CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 294/MP/2019

Coram:

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

Date of Order: 7th February, 2021

In the matter of

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.

And

In the matter of
NHPC Ltd.
NHPC Office Complex, Sector-33,
Faridabad (Haryana) - 121 003. ……**Petitioner**

Vs

Punjab State Power Corporation Ltd.
The Mall, Near Kali Badi Mandir,
Patiala-147 001 (Punjab) **……** **Respondent**

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

ORDER

The present petition has been filed by NHPC Ltd. (hereinafter referred to as "NHPC" or "the Petitioner") for adjudication of dispute between NHPC and Punjab State Power Corporation Limited (hereinafter referred to as "PSPCL" or "the Respondent") regarding payment of deferred tax liability for the period 2004-09 which materialized during FY 2017-18. The Petitioner has made following prayers in the instant petition:

> *"I. By exercising the inherent powers of the Commission under Regulations 54 and 55 of CERC (Terms & Conditions of Tariff) Regulations, 2014, issue necessary clarifications on the regulation related to recovery of "Deferred Tax Materialization" (i.e. Regulation 25 and 49 of CERC (Terms & Conditions of Tariff) Regulations, 2014) that the recovery of liability on account of "Deferred Tax Materialization" is required to be made by the generator from the beneficiaries without casting any additional tax liability on the generator. Further, in case of recovery of Deferred Tax Materialization through "Sales", as mandated as per observation of CAG / Expert Opinion / Industry Practices, above amount may be grossed up with tax rate in order to make it tax neutral from the point of the generator.*
>
> *II. Allow the Petitioner to recover the tax liability on account of "Deferred Tax Materialization", as claimed by the Petitioner during period 2014-19, by grossing up the same with tax rate as prayed at Serial No.1 and also whenever arises during the period 2019-24 and thereafter.*
>
> *III. Issue necessary directions to the respondent, PSPCL to make payment of withheld amount of ₹31,87,98,691/-, which includes amount of ₹ 29,58,50,381/- on account of 'Deferred Tax Materialization' [Original Deferred Tax Materialized amounting to ₹ 19,34,62,481/- plus Grossing-up amount of₹10,23,87,900/-], to the Petitioner with applicable surcharge without further delay as the Petitioner has raised the supplementary bills to the respondent based on Regulatory Provisions and CAG observation / Expert Opinion / Industry Practices.*
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> *IV. Allow the Petitioner to recover the petition fee amounting to ₹ 3,00,000/- (₹three lakh only) from the respondent.*
>
> *V. Pass such other and further order/ orders as are deemed fit and proper in the facts and circumstances of the case."*

Submissions of the Petitioner

2. NHPC is currently operating 15 (fifteen) hydropower stations in the Northern Region with an aggregated capacity of 4510 MW and is supplying power to 14

(fourteen) beneficiaries/ Discoms including the Respondent, PSPCL, under long term Power Purchase Agreements (PPAs). Out of the 15 hydropower stations in the Northern Region, PSPCL is getting power from 12 hydropower stations of the Petitioner, namely, Bairasiul, Salal, Tanakpur, Chamera-I, Uri-I, Chamera-II, Dhauliganga, Dulhasti, Sewa-II, Chamera-III, Uri-II and Parbati-III as per allocation order issued by the Ministry of Power, Government of India.

3. Tariff orders for the different control periods upto 2014-19 have been issued by the Commission in respect of NHPC hydropower stations based on the respective tariff regulations. Accordingly, the Petitioner raised energy bills to the beneficiaries as per the provisions of relevant regulations and tariff orders from time to time.

4. The Petitioner raised supplementary bill amounting to ₹31,87,98,691/- for the FY 2017-18 on 14.6.2018 relating to tariff period up to 31.3.2009 on PSPCL which included an amount of ₹29,58,50,381/- on account of Deferred Tax Materialization. The above amount of ₹29,58,50,381/- on account of Deferred Tax Materialization comprises of the amount of Original Deferred Tax Materialized amounting to ₹19,34,62,481/- plus grossing-up amount of ₹10,23,87,900/.

5. However, the respondent raised objections on the issue of 'grossing up' of amount of 'Deferred Tax Materialization' vide their email dated 23.08.2018 stating as below:-

> *"Deferred Tax Liability is a recovery of income tax payable for the period up to 31.03.2009 as per Tariff Regulation from time to time. No grossing up of Deferred Tax Liability can be done as per Tariff Regulation and logically also it will be treated as tax on tax. Hence, recovery of the same by your office in respective years under the head Deferred Tax Liability without sharing the details of doing so or otherwise is a grossly violation of Regulations."*

6. The issue was discussed and deliberated by the Petitioner with the Respondent in various meetings and through correspondences but the issue remains unresolved. Consequently, the Respondent has withheld an amount of ₹31,87,98,691/- since June 2018. Accordingly, the present petition has been filed by the Petitioner in order to recover the above amount from the Respondent and to avoid any subsequent dispute in relation to grossing up of Deferred Tax Liability Materialized in future.

7. The Petitioner has submitted that during 2009-10, the Petitioner raised supplementary bills on the Respondent for the amount of Deferred Tax Materialized as a separate tax reimbursement without grossing up. During Phase-II Audit of NHPC for Financial Year 2009-10, CAG had issued Half Margin for not recovering the amount of Deferred Tax Materialized through "Sales" (after grossing up at normal tax rate) as against practice of recovery of above amount as 'tax' from the beneficiaries. The said Half Margin was dropped after NHPC management reply that if recovery of Deferred Tax Materialization was done through "Sales", grossing up thereof would be required. Therefore, profit before tax would be overstated and beneficiaries shall have to pay tax over and above the amount of Deferred Tax Materialized. Accordingly, the para was dropped by CAG.

8. Later on, during Phase-I Audit for Financial Year 2010-11, CAG once again raised the same issue of recovery of Deferred Tax Materialization through Sales. Accordingly, the issue was also enquired from other generating companies and it was learnt that these generating companies are also recovering the amount of Deferred Tax Materialized through "Sales" and grossing up of Deferred Tax Materialization was also being done by them. In the above background, by complying with the

directions of CAG, the Petitioner also started to recover the amount of Deferred Tax Materialization through "Sales" (after grossing up at normal tax rate) on the pattern of other power generating companies and accordingly also revised the previous recovery statements after required grossing up of Deferred Tax Materialization. The Petitioner has informed that the above practice has also been agreed by their Statutory Auditors, and necessary Chartered Accountant Certificates have been provided for the above Deferred Tax Materialized as and when recovered from beneficiaries. The Petitioner has argued that since recovery of Deferred Tax Materialization ibid is required to be made through "Sales", additional income tax liability to be paid on above amount is also required to be recovered from the beneficiaries in order to make it tax neutral from the point of NHPC Limited.

9. The Petitioner has also referred to the opinion of Expert Advisory Committee (EAC) of the Institute of Chartered Accountants of India (ICAI) on the issue of accounting of income tax recoverable from beneficiaries, i.e. whether the same is to be treated as an adjustment from tax expenses or to be recognized as revenue. This issue was referred to the Expert Advisory Committee of the Institute of Chartered Accountants of India (EAC of ICAI) in 2001 by one of the Power Generating CPSEs. The operating part of the query and opinion of the EAC are as under:

> *"The querist had sought the opinion of the EAC as to whether the netting off of reimbursement of income tax against the income tax provision in the profit and loss account is in order.*
>
> ***Opinion dated 14.04.2001 of EAC of ICAI:***
>
> *EAC has inter –alia deliberated as under:*
>
> *i) Taxes such as sales tax and entertainment tax are collected on behalf of a third party, viz., the government and, accordingly, such taxes are excluded from revenue.*

ii) Income tax, being a direct tax, is a charge on the enterprise's income and has to be borne by the enterprise itself. In case the burden on account of income tax is passed on to the customers, it is in the form of recovery of any other expense of the enterprise in the form of a consideration to sell its products or render services and, therefore, the recovery of income tax from the customers should form part of gross inflow on account of sale of the product or rendering of services.

iii) The Committee finally concluded that netting off of recovery of income tax from Electricity Boards against the income tax provision is not in order and the said recovery should form part of the revenue of the company."

10. As per the Petitioner, the requirement of recovery of Deferred Tax Materialized through "Sales" has arisen keeping in view the opinion of the EAC of ICAI, observation of CAG and industry practice, and accordingly the Petitioner revised its earlier accounting treatment and started recovery of Deferred Tax Materialization through "Sales" from the beneficiaries including PSPCL after grossing up the same with normal tax rate in order to make it tax neutral from the point of NHPC.

11. It has been submitted that the Deferred Tax Materialization, being claimed by NHPC, pertains to Deferred Tax Liability accrued upto 31.03.2009 only. Any Deferred Tax Liability accrued upto 31.03.2009, which was not recovered earlier from the beneficiaries but materialized/ materializing during the tariff periods 2009-14, 2014-19 and 2019-24 are directly recoverable by the generating companies from the beneficiaries in terms of Regulation 39 of the 2009 Tariff Regulations, Regulation 49 of the 2014 Tariff Regulations and Regulation 67 of the 2019 Tariff Regulations respectively. Further, the above reimbursement on account of Deferred Tax Materialization is required to be claimed from the beneficiaries through "Sales"' as per the views of EAC of ICAI and CAG. Hence, during tariff periods 2009-2014 and 2014-2019, recovery of Deferred Tax Materialization has been claimed from the beneficiaries through sales after grossing up the same with applicable tax rate.

12. As per the Petitioner's submission, none of the beneficiaries, except PSPCL, have raised any objection to the supplementary bills raised by the Petitioner or questioned the methodology adopted by the Petitioner. According to the Petitioner, the issue has been taken up with PSPCL number of times through correspondences/ meetings at the higher management level. However, the issue has remained unresolved till date and the payment of ₹31,87,98,691/-, which includes amount of ₹29,58,50,381/- on account of 'Deferred Tax Materialization' [Original Deferred Tax Materialized amounting to ₹19,34,62,481/- plus grossing-up amount of ₹10,23,87,900/-], pertaining to FY 2017-18 is yet to be released by PSPCL. This is mainly because of contention of PSPCL that the Tariff Regulations do not provide for grossing up of 'Deferred Tax Materialized' with tax rate and accordingly additional burden of grossing up ibid is not in accordance with the Tariff Regulations.

13. In view of the submissions as above, the Petitioner has requested that the Commission may issue clarity on the regulatory provisions related to grossing-up of "Deferred Tax Materialization" and also direct the Respondent PSPCL to release the pending payment of ₹31,87,98,691/- with applicable late payment surcharge.

14. Accordingly, the present petition has been filed by the Petitioner under the provisions of Regulations 54 and 55 of CERC (Terms & Conditions of Tariff) Regulations, 2014 for removal of the difficulty being faced by the Petitioner in implementing the provisions of Regulations 25 and 49 of CERC (Terms & Conditions of Tariff) Regulations, 2014 related to recovery of "Deferred Tax Materialization". It is mentioned by the Petitioner that since the regulations related to recovery of "Deferred Tax Materialization" are almost similar for tariff periods 2009-14, 2014-19 and 2019-

24 period, the direction/ decision of the Commission in this matter will have a binding/ consequential effect during 2019-24 also.

Reply by the Respondent, PSPCL

15. PSPCL, vide its reply dated 16.3.2020, has submitted that NHPC ought to be directed to array as Respondents all other beneficiaries receiving electricity supply from the Petitioner. It has submitted that the deferred tax prior to 1.4.2009 sought to be recovered by the Petitioner through grossing up has been objected to by other beneficiaries including the Distribution Companies of Delhi in several NRPC meetings. However, the Petitioner has only arrayed PSPCL as Respondent. The issue to be decided by the Commission cannot be confined to the Petitioner and PSPCL, and any decision will govern the manner of recovery of deferred tax by the Petitioner from all its beneficiaries. PSPCL has, therefore, submitted that the Petitioner should implead all beneficiaries at this stage so that a comprehensive view can be taken by the Commission.

16. PSPCL has submitted that the claim of the Petitioner for recovery of alleged tax liability on account of "Deferred Tax Materialization" during period 2014-19, by grossing up the tax rate is patently in contravention to the Tariff Regulations notified by this Commission. The claims raised by the Petitioner pertain to the tariff period upto 31.03.2009. The deferred tax being claimed against the Petitioner is for the period from 2004–09. As such, the Tariff Regulations applicable would be the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004. Regulation 7 of the 2004 Tariff Regulations deal with the 'Tax on Income' as under:

Regulation 7 - Tax on Income:

(1) 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.

(2) 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 statutory auditors.

Provided that tax on any income stream other than the core business shall not constitute a pass through component in tariff and tax on such other income shall be payable by the generating company or transmission licensee, as the case may be.

Provided further that the generating station-wise profit before tax in the case of the generating company and the region-wise profit before tax in case of the transmission licensee as estimated for a year in advance shall constitute the basis for distribution of the corporate tax liability to all the generating stations and regions.

Provided further that the benefits of tax-holiday as applicable in accordance with the provisions of the Income-Tax Act, 1961 shall be passed on to the beneficiaries.

Provided further that in the absence of any other equitable basis the credit for carry forward losses and unabsorbed depreciation shall be given in the proportion as provided in the second proviso to this regulation.

Provided further that income-tax allocated to the thermal generating station shall be charged to the beneficiaries in the same proportion as annual fixed charges, the income-tax allocated to the hydro generating station shall be charged to the beneficiaries in the same proportion as annual capacity charges and in case of interstate transmission, the sharing of income-tax shall be in the same proportion as annual transmission charges.

17. As per PSPCL, the Petitioner has itself admitted in the petition that the deferred tax is for the period till 31.03.2009. However, it is wrong that deferred tax which materializes in a subsequent year pertains to the tax liability of that subsequent year. But for the fact that the deferred tax claims are being raised later, the manner to deal with the tax can only be as per the 2004 Tariff Regulations since such claims pertain to the liability of the Petitioner in the period 2004-09 (for which they are due).

18. PSPCL has submitted that the Commission changed the manner of recovery of income tax from the notification of the 2009 Tariff Regulations. The relevant

extracts from the 2009 Tariff Regulations, the 2014 Tariff Regulations and the 2019 Tariff Regulations are as under:

> **2009 Tariff Regulations:**
> *"39. Tax on Income. Tax on income streams of the generating company or the transmission licensee, as the case may be, shall not be recovered from the beneficiaries, or the long-term transmission customers, as the case may be:*
> *Provided that the deferred tax liability, excluding Fringe Benefit Tax, for the period up to 31st March, 2009 whenever it materializes, shall be recoverable directly from the beneficiaries and the long-term customers:"*
>
> **2014 Tariff Regulations:**
> *49. Deferred tax liabilities for the period upto 31st March, 2009 whenever they materialise shall be recoverable directly by the generating companies or transmission licensees from the beneficiaries or long term transmission customers/DICs, as the case may be. Deferred tax liabilities for the periods from 1.4.2009 to 31.3.2014 and 1.4.2014 to 31.3.2019 shall not be recoverable from the beneficiaries or the long term transmission customers/DICs, as the case may be.*
>
> **2019 Tariff Regulations:**
> *"67. Deferred Tax Liability with respect to previous tariff period:*
>
> *Deferred tax liabilities for the period upto 31st March, 2009 whenever they materialize shall be recoverable directly by the generating companies or transmission licensees from the then beneficiaries or long term customers, as the case may be. Deferred tax liabilities for the period arising from 01.04.2009 to 31.03.2014 if any, shall not be recoverable from the beneficiaries or the longterm customers, as the case may be."*

19. PSPCL has submitted that the Commission was mindful of the position regarding grossing up till 31.3.2009 and, therefore, while notifying the 2009 Tariff Regulations, the 2014 Tariff Regulations and the 2019 Tariff Regulations, the Commission specifically provided that any deferred tax liability for the period till 31.03.2009 would be directly recoverable from the beneficiaries/ DICs. This being the case, there is no basis for the Petitioner to claim that the deferred tax for the period till 31.03.2009 should be recovered through grossing up. Any such claim is against the provisions of various Tariff Regulations. It cannot be that the tax is payable for the period 2004-09, but the manner of grossing up will be as per the 2009 Tariff Regulations. Income tax has to be dealt with as per the provisions of Regulation 7 of the 2004 Tariff Regulations only. If the interpretation as given to the Regulation 7 of

the 2004 Tariff Regulations by the Petitioner is accepted, the same would result in enlarging the scope of the Regulation thus defeating the legislative intent behind the same.

20. As per PSPCL, this position has been clarified to the Petitioner on several occasions including in the email dated 23.8.2018. The relevant extracts from the email dated 23.08.2018 are as under:

> *"Deferred Tax Liability is a recovery of income tax payable for the period up to 31.03.2009 as per Tariff Regulation from time to time. No grossing up of Deferred Tax Liability can be done as per Tariff Regulation and logically also it will be treated as tax on tax. Hence, recovery of the same by your office in respective years under the head Deferred Tax Liability without sharing the details of doing so or otherwise is a grossly violation of the Regulations."*

21. It is submitted by the Respondent PSPCL that the reliance placed by the Petitioner on the observation of the office of the Comptroller and Auditor General and opinion of the Expert Advisory Committee of the Institute of Chartered Accountants of India is misplaced as the merits of the same, if any, cannot overrule the factum that the applicable Tariff Regulations do not provide for the consequential relief as is being sought for by the Petitioner by relying on the aforesaid observation and opinion.

22. As further submitted by the Respondent, the admission on the part of the Petitioner that it thought of changing its methodology for recovery of deferred tax after the CAG Audit Report would not make such methodology consistent with the terms of the Tariff Regulations notified by the Commission. The further reliance placed on the opinion of EAC of ICAI which dates back to 2001 also has no bearing on the issue at hand. The query and opinion were both related to recovery of income

tax from customers. This will not change the wordings of the Tariff Regulations notified by the Commission.

23. The Petitioner has preferred the present petition under Regulations 54 and 55 of the 2014 Tariff Regulations. In this regard, PSPCL has submitted that the Petitioner in essence is seeking to override the Tariff Regulations under the garb of praying for removing of difficulties and relaxation. In fact, the Petitioner is seeking to apply the treatment given in a subsequent Regulation to the period till 31.03.2009.

24. PSPCL has submitted that it is a settled position of law that 'power to remove difficulties' is a limited power and that the same cannot be used to imply the presence of a provision which did not form part of the Regulations in the first place. The scope of 'power to remove difficulties' has been interpreted by the Hon'ble Supreme Court in Madeva Upendra Sinai v. Union of India, (1975) 3 SCC 765 as under:

> *"38. For a proper appreciation of the points involved, it is necessary to have a general idea of the nature and purpose of a "removal of difficulty clause" and the power conferred by it on the Government.*
>
> *39. To keep pace with the rapidly increasing responsibilities of a welfare democratic State, the Legislature has to turn out a plethora of hurried legislation, the volume of which is often matched with its complexity. Under conditions of extreme pressure, with heavy demands on the time of the Legislature and the endurance and skill of the draftsman, it is well nigh impossible to foresee all the circumstances to deal with which a statute is enacted or to anticipate all the difficulties that might arise in its working due to peculiar local conditions or even a local law. This is particularly true when Parliament undertakes legislation which gives a new dimension to socio-economic activities of the State or extends the existing Indian laws to new territories or areas freshly merged in the Union of India. In order to obviate the necessity of approaching the Legislature for removal of every difficulty, howsoever trivial, encountered in the enforcement of a statute, by going through the time-consuming amendatory process, the Legislature sometimes thinks it expedient to invest the Executive with a very limited power to make minor adaptations and peripheral adjustments in the statute, for making its implementation effective, without touching its substance. That is why the "removal of difficulty clause", once frowned upon and nick-named as "Henry VIII clause" in scornful commemoration of the absolutist ways in which that English King got the "difficulties" in enforcing his autocratic will removed through the instrumentality of a servile Parliament, now finds acceptance as a practical necessity, in several Indian statutes of post-independence era.*

40. Now let us turn to clause (7) of the Regulation. It will be seen that the power given by it is not uncontrolled or unfettered. It is strictly circumscribed, and its use is conditioned and restricted. The existence or arising of a "difficulty" is the sine qua non for the exercise of the power. If this condition precedent is not satisfied as an objective fact, the power under this clause cannot be invoked at all. Again, the "difficulty" contemplated by the clause must be a difficulty arising in giving effect to the provisions of the Act and not a difficulty arising aliunde, or an extraneous difficulty. Further, the Central Government can exercise the power under the clause only to the extent it is necessary for applying or giving effect to the Act, etc., and no further. It may slightly tinker with the Act to round off angularities, and smoothen the joints or remove minor obscurities to make it workable, but it cannot change, disfigure or do violence to the basic structure and primary features of the Act. In no case, can it, under the guise of removing a difficulty, change the scheme and essential provisions of the Act."

25. PSPCL has submitted that as a well settled position, when the language of the Regulation is clear, there is no question of changing the language by exercising power to remove difficulties or power to relax. Further, it is equally well settled that once Regulations are notified, they are binding on all parties including the Commission. PSPCL has referred to the judgement by Appellate Tribunal dated 11.05.2018 in Chhattisgarh State Power Distribution Co Ltd., vs. CERC and Ors. (Appeal Nos. 86 of 2014 and 102 of 2014) wherein it has been held as under:

Effect and binding nature of Regulation

4.21 The notification of a Regulation by the Commission in exercise of its delegated legislative power brings into effect a statutory instrument having force of law. Such a Regulation is binding on all parties. The Commission is also bound by the Regulation. The Commission cannot make orders inconsistent or contrary to the Regulation. The provisions of a Regulation cannot be given a go-by or made ineffective by any order passed by the Commission.

4.22 The mere intention or contemplation of the Commission to amend the Regulation in future, whether expressed in an order or otherwise, cannot be the basis or consideration to pass orders contrary to the Regulation. The Regulation continues to be in full force and effect till it has actually been amended by a notification after following the procedure prescribed by law.

4.23 This Hon'ble Tribunal, in exercise of its appellate power and authority, has consistently held that the Regulation is binding and this Hon'ble Tribunal has not itself interdicted with, or rendered effective, any Regulation notified by a Commission. This was on the settled principle that the Regulation is a delegated legislation and is binding. The Commission cannot be on any better or different footing so far as the binding nature of a Regulation is concerned."

26. PSPCL, in light of the submission made as above, has submitted that the present petition is without any merit and is liable to be dismissed on this ground alone.

Hearing dated 18.6.2020

27. The Commission heard the petition on 18.6.2020. After hearing the arguments by both the parties, the Commission directed the Petitioner to file on affidavit, the following details/ information:

(a) Break-up of ₹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; and

(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.

28. The Commission further directed the Respondent, PSPCL, to file on affidavit, 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.

29. The Petitioner, in response to the ROP of hearing dated 18.6.2020, filed an affidavit dated 16.7.2020 and has submitted the information as sought. The Petitioner has submitted the break-up of ₹31,87,98,691 along with detailed calculations duly certified by the Auditor. Further, the documentary evidence in support of above amount viz. CA certificate for Deferred Tax Materialized for the FY 2017-18,

beneficiary-wise amount of Deferred Tax Materialized for the FY 2017-18 and copy of invoice No. NH/PSEB/977 dated 14.06.2018 raised to PSPCL for the FY 2017-18 have also been submitted. The Petitioner has submitted the Auditor's certificate apportioning the tax between the core and non-core business of the Petitioner and Auditor's certificate in respect of station-wise and beneficiary-wise allocation of tax on the core business. In response to the Commission's direction to furnish 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, the Petitioner furnished year-wise details of supplementary bills raised to PSPCL during FY 2009-10 to FY 2016-17 i.e. copies of invoices with supporting documents [CA Certificate, Beneficiaries-wise calculations] and periodical Reconciliation Statements signed by PSPCL as a documentary proof of payment of Invoices relating to Deferred Tax Materialized with grossed-up amount.

30. As regards the Commission's query regarding the accounting treatment followed in the books as regards the deferred tax liability along with relevant excerpts from the final accounts, the Petitioner has submitted as under:

a. Financial Year 2008-09

"14.2 Deferred tax recognized on timing differences between the accounting income and taxable income for the year and quantified using the tax rates and laws enacted or substantively enacted as on the Balance Sheet date. Deferred tax assets are recognized for unabsorbed depreciation or carry forward of losses under tax laws and carried forward to the extent there is a virtual certainty supported by convincing evidence that sufficient future taxable income will be available against which such deferred tax assets can be realized. Other deferred tax assets are recognized and carried forward to the extent there is reasonable certainty that sufficient future taxable income will be available against which such deferred tax assets can be realized. Deferred Tax Recovery Adjustment Account is credited/debited to the extent tax expense is chargeable from the Beneficiaries in future years on actual payment basis."

b. Financial Year 2017-18

"15.c Recovery towards deferred tax items recognized till March 31, 2009 are accounted for when the same materializes."

(2) Deferred Tax Liability pertaining to the period upto Financial Year 2008-09, which has been materialized during subsequent years, is recovered from the beneficiaries through "Sales" [Grossed-up amount] and corresponding amount is also shown as "Tax Expense" during that year. In Financial Year 2017-18, Deferred Tax Liability Materialized has been booked in Sales with an amount of Rs.236,62,63,343/- i.e. Grossed up value and corresponding amount has been booked as Tax Expenses.

(3) Above recovered amount is being booked in separate Head of Account (Deferred Tax Liability Recoverable for Tariff Period upto 2009). As per Annual Audited Accounts of FY 2017-18, balance of Deferred Tax Liability Recoverable for Tariff Period upto 2009 was Rs.1792,03,04,384/-

31. The details regarding the deferred tax liability paid against the bills raised by the Petitioner before the financial year 2017-18 submitted by PSPCL is as below:

FY	Grossed Amount of Total Deferred tax liability materialized for the year (in Rs)	PSPCL Portion (in Rs)	Details of Invoice raised by NHPC to PSPCL with date of Invoice
2011-12	67,41,14,792	8,89,37,086	NH/PSEB/548 Dt. 29-01-2013
2012-13	54,65,73,103	6,98,26,591	NH/PSEB/632 Dt. 14.11.2013
2013-14	114,05,01,000	18,66,63,802	NH/PSEB/753 Dt 12.09.2014
2014-15	146,11,49,380	23,05,64520	NH/PSEB/803 Dt. 16.10.2015
2015-16	191,11,76,688	26,98,85,672	NH/PSEB/899 Dt. 16.08.2016
2016-17	192,86,83,138	25,35,58,228	NH/PSEB/939 Dt. 08.06.2017

32. As regards the explanation whether the same was billed and paid with grossing up or otherwise, the respondent has submitted that the bills raised by the Petitioner were after grossing up and same had been paid.

Analysis and decision

33. As stated, this petition has been filed by the Petitioner for adjudication of the dispute with regard to the payment of outstanding amount of ₹31,87,98,691/- withheld by PSPCL**,** which includes an amount of ₹29,58,50,381/- on account of 'Deferred Tax Materialization' pertaining to the year 2008-09 [Original Deferred Tax Materialized amounting to ₹19,34,62,481/- plus Grossing-up amount of ₹10,23,87,900/].

34. Before dealing with claim of the Petitioner, we consider it appropriate to dispose of a preliminary objection of the Respondent PSPCL regarding non-rejoinder of parties. PSPCL has submitted that NHPC should have arrayed as Respondents all other beneficiaries receiving electricity supply from the Petitioner. PSPCL has submitted that the methodology of recovery of deferred tax prior to 1.4.2009 through grossing up has been objected to by other beneficiaries including the Distribution Companies of Delhi in several NRPC meetings. It has, therefore, submitted that the issue to be decided by the Commission cannot be confined to PSPCL only, and any decision will govern the manner of recovery of deferred tax by the Petitioner from all its beneficiaries. PSPCL has, therefore, submitted that the Petitioner should implead all beneficiaries so that a comprehensive view can be taken by the Commission.

35. We have considered the submissions of PSPCL. In Udit Narayan Singh Malphaharia Vs. Additional Member Board of Revenue, Bihar and Anr [AIR 1963 SC 786], the Hon'ble Supreme Court has laid down the principle to determine necessary and proper parties to a proceedings as under:

> *"....To answer the question raised it would be convenient at the outset to ascertain who are necessary or proper parties in a proceeding. The law on the subject is well settled: it is enough if we state the principle. A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can*

be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding."

36. Further, Hon'ble Supreme Court in Kasturi Vs. Iyyamperumal and Others [(2005) 6 SCC 733] has laid down that two tests are to be applied for determining the 'necessary party' in a proceedings, i.e. (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings; and (2) no effective decree can be passed in the absence of such party.

37. In the present Petition, the Petitioner is seeking release of withheld amount by PSPCL. In the light of the legal principles quoted above, other beneficiaries of the hydropower stations of the Petitioner are not necessary parties since no relief has been claimed against them in the present proceedings and an effective order can be passed in their absence. Further, these entities are not proper parties as they are neither concerned nor have any role to play in the matter of payment of withheld amount by the Respondent. Accordingly, objection of PSPCL on this count is rejected.

38. Having dealt with the preliminary objection raised by the Respondent PSPCL regarding non-rejoinder of parties, we now proceed to deal with the claim of the Petitioner. It is the contention of the Petitioner that the grossed-up amount has become recoverable for increased tax liability of the Petitioner due to recovery of "Deferred Tax Materialization" for the year 2008-09. PSPCL has raised objection to the Petitioner's contention stating that the Deferred Tax Liability is a recovery of income tax payable for the period up to 31.03.2009, and hence grossing up of the same is not as per provisions of the 2004 Tariff Regulations since the concept of grossing up has emerged only after notification of the 2009 tariff Regulations. PSPCL

has further argued that logically also grossed up amount will be treated as tax on tax. It emerges from the submissions of the contending parties that the above issue has been discussed and deliberated through various meetings and correspondences without reaching any consensus. Since the issue remains unresolved, the respondent has withheld ₹31,87,98,691/- since June 2018 and the Petitioner has approached the Commission through the present petition.

39. In support of its position, the Petitioner has relied upon the observations by Comptroller & Auditor General of India (CAG) and the opinion of Expert Advisory Committee (EAC) of the Institute of Chartered Accountants of India (ICAI). As regards the observations of CAG, the Petitioner has submitted that during the year 2009-10, it raised supplementary bills on the Respondent for payment of the amount of Deferred Tax Materialized as a separate tax reimbursement without grossing up. CAG issued Half Margin to the Petitioner for not recovering the amount of Deferred Tax Materialized through "Sales" (after grossing up at normal tax rate) from the beneficiaries. The Management of the Petitioner company submitted a reply to CAG that if recovery of Deferred Tax Materialization was done through "Sales", grossing up thereof would be required. Therefore, profit before tax would be overstated and beneficiaries would have to pay tax over and above the amount of Deferred Tax Materialized. The said Half Margin was dropped by CAG after this reply. However, during the Phase-I Audit of Financial Year 2010-11, CAG once again raised the same issue of recovery of Deferred Tax Materialization through Sales. The Petitioner has submitted that on enquiry from other generating companies, it was learnt that these generating companies are also recovering the amount of Deferred Tax Materialized through "Sales" and grossing up of Deferred Tax Materialization was also being done

by them. In the above background, to comply with the directions of CAG, the Petitioner started to recover the amount of Deferred Tax Materialization through "Sales" (after grossing up at normal tax rate) on the pattern of other power generating companies and accordingly, also revised the previous recovery statements after required grossing up of Deferred Tax Materialization.

40. As per the Petitioner, the above practice has also been agreed by their Statutory Auditors and necessary Chartered Accountant Certificates have been provided for the above Deferred Tax Materialized as and when recovered from beneficiaries. The Petitioner has argued that since recovery of Deferred Tax Materialization ibid is required to be made through "Sales", additional income tax liable to be paid on above amount is also required to be recovered from the beneficiaries in order to make it tax neutral from the point of NHPC.

41. The Petitioner has also referred to the opinion of Expert Advisory Committee (EAC) of the Institute of Chartered Accountants of India (ICAI) in response to a query by one of the power generating CPSEs. The querist had sought the opinion of EAC of ICAI as to whether the netting off of reimbursement of income tax against the income tax provision in the profit and loss account was in order. In response, EAC of ICAI had opined that taxes such as sales tax and entertainment tax are collected on behalf of a third party, viz., the government and, accordingly, such taxes are excluded from revenue. Income tax, being a direct tax, is a charge on the enterprise's income and has to be borne by the enterprise itself. EAC of ICAI further deliberated that in case the burden on account of income tax is passed on to the customers, it is in the form of recovery of any other expense of the enterprise in the form of a consideration to sell its products or render services and, therefore, the recovery of

income tax from the customers should form part of gross inflow on account of sale of the product or rendering of services. Accordingly, EAC of ICAI finally concluded that netting off of recovery of income tax from Electricity Boards against the income tax provision is not in order and the said recovery should form part of the revenue of the company.

42. It is the submission of the Petitioner that it revised its earlier accounting treatment and started recovery of Deferred Tax Materialization through “Sales” from the beneficiaries including PSPCL after grossing up the same with normal tax rate in order to make it tax neutral from the point of NHPC in view of the opinion of EAC of ICAI, observation of CAG and industry practice. The Petitioner has also submitted that the Respondent PSPCL has paid the materialised deferred tax liability after grossing up till the year 2016-17 which has been confirmed by PSPCL in its reply dated 8.7.2020.

43. The respondent PSPCL has, on the other hand, argued that that the claim by the Petitioner for recovery of tax liability on account of “Deferred Tax Materialization” during period 2014-19, by grossing up the tax rate is patently in contravention of the provisions of the 2004 Tariff Regulations. The claims raised by the Petitioner pertain to the tariff period upto 31.03.2009 and the deferred tax being claimed against the Petitioner is for the period from 2004–09. As such, for adjudicating the claims, the 2004 Tariff Regulations would be applicable whereas the concept of grossing up has been introduced only in the 2009 Tariff Regulations.

44. We have considered the submissions of the Petitioner and Respondent PSPCL and carefully gone through the documents on record. The deferred tax

liability pertained to the period 2008-09 which materialised during the year 2009-10. The Petitioner raised the bill on the respondent without grossing up which was objected to by CAG through its half margin observations. Though the half-margin was initially dropped by CAG, the same was revived in the year 2010-11 with the observation that the bills should be raised on beneficiaries for sales i.e. after grossing up the deferred tax materialised. After enquiring from other generating companies and getting a confirmation that recovery of deferred tax materialisation has to be done through "sales" i.e. by grossing up the deferred tax liability, the Petitioner raised the bills on the respondents accordingly. PSPCL has taken objection to the grossing up of deferred tax materialisation on the ground that there was no provision for grossing up in the 2004 Tariff Regulations and grossing up was introduced only in the 2009 Tariff Regulations and continued thereafter in the 2014 Tariff Regulations and the 2019 Tariff Regulations. Therefore, it cannot be applied in case of the deferred tax materilisation which pertained to the period 2008-09.

45. In order to consider the controversy in the correct perspective, it is necessary to discuss the provisions regarding income tax liability and liability for deferred tax materialisation in the 2004 Tariff Regulations, the 2009 Tariff Regulations, the 2014 Tariff Regulations and the 2019 Tariff Regulations. Provisions of the Tariff Regulations pertaining to different tariff periods are quoted as below:

> **A. 2004 Tariff Regulations:**
> ***Regulation 7 - Tax on Income:***
>
> *(1) 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.*
>
> *(2) 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 statutory auditors.*

Provided that tax on any income stream other than the core business shall not constitute a pass through component in tariff and tax on such other income shall be payable by the generating company or transmission licensee, as the case may be.

Provided further that the generating station-wise profit before tax in the case of the generating company and the region-wise profit before tax in case of the transmission licensee as estimated for a year in advance shall constitute the basis for distribution of the corporate tax liability to all the generating stations and regions.

Provided further that the benefits of tax-holiday as applicable in accordance with the provisions of the Income-Tax Act, 1961 shall be passed on to the beneficiaries.

Provided further that in the absence of any other equitable basis the credit for carry forward losses and unabsorbed depreciation shall be given in the proportion as provided in the second proviso to this regulation.

Provided further that income-tax allocated to the thermal generating station shall be charged to the beneficiaries in the same proportion as annual fixed charges, the income-tax allocated to the hydro generating station shall be charged to the beneficiaries in the same proportion as annual capacity charges and in case of interstate transmission, the sharing of income-tax shall be in the same proportion as annual transmission charges.

B. 2009 Tariff Regulations:
"15. Return on Equity.
(1) Return on equity shall be computed in rupee terms, on the equity base determined in accordance with regulation 12.

(2) Return on Equity shall be computed on pre-tax basis at the base rate of 15.5% for thermal generating stations, transmission system, and run of the river generating station and 16.5% for the storage type generating stations and run of river generating station with pondage and shall be grossed up as per clause (3) of this regulation.

(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 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.
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(5) The generating company or the transmission licensee, as the case may be, shall recover the shortfall or refund the excess Annual Fixed Charge 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 the 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 Regulations 6 of these regulations.
----
39. Tax on Income.

Tax on income streams of the generating company or the transmission licensee, as the case may be, shall not be recovered from the beneficiaries, or the long-term transmission customers, as the case may be:

Provided that the deferred tax liability, excluding Fringe Benefit Tax, for the period up to 31st March, 2009 whenever it materializes, shall be recoverable directly from the beneficiaries and the long-term customers:"

C. 2014 Tariff Regulations:
"25. Tax on Return on Equity:

(1) The base rate of return on equity as allowed by the Commission under Regulation 24 shall be grossed up with the effective tax rate of the respective financial year. For this purpose, the effective tax rate shall be considered on the basis of the actual tax paid in respect of the financial year in line with the provisions of the relevant Finance Acts by the concerned generating company or the transmission licensee, as the case may be. The actual tax on income on other income stream including deferred tax liability (i.e. income of non-generation or non transmission business, as the case may be) shall not be considered for the calculation of "effective tax rate".

(2) Rate of return on equity shall be rounded off to three decimal places and shall be computed as per the formula given below:

Rate of pre-tax return on equity + Base rate/(1-t)

(3) The generating company or the transmission licensee, as the case may be, shall true up the grossed up rate of return on equity at the end of the financial year based on actual tax paid together with any additional tax demand including interest thereon, duly adjusted for any refund of tax including interest received from the income tax authorities pertaining to the tariff period 2014-15 to 2018-19 on actual gross income of any financial year. However, penalty, if any, arising on account of delay in deposit or short deposit of tax amount shall not be claimed by the generating company or transmission licensee, as the case may be. Any under-recovery or over-recovery of grossed up rate on return on equity after truing up, shall be recovered or refunded to beneficiaries or the long term transmission customers/DICs, as the case may be, on year to year basis."

"49. Deferred Tax liability with respect to previous tariff period
Deferred tax liabilities for the period upto 31st March, 2009 whenever they materialise shall be recoverable directly by the generating companies or transmission licensees from the beneficiaries or long term transmission customers/DICs, as the case may be. Deferred tax liabilities for the periods from 1.4.2009 to 31.3.2014 and 1.4.2014 to 31.3.2019 shall not be recoverable from the beneficiaries or the long term transmission customers/DICs, as the case may be."

D. 2019 Tariff Regulations:
"31. Tax on Return on Equity.

(1) The base rate of return on equity as allowed by the Commission under Regulation 30 of these regulations shall be grossed up with the effective tax rate of the respective financial year. For this purpose, the effective tax rate shall be considered on the basis of actual tax paid in respect of the financial year in line with the provisions of the

relevant Finance Acts by the concerned generating company or the transmission licensee, as the case may be. The actual tax paid on income from other businesses including deferred tax liability (i.e. income from business other than business of generation or transmission, as the case may be) shall be excluded for the calculation of effective tax rate.

(2) Rate of return on equity shall be rounded off to three decimal places and shall be computed as per the formula given below:

Rate of pre-tax return on equity = Base rate / (1-t)

(3) The generating company or the transmission licensee, as the case may be, shall true up the grossed up rate of return on equity at the end of every financial year based on actual tax paid together with any additional tax demand including interest thereon, duly adjusted for any refund of tax including interest received from the income tax authorities pertaining to the tariff period 2019-24 on actual gross income of any financial year. However, penalty, if any, arising on account of delay in deposit or short deposit of tax amount shall not be claimed by the generating company or the transmission licensee, as the case may be. Any under-recovery or over-recovery of grossed up rate on return on equity after truing up, shall be recovered or refunded to beneficiaries or the long term customers, as the case may be, on year to year basis.

67. Deferred Tax Liability with respect to previous tariff period:

Deferred tax liabilities for the period upto 31st March, 2009 whenever they materialize shall be recoverable directly by the generating companies or transmission licensees from the then beneficiaries or long term customers, as the case may be. Deferred tax liabilities for the period arising from 01.04.2009 to 31.03.2014 if any, shall not be recoverable from the beneficiaries or the long term customers, as the case may be."

46. Perusal of the relevant provisions with regard to income tax in various Tariff Regulations reveal that under the 2004 Tariff Regulations, tax on the core business of the generating company or transmission licensee was to be computed as an expense and recovered from the beneficiaries whereas under the 2009 Tariff Regulations provides that tax on the income streams of the generating company or transmission licensee shall not be recovered from the beneficiaries. Though not explicitly stated, the 2014 Tariff Regulations and the 2019 Tariff Regulations do not provide that tax on the income streams of the generating company or transmission licensee shall be recovered from the beneficiaries. In fact, the 2009 Tariff Regulations, the 2014 Tariff Regulations and the 2019 Tariff Regulations provide that the base rate of return on equity shall be grossed up at the applicable/ effective tax

rate of the respective financial year and the return on equity so arrived at shall be paid by the beneficiaries as part of annual fixed charges. In other words, grossing up of return on equity with the applicable/ effective tax rate has been used to arrive at the recoverable rate of return on equity. It is the responsibility of the generating companies and transmission licensees to manage their tax portfolio instead of passing of the tax liability to the beneficiaries.

47. The contention of PSPCL that grossing up of income tax was introduced for the first time in the 2009 Tariff Regulations is not correct. In the 2004 Tariff Regulations, the recovery of income tax liability was on post tax basis whereas in the 2009 Tariff Regulations, recovery of income tax on return on equity is on pre-tax basis. Wherever, recovery of income tax is on post tax basis, i.e., where the beneficiaries are required to bear and reimburse the income tax of the generating company or transmission licensee, such income tax is treated as an expense of the generating company or transmission licensee, as the case may be, and is recovered after grossing up. Since the 2004 Tariff Regulations was following the post tax system of reimbursement of income tax, the recovery of income tax liability from the beneficiaries was being done by grossing up of the income tax at the applicable tax rate.

48. In this connection, it is relevant to quote the paras 14.2, 14.3 and 14.4 of the Statement of Reasons to the 2009 Tariff Regulations as under:

"14. Pre-tax Return {Regulation 15(4)}

14.2 The issue of allowing post-tax rate of return or pre-tax rate of return was raised in public hearing as well as written submissions. The generating companies and transmission licensees are in favour of retaining existing regulation. In other words, they are of the view that all the risks pertaining to tax on income from core business including incentive, efficiency gain, income on UI, etc should be passed on to the beneficiaries. On

the other hand, beneficiaries want that income tax burden to the extent of normal return on equity should only be passed on to the beneficiaries and any proportion of income tax on account of income other than return on equity, like income accrued due to efficiency gain, incentive, UI, normative expenditure, etc should be borne by the utilities themselves.

14.3 Under post-tax rate of return on equity the beneficiaries are paying tax on the net income of the utilities and the tax burden is calculated by grossing up. Considering the present tax rate of 33.99% applicable to the company's form of business, under grossing up methodology, the tax burden becomes almost 50% of the net income of the utility. The beneficiaries are not against refunding income tax to the utilities on the admitted return on equity. The beneficiaries also do not have any objection if the utilities run their business more efficiently and thereby optimize their annual income provided no further cost on account of income tax on income other than admitted return on equity is passed on to them. From the utilities point of view, in a regulated business, the tax burden is reimbursed from the beneficiaries or the consumers on no profit and no loss basis. Consumers pay for the income tax only when it is actually levied on the utilities. In case of any refund of income tax, the same is also passed on to the beneficiaries. Under existing regulation, even the benefit of income tax holiday under section 80IA of the Income Tax Act, 1961 is passed on to the beneficiaries. This benefit of income tax holiday is available to the investors only for development of infra-structure facilities. In case, the passing on the tax burden to the beneficiaries is restricted only to the return on equity component, there is no logic in passing on the benefit of income tax holiday under section 80IA of the Income Tax Act, 1961 to the beneficiaries.

14.4 The Commission, after considering all the views of all stakeholders is of the view that it will be appropriate to move to the system of pre-tax rate of return on equity from the existing post-tax rate of return on equity. Accordingly, the Commission has decided to allow pre-tax rate of return on equity to the utilities. The same shall be calculated by considering the applicable tax rate for the companies for the year 2008-09 as per the relevant Finance Act, as base rate."

49. It is evident from the Statement of Reasons that during the period 2004-09, the post tax system was in operation which required grossing up of the tax while recovering the same from the beneficiaries. During the 2009-14 period, the post tax rate of return was sought to be changed to pre-tax rate of return. The Commission decided to switch over to pre-tax rate of return under which the base rate of tax will be the applicable tax rate of the company for the year 2008-09 and the rate of return will be grossed up at that rate to arrive at the recoverable rate of return. Therefore, grossing up of tax was already in existence during the period 2004-09 and it is incorrect on the part of PSPCL to contend that grossing up was introduced only in the 2009 Tariff Regulations.

50. It is pertinent to mention that Expert Advisory Committee (EAC) of the Institute of Chartered Accountants of India (ICAI) in its opinion has clarified that in case the burden on account of income tax is passed on to the customers, it is in the form of recovery of any other expense of the enterprise in the form of a consideration to sell its products or render services and, therefore, the recovery of income tax from the customers should form part of gross inflow on account of sale of the product or rendering of services. EAC of ICAI finally opined that netting off of recovery of income tax from Electricity Boards against the income tax provision is not in order and that the said recovery should form part of the revenue of the company which means that the income tax has to be grossed up while recovering from the beneficiaries.

51. CAG in its Half Margin observation has pulled up the Petitioner for not recovering the amount of Deferred Tax Materialized through “Sales” (after grossing up at normal tax rate) from the beneficiaries. The Petitioner ascertained about the practice adopted by other generating companies who are stated to be recovering the amount of Deferred Tax Materialized through “Sales” and grossing up of Deferred Tax Materialization was also being done by them. In fact, the Respondent PSPCL has admitted vide its affidavit dated 8.7.2020 that it has paid the grossed up deferred tax liability for the period 2011-12 to 2016-17 to the Petitioner. Had it been the understanding of the Respondent that the tax liability during the 2004-09 period is not required to be grossed up, then it would not have paid the deferred tax liability duly grossed up for consistently six years.

52. The issue of grossing up of Income Tax during the 2004-09 period was deliberated by this Commission vide Order dated 7.1.2010 in petition No. 163/2008 (NLC Vs TNEB). The Commission, in the said order, has observed as below:

> *19. From the above provisions of the regulations, it is evident that the tax on the income from core business of the generating company has to be borne by the beneficiaries in the proportion to their share in the annual fixed charges. It is further provided that any over recovery or under recovery shall be adjusted on the basis of the certificate of the statutory auditors. The tax liabilities are borne by the beneficiaries and accordingly, the tax liability has to be considered as per the relevant provisions of the IT Act. Section 195A of the IT Act which is relevant to this case is extracted as under:*
>
> > *'Income payable "net of tax" 195A.*
> >
> > *In a case other than that referred to in sub-section (1A) of section 192,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.'*
>
> *20. We are of the view that the 2001 and 2004 regulations of the Commission provide for the arrangement as to how the tax liability on the income from core business of the generating company has to be serviced. The regulations are to be read and interpreted along with the relevant provisions of the IT Act. The calculation for servicing the tax liability has to be done as per the provisions of the IT Act. Section 195A of the IT Act clearly provides that liability to pay the tax is to be borne by the person by whom the income is payable. Such income for the purpose of deduction of tax shall be increased to such amount which after the deduction of the tax shall be equal to the net amount payable under the arrangement. In view of the aforesaid statutory provisions in the IT Act read with 2001 and 2004 regulations of the Commission, the tax on the core business of the generating company has to be grossed up before recovery from the beneficiaries.*
>
> *21. In view of our finding in the preceding paragraph that grossing up is mandatory in terms of Section 195 A of IT Act, and since the bills have been prepared by the statutory auditor after grossing up, the respondent is liable to pay the income tax dues as determined by the statutory auditor. Since the only objection of the respondent pertains to grossing up income tax which has been decided as above, we direct that the respondent shall reimburse Rs.481.46 crore to the petitioner by 15.1.2010."*

53. The order dated 7.1.2010 in Petition No.163/2009 was challenged by the respondent therein in Appeal No. 49/2010 before the Appellate Tribunal for Electricity (hereinafter 'the Appellate Tribunal') along with an application for stay of the said

order. The appeal was admitted and no stay was granted by the Appellate Tribunal. The Appellate Tribunal in its order dated 10.9.2010 in Appeal No.49/2010 has issued the following directions:

> *"64. SUMMARY OF OUR FINDINGS:*
> *(i) Challenging the jurisdiction of the Central Commission to adjudicate upon the disputes with reference to the reimbursement of income tax or refund of Excess Rebate is not tenable. The Central Commission while adjudicating upon the dispute has to act in conformity with the applicable clauses contained in Regulations. In this case the Central Commission, while adjudicating the dispute in respect of reimbursement of income tax has acted in conformity with the clauses 2.12 of Regulation, 2001 and clause 7 of Regulation, 2004 and while adjudicating upon the dispute in respect of refund of Excess Rebate, the Central Commission has acted in conformity with clause 2.15 of Regulation 2001 and Clause 25 of Regulation 2004. Admittedly, the dispute presently raised by the Respondent NLC before the Central Commission is a dispute involving a Generating Company, the Respondent and the Electricity Board, transmission and distribution licensee. Hence the Central Commission has the competence and jurisdiction to adjudicate upon the dispute raised by the generating company as against the transmission and distribution licensee.*
>
> *(ii) Section 195A of Income Tax Act is a provision which comes into play in all cases where an employer/purchaser makes payment net of tax as in the present case. The concept of grossing up is restatement of basic proposition that where any part of income tax, which is due to the Government, is borne by the purchaser, then the tax borne by the said purchaser has to be necessarily treated as further income in the hands of seller, thereby making it eligible for income tax again. A reading of section 195A of Income Tax Act leaves no doubt that the recovery of income tax paid as an expense from the beneficiaries requires to be grossed up in such a manner so as to ensure that the actual tax paid is fully recovered through tariff. Under those circumstances, the finding given by the Central Commission in regard to grossing up is perfectly valid. The contention of the Counsel for the Appellant contrary to the concept of grossing up is misconceived."*

54. In the light of the above discussion, it emerges that under the 2004 Tariff Regulations, tax on core business of the generating company or transmission licensee shall be treated as an expense and recovered from the beneficiaries. When under an arrangement, the income tax is to be borne by a purchaser, the tax borne by the said purchaser has to be treated as further income in the hands of the Seller, thereby making it eligible for further tax again. Therefore, recovery of income tax treated as an expense in the hands of the generating company or transmission licensee and recovered from the beneficiaries requires to be grossed up in such a

manner as provided in Section 195A of the Income Tax Act, 1961 so as to ensure that the actual tax paid is fully recovered through tariff. The deferred tax liability for the period 2004-09 has to be borne by the beneficiaries whenever they materialise in terms of Regulation 39 of 2009 Tariff Regulations, Regulation 49 of 2014 Tariff Regulations and Regulation 67 of 2019 Tariff Regulations. Accordingly, since the beneficiaries are required to bear the deferred tax liabilities for the period 2004-09 materialised during the subsequent period, such deferred tax liability has to be treated as an expense in the hands of the generating companies or transmission licensees, as the case may be and shall be recovered after grossing up in order to ensure that the generating companies or transmission licensees fully recover the deferred tax liability through tariff.

55. Accordingly, the Petitioner shall be entitled to recover from the beneficiaries including Respondent PSPCL the deferred tax liabilities for the year 2008-09 materialised during 2014-19 period after grossing up.

56. In prayer (I), the Petitioner has invoked the power of the Commission under Regulations 54 and 55 of 2014 Tariff Regulations to seek clarification regarding Regulations 25 and 49 of the said Regulations with regard to deferred tax liabilities materialised. Since there is no ambiguity in the provisions of Regulation 7 of the 2004 Tariff Regulations read with Regulations 25 and 49 of the 2014 Tariff Regulations, there is no necessity to exercise our power under Regulations 54 and 55 of the 2014 Tariff Regulations. In Prayers (II) and (III), the Petitioner has sought a direction for payment by PSPCL of the deferred tax liability materialised. The prayers are disposed of in terms of directions in paragraph 50 above. In prayer (IV), the Petitioner

has prayed for reimbursement of filing fee of Rs.3,00,000/-. There is no provision for allowing such reimbursement and accordingly, this prayer is rejected.

57. Petition No. 294/MP/2019 is disposed of in terms of the above.

Sd/	Sd/	Sd/
(Arun Goyal)	**(I. S. Jha)**	**(P.K.Pujari)**
Member	**Member**	**Chairperson**