2219.75	332.95		115.20	652.81	768.01	115.20

b) NLC's reply:

- As per lignite price guidelines, all fixed cost and RoE is recoverable upto 85% level.
- As per guidelines dated 30.1.2006 issued by MOC, NLC is entitled to get the revenue/ profit over and above the recovery of cost accordingly.
- Therefore, it is a practice to reward a mining company for the high risk involved.

c) TANGEDCO's final view on this issue:

- Reg. 23 of the CERC Tariff Regulations, 2004 provides for an incentive of 0.25 paise/kwh for the excess generation over the NAPAF of 85% level. as fixed costs are recovered at 85% capacity itself any production over and above is rewarded with incentive only and the actual profit made on the excess production and the



corresponding tax paid on it cannot be passed on to the beneficiaries, as it will result on unjust enrichment of NLC.

Issue No. 3:

24. Excess lignite consumption beyond norms

a) TANGEDCO's Contention:

- There is a vast difference in the lignite consumption in proportion to the energy billed to the beneficiaries resulting into excess tax collection amounting to ₹675.90 Cr from the beneficiaries.

b) NLC's reply:

- There is a mistake in TANGEDCO's working in respect of auxiliary consumption and stock adjustment/ internal consumption. Lignite consumption should cover auxiliary consumption also. Hence, there is no excess consumption.

c) TANGEDCO's final view on this issue:

- NLC has not submitted any reconciliation working in support of their stand.
- Tariff calculations of the energy billed are after taking into consideration the auxiliary consumption. Hence, NLC's claim in this regard is not right.
- Lignite price which is considered for the purpose of calculation of energy charges is determined based on the MOC guidelines. The quantum of lignite required for generation of one unit of power (kwh) is normative basis and therefore the consumption of lignite for generation of electricity cannot be more than the norms. Therefore, NLC cannot pass on the tax on the excess quantum of lignite consumed for generation of electricity upon the beneficiaries.

Issue No. 4:

25. Production and consumption mismatch

a) TANGEDCO's Contention:

- Production and consumption mismatch for the years 2005-06 and 2006-07 as per the statement furnished by NLC vide letter dated 28.2.2017.

b) NLC's reply:

- The data may not match exactly due to stock adjustments and other reasons.

c) TANGEDCO's final view on this issue:

- Production and consumption data is reconciled with the stock statement furnished by NLC.



NIC's reply dated 18.7.2017 to the ROP dated 06.07.2017:

26. Vide ROP dated 06.07.2017, the Commission directed NLC to comply with the directions of the Commission in Para 4 of the ROP for the hearing dated 22.09.16 wherein NLC was directed to furnish the information, viz; (i) Accounts related to all its income; (ii) Accounts related to income from the petitioner (iii) Split up the details of the tax paid on RoE of all its mines and split up details of tax paid on profit.

27. In reply to the above, the respondent NLC vide affidavit dated 18.7.2017 stated that the information that has been directed to be submitted by the Commission has been already submitted vide affidavit dated 14.11.2016.

28. NLC has further submitted that split up details of tax paid on RoE for Mines could not be furnished separately in view of the fact that tax is paid only on taxable profit.

Rejoinder by TANGEDCO dated 31.7.2017

29. TANGEDCO vide rejoinder dated 31.7.2017 has submitted following:

- The respondent (NLC) in Annexure-V of its affidavits dtd. 14.11.2016 has furnished only the total taxable income of NLC as a whole and calculated tax accordingly which is not in line with the directions of the Hon'ble CERC (viz. to furnish Split up details of the tax paid on RoE of all its mines and split up details of tax paid on profit).NLC has failed to furnish the split up details of actual tax payable on RoE and tax paid on income from the beneficiaries.
- In Para. 5 of its affidavit dt. 18.7.2017, NLC has stated that it has paid excess tax considering the tax calculated on grossed up basis on the Return on Equity for the period 2004-09 and the tax payable on the taxable profit.
- NIC has devised a new concept by comparing the grossed up RoE with the actual tax on taxable profit. The Comparison should only be made on the Grossed up tax on Return on Equity and the actual tax payable on Return on Equity.
- The Grossed up tax on the Return on Equity in respect of Mines for the period 2004-09 is ₹819.39 Crores and the actual tax (without grossing up) on Return on Equity in respect of Mines for the period 2004-09 is ₹537.06 Cr. Therefore, the beneficiaries have paid an excess of ₹282.33 Cr to NLC.



Hearing dated 26.4.18

30. The petition was again heard on 26.04.2018. The Commission after hearing the parties who reiterated their respective arguments, directed the Chief (Finance) of the Commission to convene a meeting of Director (Finance) of NLC and Director (Finance) TANGEDCO to resolve the differences and find out an amicable solution to the problem, by 28.5.2018.

Details with respect to the preliminary meetings held at the Commission:

31. As directed by the Commission, the office of Chief (finance) communicated with petitioner TANGEDCO and respondent NLC for arranging a final meeting to resolve the issue. Accordingly, it was decided to convene a meeting on 4.6.2018.

32. Meanwhile, to facilitate each party to appraise with their view, the representatives of the respective parties were called for a meeting with Chief (Finance). Accordingly, Mr. C. Veeramani, Chief Engineer (Electrical/ Regulatory cell) and Mr. R. Jayaprakash, Accounts Officer of TANGEDCO visited the office on 16.5.2018.

33. In the meeting, they detailed the argument by TANGEDCO with respect to the instant petition. It was stated that the tax calculated and collected by NLC from the beneficiaries is not in line with the Article 6.2 of Power Purchase Agreement. NLC has earned super profits during the period 2004-09 due to escalated O&M and excavation of mines more than the Capacity Utilization Factor and passed on the actual tax upon the beneficiaries on the super profits earned. Therefore, the petitioner is not liable to pay for anything contrary to what is agreed to under Article 6.2 of Power Purchase Agreement.

34. Subsequent to the meeting with TANGEDCO, representatives of NLC, Mr. S. Varadhrajan, Chief Manager (finance) and Mr. C. Ganesan, Chief General Manager (Commercial) visited the office on 7.5.2018 and 22.5.2018. During the meeting, they



reiterated the stand of NLC with respect the TANGEDCO's claim of excess tax recovery. It was stated that the recovery made by NLC is as per the provisions of Clause 6.2 of the BPSA only. They explained that as per the BPSA, the total tax liability of the recipient shall be the least of (i) tax payable on the RoE and internal resources relating to Mine-II and Power Station-II adopted in the tariff calculations and the grossed up tax thereon; and (ii) The actual tax assessed for the above streams. They cited the decision by APTEL in appeal no. 49/2010 (filed by TANGEDCO, challenging Commission's order dated 7.1.2010 in petition no. 163/08) vide order dated 10.9.2010, wherein it was held that the recovery of the income tax needs to be on grossed up basis, thereby treating the income tax to be recovered as an expense.

35. Accordingly, NLC clarified their stand that the comparison should be made between the actual tax on taxable profit and the tax portion in grossed up RoE and not between actual tax on taxable profit and tax on RoE (no grossing up of RoE) to arrive at the least of two. Accordingly, actual tax of ₹76802 lakh should be compared with tax portion in the grossed up RoE amounting to ₹819.39 Cr and not with 537 Cr (tax on RoE). Hence, the tax recovered by NLC amounting to ₹768 Cr is as per the BSPA and hence, correct.

36. Further to the meeting, certain information was called for from NLC which is as below:

- (a) Detail working of advance tax for the relevant period
- (b) Proof of payment of advance tax
- (c) Workings u/s 195A of income tax act, 1961
- (d) Copies of the assessment order of the relevant period.

37. The said information was furnished by NLC vide submission dated 11.5.2018.

38. Meantime, the Chief (Finance), CERC had a discussion on conference call with both Director (Finance), NLC and Director (Finance), TANGEDCO. Both the DFs agreed to deliberate further on this issue to reach to a consensus. Accordingly, both the DFs met at



TANGEDCO office on 2.6.2018 where TANGEDCO requested for certain further documents for their examination to which NLC agreed to. Subsequently, NLC provided those documents. TANGEDCO without any further meeting with NLC, submitted their rejoinder which is discussed below.

39. TANGEDCO vide affidavit 19.6.2018 submitted opinion of their standing counsel/ Auditor on the issue. Salient points from the same are as under:-

- “Reimbursement of Income Tax as a component from the profit of mines for lignite supply is sought to be collected from SEB and at this stage, the mines profits have been notionally arrived at. This being a commercial arrangement, one has to go with the same and now NLC is demanding tax on profit from generation activity, in that event NLC must show that the profits of the generation division excludes the profits of the mines divisions, failing which, TANGEDCO will be paying tax on mine profit at stage-1 and that if the profits are not eliminated, the same profit will form part of generation division once again and TANGEDCO will pay tax on the same. This issue is arising because NLC as one entity will be paying taxes on mines and generation division which are not separate taxable entities and hence TANGEDCO should ensure the profits of the mines on which the taxes have already been reckoned at mining stage shall be eliminated from generation profits in as much the lignite cost is input cost for generation of power.”
- “Tariff of the generating stations is governed by three different situations in the current case:
 - a) CERC Tariff Regulations, 2001
 - b) CERC Tariff Regulations, 2004
 - c) BPSA dated 18.2.1999
- **If CERC Regulations are to be considered as of overriding status over the BPSA:**

In this scenario, TANGEDCO doesn't have the obligation to pay grossed up tax. This view is in spite of orders of APTEL in the matter of appeal No. 49 of 2010 vide order dated 10.9.2010 in as much as the orders of the CERC needs to be challenged in view of the fact that the Commission while dealing with the matter of tax grossed up as an obligation, has heavily relied upon the provisions of the section 195A and concluded that as per the provisions of section 195A, such grossing up is mandatory. We beg to differ on this point in as much section 195A is not a charging provision, it is only a procedural provision and the same is not applicable to the present case as section 195A applies to those incomes covered under chapter XVII of Income Tax Act and purchase of power is not an income covered under that chapter. Hence the provisions of section 195A have no role, thus the CERC or any other adjudicating forum has to define what does the grossing up of tax mean as per the BPSA.

- **If covenants of the BPSA are to be considered overriding over the CERC Regulations:**



As per clause 6.2 of the BPSA, TANGEDCO is to reimburse the taxes pertaining to Mine-II and PS-II for tariff calculations on a grossed up tax basis if the tax payable is arrived at based on return on equity and internal resources basis or actual tax assessed for the above streams whichever is less.

In the current situation, the reimbursement of tax is based on the entitlement computed on Return on equity basis. The amount so far collected is subject to adjustment that arises on account of actual income tax liability pursuant to income tax assessments. The current Income Tax assessment is significantly sub-judice before the High Court of Madras. Hence, the determination of actual tax reimbursement by TANGEDCO to NLC pursuant to BPSA poses challenge in quantifying and giving finality as actual tax liability of NLC is under litigation. In absence of actual determination of tax liability, this particular clause under BPSA is unenforceable.

- Therefore, guidance for reimbursement of tax by TANGEDCO can be sought only from CERC Regulations. As explained above, CERC Regulations does not refer to grossing up of the tax. Thus, the reimbursement of tax in relation to Mine-1 and TPS-2 shall be paid on normal basis and not on grossed up basis.

40. Regarding CERC Tariff Orders relied upon by NLC, the Auditor of the TANGEDCO has opined as below:-

- “CERC order dated 7.1.2010 in Petition No. 163/2008 refers to Sec195 of IT Act as the basis for justifying the grossing up of the tax and fixes obligation on TANGEDCO. However, Sec 195 is not applicable to the present case as section 195A applies to those incomes covered under chapter XVII of Income Tax Act and purchase of power is not an income covered under that chapter. Therefore, Commission’s order is not in conformity with the Tariff Regulations in as much as the Sec 195 does not give a preposition of grossing up of tax unless the parties have contractually agreed upon for such grossing up. In other words, the grossing up of the tax is reimbursable as per the PPA is a commercial understanding and Sec195 has no role in this regard.”

41. NLC, vide affidavit dated 11.7.2018 has submitted a reply to TANGEDCO’s submission dated 19.6.2018. The main points are as below:-

“The issue of Grossing up of Income Tax was decided by the Hon’ble Central Commission vide order in petition no.163/2008 & 49/2010, APTEL order 47 of 2010 (NLCIL) and CERC order 263/2009 & APTEL order 134 of 2010 (NTPC). In fact, TANGEDCO had gone on appeal against the APTEL order 47 of 2010 in the Hon’ble Supreme Court vide Civil Appeal No.9675 of 2010.

Had the issue of “Grossing up of Income Tax” been revealed/ divulged in the petition itself, then the petition would have hit the question of maintainability, being sub judice. Hence, it is submitted that TANGEDCO had concealed the core issue and also the fact that they had gone on appeal to Hon’ble Supreme Court against APTEL order 47 of 2010 on the same issue, in the petition, which would have rendered the petition susceptible for dismissal in limine. TANGEDCO had approached the Commission innuendo under the guise of excess Income tax reimbursement determination through this miscellaneous petition.”

42. **NLC has also submitted an opinion from their Auditor which is as below:-**



“...Therefore, the principle of grossing up is applicable in the present case as per the order of the Hon’ble High Court, Expert advisory Committee opinion provided by ICAI and the abovementioned CERC orders. In any case, grossing up is a well-recognized concept in trade circles. Section 195A or Section 115-O of the Income Tax Act, 1961 gives statutory recognition to the general trade concept of grossing up. Section 195A of the Income Tax Act, 1961 reads as under:

Income payable "net of tax" (195A)

In a case other than that referred to in sub-section (1A) of section 192, where under an agreement or other arrangement, the tax chargeable on any income referred to in the foregoing provisions of this Chapter is to be borne by the person by whom the income is payable, then, for the purposes of deduction of tax under those provisions such income shall be increased to such amount as would, after deduction of tax thereon at the rates in force for the financial year in which such income is payable, be equal to the net amount payable under such agreement or arrangement.

Therefore, whenever amounts have to be paid net of taxes, the amount has to be grossed-up. Hence, it is only apt to apply the principles contained in Section 195A to the facts of the instant case to determine the value inclusive of taxes.”

Written submission on behalf of the petitioner dated 20.8.2018

43. The petitioner has made a submission vide affidavit dated 20.8.2018 in which the petitioner has presented the summary of the various submissions made in the instant petition. With respect to the core issue of collection of excess tax reimbursement by NLC, the petitioner has reiterated the reference of provisions of BPSA and has *inter-alia* stated as below:-

- The claim of NLC that it is entitled to grossing up and therefore the claim of the petitioner in the instant petition deserves no consideration is wholly untenable. NLC also relied upon Section 195 of IT Act as a justification for grossing up which is equally untenable.
- The reimbursement by the petitioner and other beneficiaries to the Respondent is covered by BPSA and various regulations 2001 and 2004.
- Article 6.2 of BPSA provides that the total tax liability of the respondent shall be either the tax payable on the return on equity and internal resources relating to Mine-II and power station-II adopted in the tariff calculations and the grossed up tax thereon, or the actual tax assessed for the above streams, whichever is less. thus as per BPSA, NLC is not entitled to grossing up of the tax and claiming refund of the income tax paid to the authorities.
- Regulation 7 does not provide for grossing up. Regulation 7 merely provides that the tax on the income streams from its core business shall be computed as an expense and shall be recovered from the beneficiaries. The core business is defined in Regulation 5 which *inter-alia* would mean only generation of electricity.
- Regulation 7(2) of Tariff Regulation, 2004 provides that any under recoveries or over recoveries of tax on income shall be adjusted every year on the basis of income tax



assessment under the Income Tax Act, 1961, as certified by the auditor ₹ Regulation 7(2) further provides that tax on any income stream other than the core business shall not constitute a pass-through component on tariff and tax on such other income shall be payable by the generating company as the case may be.

- In the present case, NLC is also being a single legal entity paying taxes for both mining and generating divisions. The generating division being the core business activity, the income stream from mining cannot constitute a pass-through component in tariff and the tax on such other income shall have to be paid by the generating company viz., NLC. It cannot be fastened to the beneficiaries. The lignite used for generation is not purchased by NLC. It is mined from the captive mines of NLC. This Hon'ble Commission approves the lignite transfer price determined by the Ministry of Coal, which becomes part of the generation tariff.
- Even though NLC in its affidavit dt. 14.11.2016 has furnished year wise income collected from TANGEDCO in respect of Mines and Thermal Stations, as the present petition relates to Mines, the income from TANGEDCO in respect of Mines has been calculated as below.

(₹In lakhs)

	2004-05	2005-06	2006-07	2007-08	2008-09
Mine-I	35939.95	5720.59	- 9582.98	- 785.91	6531.01
Mine-IA	2126.30	2721.20	2082.15	1992.25	1122.88
Mine-I Expn	5515.90	8469.02	3513.29	4684.88	2976.16
Mine-II	3091.89	4879.88	10073.47	9036.39	9019.87
Total income	46674.04	27790.69	6085.93	14927.61	19649.92
Tax Rate	36.59%	33.66%	33.66%	33.99%	33.99%
Total tax amount	17078.03	9354.35	2048.52	5073.89	6679.01

- From the above, NLC has earned an income amounting to ₹1151.28 Crores from TANGEDCO during the period 2004-2009 towards the consumption of lignite for the quantum of energy supplied to TANGEDCO. NLC has collected a tax amount of ₹402.32 Crores from TANGEDCO during the period 2004-2009 on the income earned by NLC in respect of its Mines.
- The total tax collected by NLC towards the total income of ₹2219.75 Crores earned in respect of Mines from the Southern Region beneficiaries during the period 2004-2009 is ₹768.01 Crores. Out of this ₹768.01 Crores, the tax amount collected from TANGEDCO is ₹402.32 Crores as per the table shown in para.22 above.
- NLC has calculated an amount of ₹819.32 Crores as the tax portion on the Grossed-up Return on Equity for the period 2004-2009 and compared the same with the tax portion of ₹768.01 Crores on the income earned from Southern Region beneficiaries in respect of Mines and has stated that the tax portion collected is lesser by 51.38 Crores.
- The statement by NLC is not correct. NLC should have compared the Tax portion of ₹819.32 Crores of Grossed-up RoE with the actual tax of ₹537.06 Crores on the Return on Equity calculated by TANGEDCO vide page 205. There will be a difference of ₹282.26 Crores (Rs.819.32 – ₹537.06 Crores).
- In view of the above, this Hon'ble Commission may be pleased to allow the present petition and direct the Respondent No.1 NLCIL to refund the excess amount of ₹282.26 crores to the beneficiaries along with interest.



Analysis and decision

44. As stated, this petition has been filed by the petitioner in accordance with the liberty granted by the Commission while passing the order in petition no. 65/MP/2013 dated 12.5.2015 with respect to an incidental issue on income tax that was raised by TANGEDCO in the said petition no. 65/MP/2013. The Commission, while granting the liberty, had observed that neither TANGEDCO nor NLC had given any details of the contended income tax benefit in absolutely clear terms, due to which, no decision on the said issue was contemplated and directed that TANGEDCO may approach the Commission with all relevant details with regard to above claim through a separate petition.

45. In line with the liberty granted as above, the petitioner has filed the instant petition vide affidavit dated 6.6.2015 wherein he has prayed to the Commission for directing NLC to refund the excess tax collected beyond the tax applicable for the Return on Equity. Petitioner, for the said claim, has relied upon the provision of Power Purchase Agreement entered by TANGEDCO with NLC; and has stated that he is not liable to pay anything contrary to what is agreed to under Clause 6.2 of the Power Purchase Agreement. NLC has contended that the claim made by TANGEDCO regarding excess income tax recovery from the beneficiaries by comparing RoE component with taxable profit, is misconceived and liable to be rejected.

46. As per the calculations furnished by NLC vide affidavit dated 14.11.2016, actual tax collected by NLC (₹76802 lakh) is less by ₹5137 lakh than what should have been collected (₹81939 lakh) i.e. the tax portion in the grossed up RoE. As per TANGEDCO's submission, NLC should have collected ₹53706 lakh, i.e. the amount of tax on RoE component as against actually collected amount of ₹76802 lakh, thereby collecting ₹23096 lakh in excess. Both the parties have submitted detailed arguments and calculations in support of their respective contentions.



47. In this regard, TANGEDCO has submitted the opinion of their standing counsel who has stated that the current Income Tax assessment is *sub-judice* before the High Court of Madras. Hence, the determination of actual tax reimbursement by TANGEDCO to NLC pursuant to BPSA poses challenge in quantifying and giving finality as actual tax liability of NLC is under litigation. In absence of actual determination of tax liability, the particular clause (6.2) under BPSA is unenforceable. In this situation, reimbursement of tax can be guided only by CERC Regulations, which does not refer to grossing up of the tax. Thus, the reimbursement of tax in relation to Mine-1 and TPS-2 shall be paid on normal basis and not on grossed up basis.

48. In this regard, TANGEDCO has submitted a table showing calculation of tax on return on equity of mines amounting to ₹53706.40 lakh (without grossing up). The year-wise details of the same are as follows:

(₹in lakh)			
	Return on Equity	Tax rate	Tax amount
2004-05	32228.58	36.59%	11792.44
2005-06	29995.85	33.66%	10096.60
2006-07	31083.07	33.66%	10462.56
2007-08	32153.91	33.99%	10929.11
2008-09	30672.74	33.99%	10425.66
			53706.38

49. As such, the issue for our consideration is to decide whether the actual tax recovered by NLC of ₹76801.51 lakh (tax on mining profit) is to be compared with ₹53706.38 lakh (tax on RoE, without grossing up) or with ₹81939.20 lakh (tax portion in grossed up RoE), thereby to decide whether there has been an excess recovery or under recovery of tax as contended by TANGEDCO and NLC, respectively.

50. We have considered the submissions made by the parties and the documents placed on the record. It is pertinent to mention that MOC Guidelines (Cl.4.7) suggests that



reimbursement of tax in respect of fixation of lignite transfer price shall continue as per the practice laid down in the BPSA between NLC and the beneficiaries. The BPSA in this regard prescribes as below:-

6.2 *The total tax liability of the recipient however shall be*

(a) the tax payable on the RoE and internal resources relating to Mine-II and Power Station-II adopted in the tariff calculations and the grossed up tax thereon.

(or)

(b) the actual tax assessed for the above streams, whichever is less.

51. The tariff for the period 2004-09 in respect of thermal power generation shall be regulated as per CERC Tariff regulations, 2004. Thus, the BPSA is applicable in respect of fixation of transfer price of lignite only i.e. mining portion only.

52. The tax portion in grossed up RoE in respect of mines as computed by NLC, which is *sub-judice* and furnished vide affidavit dated 14.11.2016 for the period 2004-09 amounts to ₹81939 lakh as referred at para 14 above.

53. The self assessment income and tax thereon as furnished by NLC vide affidavit 14.11.2016 and the actual tax assessed by the Income Tax Authorities in respect of 2004-09 period as furnished by NLC vide affidavit dated 11.5.2018, which is also *sub-judice* is summarized as under:-

(₹in Crore)					
Financial Year	Self assessment income	Assessed income	self tax	assessed	tax assessed by tax authorities
2004-05	1201.29	1204.52		439.58	418.64
2005-06	750.50	787.09		252.62	264.93
2006-07	885.82	1427.71		298.17	480.57
2007-08	1427.00	1602.05		485.03	*544.55
2008-09	799.52	1034.10		271.76	*351.49
Total	5064.13	6055.47		1747.16	2060.18

*Derived by applying effective income tax rate of 33.99% on income assessed by tax authorities



54. NLC vide affidavit dated 14.11.2016 furnished the allocation of income amongst mines, thermal and others as under:-

(₹in lakh)

FY	Mines	Thermal	Others	As per Company's tax return		
				Total income	Tax rate	Tax payable
2004-05	61961.26	20389.80	37777.97	120129.03	36.59%	43958.21
2005-06	45580.11	(21144.09)	50614.28	75050.30	33.66%	25261.93
2006-07	32975.39	(41320.98)	96927.56	88581.97	33.66%	29816.69
2007-08	39501.30	5360.23	97838.17	142699.70	33.99%	48503.63
2008-09	41958.27	(11318.35)	49312.56	79952.48	33.99%	27175.85
TOTAL	221976.33	(48033.39)	332470.54	506413.5		174716.31
Allocation of income as percentage of total income (%)	43.83	-9.48	65.65	100.00		

55. From the above, it is noted that mines represents 43.83% of the income. Accordingly, the income tax assessed by the income tax authority for 2004-09 period has been allocated to mines portion on the same principles as followed by NLC in apportionment of self assessment tax. This comes to ₹902.98 crore, i.e. 43.83% of ₹2060.18 crore.

56. Further, NLC vide their affidavit dated 14.11.2016 furnished that it has claimed reimbursement of income tax of ₹944.52 crore as given below:

(₹in lakh)

Financial Year	Tax reimbursement claim
2004-05	475.24
2005-06	123.98
2006-07	33.50
2007-08	154.03
2008-09	157.77
Total	944.52

57. The amount actually paid by all the beneficiaries to NLC is ₹76801.51 lakh. Thus, as per the BPSA, the tax reimbursable in respect of mines to NLC amounts to lower of the following:



- a) the tax payable on the RoE and internal resources relating to Mine-II and the grossed up tax thereon amounting to ₹819.39 crore as referred to in para 14 above.

(or)

- b) the actual tax assessed for the above streams amounting to ₹902.98 crore,

Thus, as per BPSA, the lower of the two amounts i.e. ₹81939.20 lakh becomes payable.

58. It may be noted from the above that NLC has claimed and received ₹76801.51 lakh, as against the admissible amount as per BPSA of ₹81939.20 lakh. Thus, the claim of the petitioner for recovery of excess tax reimbursed by the beneficiaries is not tenable and liable to be rejected.

59. Regarding the issue of grossing up of Income Tax, we further observe that the same has been deliberated by this Commission. In this regard, NLC in their submission, has stated as below:-

“The issue of Grossing up of Income Tax was decided by the Hon’ble Central Commission vide order in petition no.163/2008 & 49/2010, APTEL order 47 of 2010 (NLCIL) and CERC order 263/2009 & APTEL order 134 of 2010 (NTPC). In fact, TANGEDCO had gone on appeal against the APTEL order 47 of 2010 in the Hon’ble Supreme Court vide Civil Appeal No.9675 of 2010.

Had the issue of “Grossing up of Income Tax” been revealed/ divulged in the petition itself, then the petition would have hit the question of maintainability, being sub judice. Hence, it is submitted that TANGEDCO had concealed the core issue and also the fact that they had gone on appeal to Hon’ble Supreme Court against APTEL order 47 of 2010 on the same issue, in the petition, which would have rendered the petition susceptible for dismissal in limine. TANGEDCO had approached the Commission innuendo under the guise of excess Income tax reimbursement determination through this miscellaneous petition.”

60. From the above submission, it transpires that the issue of grossing up of ROE is the subject matter of appeal submitted by TANGEDCO in the Hon'ble Supreme Court. Similarly, the assessment orders of NLC are under dispute before the Hon'ble Madras High Court. Hence, quantification of income tax has not yet achieved the finality.



61. In view of the above, the instant petition is disposed off based on facts placed on record and subject to outcome of the cases pending before the Hon'ble Supreme Court and Hon'ble Madras High Court.

62. This disposes of Petition No. 115/MP/2016.

Sd/-

(Dr. M. K. Iyer)
Member

Sd/-

(A.K. Singhal)
Member

Sd/-

(P.K.Pujari)
Chairperson

