

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 304/MP/2022**

Subject : Petition under section 61(d), 79 & 94 of the Electricity Act, 2003 read with regulations 79, 86, 111 & 114 of CERC (Conduct of Business) Regulations, 1999 and Regulation 44 of CERC (Terms & Conditions of Tariff) Regulations, 2009, Regulation 54 & 55 of CERC (Terms & Conditions of Tariff) Regulations, 2014 and Regulation 76 & 77 of CERC (Terms & Conditions of Tariff) Regulations, 2019 for recovery of additional income tax paid by NHPC Limited on account of Advance Against Depreciation (AAD) since 01.04.2009 from the beneficiaries of 8 generating stations.

Petitioner : NHPC

Respondents : PSPCL & 18 ors

Date of Hearing : **13.9.2023**

Coram : Shri Jishnu Barua, Chairperson  
Shri I.S Jha, Member  
Shri Arun Goyal, Member  
Shri Pravas Kumar Singh, Member

Parties Present : Shri Ved Jain, Advocate, NHPC  
Shri Ankit Gupta, Advocate, NHPC  
Shri Venkatesh, Advocate, NHPC  
Shri Ashutosh K. Srivastava, Advocate, NHPC  
Shri Shivam Kumar, Advocate, NHPC  
Shri Aashwyn Singh, Advocate, NHPC  
Shri Ravi Kant Singh, NHPC  
Shri D. K. Garg, NHPC  
Shri Gurusharan Singh, NHPC  
Shri S.K. Meena, NHPC  
Shri Pathajit De, NHPC  
Shri Kunal Singh, Advocate, TPPDL  
Shri Tanmay Jain, Advocate, TPPDL  
Shri Buddy Ranganathan, Advocate, BYPL  
Shri Rahul Kinra, Advocate, BYPL  
Shri Aditya Ajay, Advocate, BYPL  
Shri Isnain, Advocate, BYPL  
Shri Mohit K. Mudgal, Advocate, BRPL  
Shri Sachin Dubey, Advocate, BRPL

**Record of Proceedings**

During the hearing, the learned counsel for the Petitioner, made detailed oral submissions, mainly as under:



- (a) The Commission, in the exercise of the powers under section 178 of the Act, has notified the Tariff Regulations for the determination of tariffs for different control periods from 2001-04 till 2019-24. Accordingly, based on the tariff orders issued in respect of the generating stations of the Petitioner, energy bills had been raised by the Petitioner for the beneficiaries (Respondents herein) from time to time and the tax on income has also been recovered from the beneficiaries as applicable for the relevant year.
- (b) The normal income, excluding Advance Against Depreciation (AAD) u/s 28(1) of the Income Tax Act, 1961 of the Company, is being determined on the basis of the opinion from the Expert Advisory Committee of the ICAI, which *inter alia* states that AAD may be shown as a deduction from the power and carried over to the Balance Sheet as income received in advance.
- (c) From 2001-02, Section 115JB was inserted in the Income Tax, 1961 by the Finance Act, 2000, and accordingly, the generating companies came under the purview of MAT. As an abundant precaution, the Petitioner had filed an application before the Authority for Advance Ruling (AAR) regarding the taxability of AAD and by order dated 19.1.2005, ruled that the amount of AAD is to be included for the computation of book profit, under Section 115JB of the Income Tax Act for the year of receipt.
- (d) Since AAR had not given any ruling regarding the treatment of AAD while calculating the normal income under Section 28(1) of the Income Tax Act, the Petitioner filed a Special Leave Petition before the Hon'ble Supreme Court against the order of the AAR. The Hon'ble Supreme Court, on 5.1.2010, decided the issue of AAD in favour of the Petitioner, holding that the AAD is an income received in advance, subject to adjustment in the future, and therefore, clause (b) of Explanation -I to Section 115JB is not applicable.
- (e) Consequent upon the said judgment of the Hon'ble SC, the refunds pertaining to the period up to 31.3.2009, which became due to the Petitioner on account of AAD, have been refunded to the Respondents, as and when the income tax refund was received from the IT Department.
- (f) With respect to the taxability of AAD under the normal provisions of the Income Tax, 1961, the stand of the Assessing officer did not change, and all the assessments from 2000-01 till 2008-09 were done with the conclusion that the decision of the Hon'ble SC was not for the purpose of computation of income under the normal provisions of the IT Act, and accordingly, the assessing officer added the AAD to the income computed under the normal provisions of the Act. This was, however, set aside by the appellate authority and the Hon'ble P&H High Court, thereby deciding the issue in favour of the Petitioner.
- (g) Since, during the tariff period from 1.4.2009 onwards, any addition in the taxable income of the Petitioner, due to AAD recovery had no effect on the applicable rate/effective rate of tax, which is used for the grossing up of ROE, the actual tax paid on AAD reversal, could not be recovered from the beneficiaries because there was no change in the applicable rate of tax/effective rate of tax, in these particular years.
- (h) Refund of income tax under MAT due to AAD relating to the period up to 31.3.2009, has been passed on to the beneficiaries by the Petitioner from time to time, but due to the issue of AAD under normal computation pending with the Hon'ble P&H High Court, the Petitioner did not make any adjustments in the accounts like MAT credit, etc. that would have arisen after the order of the Hon'ble High Court. Simultaneously, the Petitioner has not been claiming tax, which was paid for the adjustment of AAD, in the



books of accounts since 1.4.2009, as the recovery of income tax for the adjustment of AAD has to be made after the issue is finally decided by the Court.

- (i) It was noticed that the Income Tax Department had not filed any appeal against the order of the Hon'ble P&H High Court, which was earlier decided in favour of the Petitioner, on the issue of adjustment of AAD under the computation of taxable income under normal provisions of the income tax. Accordingly, the recovery of income tax, which has been paid by the Petitioner since 2009-10, on account of the reversal of AAD is required to be done by the Petitioner.
- (j) The concept of AAD has been discontinued by the Commission for tariff computation w.e.f. 1.4.2009 onwards. Thus, AAD, which is standing in the books, is being written-back in a systematic manner from 2009-10 onwards in respect of the power stations of the Petitioner, where AAD has been received and which have further completed 12 years of life.
- (k) Due to a change in the recovery method of income tax under the Tariff Regulations, from 1.4.2009 onwards, the Petitioner could not recover the tax paid due to the reversal of AAD, which was in fact deducted from the sales in the year of receipt, and the benefit thereof was also passed on to the beneficiaries, by way of recovering a lower tax, than what was recoverable, if AAD had been considered as income in the year of receipt.
- (l) Though the intention of the Tariff Regulations, was to allow the tax on income pertaining to a period prior to 31.3.2009, the tax on deferred income, such as the AAD, was not incorporated in the relevant Tariff Regulations, after 1.4.2009, which resulted in angularities in the Tariff Regulations and hence calls for rectification by exercise of the powers vested with the Commission through 'Power to Relax' and 'Power to Remove Difficulties'.
- (m) The income tax, being claimed by the Petitioner from 2009-10, pertains to the AAD collected up to 31.3.2009, and is due to the write back of AAD after 1.4.2009 only. The Commission may allow the recovery of tax paid on AAD till date, after grossing-up and also allow the future liability of tax, whenever it arises, after the filing of the return, from the beneficiaries without making an application.

2. In response, the learned counsel for the Respondent, BRPL, made oral submissions, mainly as under:

- (a) The Commission has discontinued the provision of AAD by its 2009 Tariff Regulations. As such, what has been expressly discontinued under the applicable Tariff Regulations cannot be allowed to the Petitioner in exercise of the Power to relax and Power to remove difficulties. Also, restoring the repealed provision through the back door is not permissible. (*Orders of this Commission dated 14.10.2009 and 7.10.2013 in Petition Nos. 153/2009 and 274/2013 were relied upon and the judgment of the Privy Council in Nazeer Ahmed vs The King Emperor J.C.96 Vol III was referred to*)
- (b) The 'Power to relax' and Power to remove difficulties' must be exercised in a conditioned and restricted manner, and such exercise of power should not change the basic and essential provisions of the statute. (the judgment of the Hon'ble SC in *M.U.Sinai v UOI & ors (1975) 3 SCC 765* and the judgment of the APTEL in *NTPC v MPSEB (2007 ELR APTEL 7* were relied upon.).)
- (c) The claim of the Petitioner for AAD during the control periods governed by the Tariff Regulations (2009, 2014 and 2019) amounts to seeking amendment of the



applicable Tariff Regulations, through a petition, which is not permissible. (*This Commission's order dated 5.8.2018 in Petition No. 215/MP/2018 was referred to.*)

- (d) The Petitioner had not raised objections in respect of the discontinuation of AAD during the public hearing of the draft 2009 Tariff Regulations, as recorded in the Statement of Objects & Reasons (SOR) to the said regulations. Moreover, the said regulations have not been challenged by the Petitioner. In view of this, the income tax paid on AAD cannot be claimed by the Petitioner now.
- (e) Since there is no provision in the 2009, 2014 and 2019 Tariff Regulations, which allows the Petitioner to recover the additional income tax paid on AAD, the Petitioner's prayer, to exercise the discretionary 'Power to relax' and Power to Remove Difficulties, is liable to be rejected.

3. In response, the learned counsel for the Petitioner, while pointing out that the Commission is required to examine the context under which the Tariff Regulations were implemented, submitted that the liability which accrued earlier got crystallized only in 2018. While pointing out that the judgments referred to by the Respondent BRPL may not be applicable to the present case, the learned counsel submitted that the Commission has the discretion to exercise the power to relax, as done in similar other cases (viz., recovery of fly ash transportation expenses by NTPC, etc.).

4. The learned counsel for the Respondent, TPPDL, adopted the submissions made by the learned counsel for the Respondent BRPL, as above.

5. At the request of the learned counsel for the parties, the Commission permitted the parties to file their written submissions on or before **31.10.2023**. Accordingly, the order in the petition was reserved.

**By order of the Commission**

**Sd/-**  
(B. Sreekumar)  
Joint Chief (Law)

