

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 133 of 2007

Dated : 13th January 2009

**Coram : Hon'ble Mrs. Justice Manju Goel, Judicial Member
Hon'ble Mr. H. L. Bajaj, Technical Member**

Delhi Transco Ltd.

Shakti Sadan, Kotla Road,
New Delhi – 110 002

... Appellant(s)

Versus

1. **Delhi Electricity Regulatory Commission**
Viniyamak Bhawan, '
C' Block, Shivalik,
Malviya Nagar,
New Delhi – 110 017.
2. **BSES Rajdhani Power Ltd.**
BSES Bhawan,
Nehru Place,
New Delhi – 110 019.
3. **BSES Yamuna Power Ltd.**
Shakti Kiran Building,
Karkardooma,
Delhi – 110 092.
4. **North Delhi Power Ltd.**
Grid Sub Station Building,
Hudson Lines, Kingsway Camp,
Delhi – 110 009.

5. **New Delhi Municipal Council**

Town Hall,
Parliament Street,
New Delhi.

6. **Military Engineers Services**

Ministry of Defence,
Government of India,
New Delhi.

7. **Delhi Power Co. Ltd.**

Shakti Sadan,
Kotla Road,
New Delhi – 110 002.

... Respondent(s)

Counsel for the appellant(s) : Mr. M.G. Ramachandran,
Mr. Anand K. Ganesan and
Ms. Swapna Seshadri
Mr. A.M. Gupta, AM (Legal)

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Ms. Anisha Upadhyay,
Mr. Santosh Mishra and
Mr. Suresh Tripathy,
Mr. Sitesh Mukherjee,
Mr. Sakya Singha Choudhury,
Mr. Vishal Anand, Mr. Hemant
Sahai, Advocates for DERC
and
Mr. K. M.Verma, Jt. Director
(Legal), Mr. Mohan S. Gupta
DD (Law), Mr. A. K. Tiwari,
Sec.,Mr. H. G. Garg, Dir. (L),
Ms. Rinku Gautam JD (T-F),
Mr. Naveen Goyal, DD(T-Engg),
DERC

Mr. V. P. Singh, Mr. Anuj Berry
for Resp. Nos. 2 & 3 (BRPL &
BYPL)

Mr. Amit Kapur, Ms. Poonam
Verma, Mr. Mansoor Ali
Shoket, Mr. Apoorva Misra,
Mr. Arijit Lala, Mr. Alok
Shankar, Mr. Anupam Verma,
Advocates for Resp. No.4, NDPL

Mr. Sumeet Pushkarna,
Mr. M. L. Gupta,
Mr. Jitender Kumar,
Mr. Yogesh Anand,
Mr. G. Banerji and
Mr. K. Sivaraman, Dy. Mgr. for
DPCL

Mr. Arjun Pant, Mr. Saurav
Agarwal, Mr. Dinesh Kumar,
Mr. V. B. Sharma, AO (Comml)
for NDMC

Mr. M. L. Gupta and
Mr. Raghubir Singh for DTL

Mr. Fanish K. Jain and
Mr. Gajender Kumar
Singhal for ECAC

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

This appeal is directed against the order of the Delhi Electricity Regulatory Commission (DERC for short) in Petition No. 7 of 2006 dated 22.9.2006. By this impugned order, the

commission approved the Annual Revenue Requirement (ARR for short) for the financial year 2006-07 and determined the Bulk Supply Tariff (BST for short) to be charged by the appellant Delhi Transco. Ltd. (DTL for short).

The background facts of the case are as under:

2) On coming into force of Delhi Electricity Reform Act 2000 and the Statutory Transfer Scheme notified under that Act the erstwhile Delhi Vidyut Board (DVB for short) was unbundled into several entities. On such unbundling the appellant Delhi Transco Ltd. or DTL was vested with the functions of transmission of bulk supply of electricity in the NCT of Delhi. The distribution functions of the DVB were made over to distribution companies (DISCOMs) namely BSES Rajdhani Limited, BSES Yamuna Power Ltd., North Delhi Power Limited as well as to the New Delhi Municipal Corporation (NDMC for short) and Military Engineering Service (MES for short). The work of generation of electricity was handed over to certain companies commonly called GENCO. In addition, a holding company called Delhi Power Company Limited (DPCL for short) was created which took over all the liabilities of the DVB including all contingent liabilities other than those which had been categorically passed on to DISCOMs. This holding company was also to hold certain shares in the DISCOMs and all share capital of the appellant DTL. All the receivables from the sale of power to consumers of the erstwhile Board except specifically mentioned in

the schedule D, E and F of the transfer scheme were to go to the account of the holding company. The DISCOMs were authorized to realize all the receivables of the DVB Company in their respective area of supply. Upon realization of such receivables i.e. recoveries made towards arrears of electricity supply, the same was to be shared between the holding company and the DISCOMs in the ratio of 80:20.

3) In the tariff order dated 26.06.03, the commission deliberated on the issue of 80% of the past receivables and recovered by the DISCOMs being given to the holding company DPCL as the commission felt that the amount was an outflow from the sector and that if the amount remains within the sector, it would substantially bring down the tariff. The Commission requested the Government to revisit the statutory transfer scheme. Nonetheless, by the order dated 26.06.03, the commission considered 80% of receivables from consumers of DVB for the period 2002-03 and 2003-04 amounting to Rs.210 Crores as found available to the appellant in the financial year 2003-04. The government of GNCTD clarified vide letter No. F.11 (99)/2001-Power/531 dated 31.03.2004 that the transfer scheme would not be revisited and the receivables against DVB arrears would continue to be shared between the holding company and DISCOMs in the ratio 80:20. The commission reiterated its request vide another letter dated 25.4.2004. The Government again declined the request with a reply

dated 04.06.2004. The appellant filed a review petition on 22.07.2004 protesting against the parking of Rs.210 Crores in the amount of appellant as having been received by it. The Commission made yet another request to the Government dated 12.08.04. However, the Government did not agree to make any change in the transfer scheme. Nonetheless the Commission dismissed the review petition vide an order dated 29.10.2004.

4) The Commission adopted the same attitude for the following years. The 80% share of old arrears recovered in the financial year 2005-06 amounting to Rs.219 Crores was taken as revenue received by the appellant in the impugned tariff order dated 22.09.06. The review petition filed by the appellant against the order dated 22.09.2006 was also dismissed.

5) The impugned order was passed on the petition of the appellant for approval of ARR and determination of BST dated 29.12.2005. The appellant raised a plea in petition that the DVB arrears recovered in the earlier years were in fact amounts received by the DPCL although the same were treated as amount received by Transco. The appellant also requested the Commission to make available the amount of DVB arrears which had been considered as revenue receipt of Transco in the previous years. The Commission rejected this prayer of the appellant. Nonetheless, the Commission proceeded to fix BST tariff by treating the amount, received by the

DPCL, as amount received by the appellant. When the appellant filed the appeal, its review petition against the tariff order being review petition No. 53/06 was still pending before the Commission which was eventually dismissed.

6) Apart from the past receivables the other two issues in this appeal which still survives are that of metering at source/sending end and denial of Rs.2.28 Crores which the appellant paid to the DPCL by way of interest on loan.

The respective pleas

7) The appellant contends that the Commission committed an error in treating 80% of the past arrears as deemed revenue for the appellant and thereby reducing the revenue requirement of the appellant. Inclusion of the past receivables of the DVB in the accounts of the appellant has reduced the approved aggregate revenue requirement and has thereby reduced the tariff to be charged by the appellant. (Appellant, as a transmission utility, charges wheeling charges). The appellant says that this has resulted in net revenue loss on actual terms. The appellant accordingly prays for appropriate direction to the Commission to correct the situation and for consequential relief.

8) The Commission opposes the appeal. It contends that 80% arrears of the past receivables collected by the DISCOMs which

have gone to the holding Company, namely DPCL, should in fact go to appellant to be ploughed back into the sector. The Commission contends that if the money is given to the appellant it will be considered as income for the appellant and the overall gap in the sector will reduce which will reduce the tariff. The Commission reiterates that it has earlier rejected the plea of the appellant in its orders dated 09th June, 2004, 07th July, 2005 as well as by the impugned order. The Commission has quoted in its reply from its order dated 07th July, 2005 in which the Commission stated that the benefit of reduction in the AT&C loss (aggregate, technical and commercial loss) achieved by the DISCOMs would not be available to the consumers if the past receivables are given to the holding company and therefore, as done in the previous order, 80% of the DVB arrears collected should remain within the sector as revenue to Transco. The Commission says that this view was only reiterated in the impugned order dated 22nd September, 2006. The Commission further adds that the holding Company, DPCL, is not a regulated entity and therefore, the Commission would not like to issue directions to DPCL. The Commission as well as the respondent No.4, North Delhi Power Ltd. contended that in the previous financial years the Commission had passed similar orders and the appellant had accepted the stand of the Commission and did not choose to file an appeal. The Commission pleads that since the earlier orders have attained finality for not having been ever challenged, the present appeal is not maintainable.

9) The appeal is generally opposed by the other DISCOMs as well as by the holding Company, DPCL although no formal reply is filed. The parties have filed written submissions to supplement their oral arguments. We have heard all the counsel appearing for different parties in this case at length.

Decision with reasons:

10) From the facts narrated above, the issue of DVB arrears is simple. The DVB, which stood unbundled after coming into force of the Delhi Electricity Reforms Act, 2000 & the Transfer Scheme was entitled to receive certain payments from the consumers and, perhaps some other parties. At the same time DVB was also liable to pay dues to various parties. At the time DVB was unbundled it had huge outstanding dues of Central Power Sector utilities like NTPC etc. amounting to over 3000 Crores of rupees. DVB also had certain unpaid loans taken from the Government. The liability to pay back the loan fell on the holding Company, DPCL. In order to make the repayment viable, it was granted 80% of the recoveries made. These recoveries were made by the DISCOMs. For the services extended by the DISCOMs for recovering the past arrears of DVB they were given the incentive of retaining 20% of such recoveries. There is no dispute that the Transfer Scheme which was formulated at that time has always remained unchanged. It is also not disputed that the Commission is bound by the Transfer Scheme and cannot direct any alternation in the sharing of the past

receivables. More importantly there has not been, in actual practice, any alteration in the sharing of the past receivables and undisputedly past receivables were actually received by the holding Company, DPCL and by the DISCOMs. It naturally follows that when such past receivables which were of the tune of Rs.210 Cr. in the FY 2002-03 & in 2003-04 and Rs.219 Cr. in the FY 2005-06 are taken as revenue of the appellant, the income required to be generated for the appellant from tariff would also be reduced. The appellant, therefore, has been granted a tariff which is artificially low. The appellant being the transmitter of power, such low tariff has resulted in lowering the cost of wheeling of power for DISCOMs consequently lowering the tariff for consumers of power. The question, however, is straight and simple. Can the money that has actually not been received by the appellant be treated to have been revenue earned by the appellant? If the answer is 'no' the consequent result will follow. The appellant will have to be granted the higher tariff and the cost of power purchase will rise for the DISCOMs. The intention of the Commission to keep the tariff low may be pious. However, the Commission has to reach its intended goal in a logical, rational and lawful manner. It defies all logic to say that past receivables should actually be received by DPCL but revenue to that extent be denied to appellant, DTL.

11) Mr. Ramji Srinivasan, Sr. Advocate appearing for the Commission, made his best efforts to justify the posting of the

amount of past receivable in the accounts of DTL as revenue earned by them. In the first place he says that the DERC wanted to keep the amount of 80% of the recoveries of the past revenue of the DVB in order to enhance the health of the sector. He supports the Commission's view that the money in question is generated from consumption/sale of electricity and thereafter should benefit this very sector and therefore be retained in it. It appears to us that the Commission is labouring under a misconception that the amounts received by the DPCL are going out of the sector. DPCL is entrusted with the task of meeting the liabilities of the DVB. This has to be done out of the asset transferred to it. 80% of the past receivables of the DVB are also required to fulfill that purpose. All liabilities of the DVB are liabilities of this sector and have to be met by it. Further to the extent the past liabilities include dues towards purchase of power, it remains with the sector as such amount are received by the power generating companies. It is nobody's case that DPCL has met all the liabilities of the DVB and there is no further requirement of any more money to meet such liabilities.

12) In any case so long as the recoveries of the past dues are not actually made over to the appellant, the Commission cannot deprive the appellant of its entitlement to recover its revenue requirement to that extent. The Govt. has already rejected the Commission's request to make amends in the Transfer Scheme. So long as the Transfer Scheme stands as it is, the transactions between the DTL,

DISCOMs & DPCL will continue to be governed by it. The Commission can neither alter the scheme nor write the recovered past arrears into the revenue side of the appellant's accounts, particularly because in reality the recovered past arrears had gone to either the DISCOMs or DPCL.

13) The Commission in order to justify its stand on this issue has pointed out that the Government has granted a loan of Rs.3450 Crores to the DTL as Transitional Loan. However, no linkage has been shown between the loans sanctioned to the appellant with the adjustment of past receivables of the DVB. In any case loans are required to be repaid and will not be an amount received once for all. The Commission has contended that in case 80% of the past receivables are allowed to go outside the sector the Government would be required to give some transitional loan which would eventually raise the tariff for the consumer. At the cost of repetition it has to be said that the benevolent intention of the Commission to keep the ultimate tariff at low ebb the Commission has to proceed according to law and according to logic. How an amount received by DPCL can be deemed to have been received by DTL is something which surpasses all sense of rationality and logic. We are unable to sustain this view of the Commission.

14) The Commission has raised a preliminary issue. The Commission says that it has taken this view in its earlier decisions

dated 26th June, 2003, 09th June, 2004 and 07th July, 2005. It is contended that since the appellant has not challenged this view in the earlier years it cannot challenge the view now. On behalf of the appellant it is contended that each year's tariff fixation exercise is an independent proceeding and therefore this question can be agitated in the present appeal.

15) It is not disputed by the counsel appearing before us that each assessment year of a tariff order gives rise to a fresh cause of action and can be challenged separately. It is also accepted at the bar that the principles of *res judicata* will not apply to the facts of this case.

16) Three judgments of the Hon'ble Supreme Court which may have bearing on this issue have been cited before us. In *Bharat Sanchar Nigam Ltd. & Another Vs. Union of India and Others (2006) 3 SCC 1* the Supreme Court dealt with the issue of finality of earlier pronouncements in taxing matters. After considering other decisions on this issue the Supreme Court concludes that *res judicata* does not apply in matters pertaining to tax for different assessment years because *res judicata* applies to debar courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct. Nonetheless the Supreme Court proceeds to hold that the courts will generally adopt a earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual

position. In *M/s. Radhasoami Satsang Swami Bagh, Agra Vs. Commissioner of Income Tax (1992) 1 SCC 659* the Supreme Court reiterating that *res judicata* does not apply to income tax proceedings said “*each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year*”. In the case of *Radhasoami Satsang* the appellant trust was being given benefit of exemption under section 4(3)(1) of the Income Tax Act 1922 on the finding that the offerings to the Trust/the Satgurus were not used for the personal use of Satgurus and the offerings were given the trust character at the time of receipt. This position continued for several decades till in the assessment years 1964-65, 1965-66 and 1966-67 the income tax authorities took a different view and denied the exemption that was being received by the appellant trust. It was in this context that the Supreme Court took the view that once it had been found as a fact that the properties and offerings to the satgurus were in the nature of trust and entitled to exemption. The position should not have been revisited.

17) Although the appellant did not challenge the earlier tariff orders it did oppose the proposition that was adopted by the

Commission namely that the appellant should be denied the right to recover its revenue requirement to the extent of the past receivables. The appellant has been asking the Commission to transfer the 80% of the past receivables to it. In fact the accounts position of the appellant reflects the factual position namely that the past receivables have not been received by it and these accounts have not been held to be incorrect or flawed by the Commission. It cannot be said that the appellant has accepted the Commission's method in this regard for such an unduly long time that following the principles in the judgments mentioned above the appellant can be non-suited on the ground that it is challenging a settled position of fact or law. The view taken by the Commission that past receivables, not received by the appellant, be deemed to have been received by the appellant borders absurdity. Since each tariff order is distinct and separate the appellant would be fully justified in approaching this Tribunal to challenge the impugned order vis a vis the year 2006-07.

18) The other two issues are simple and the respondents did not dispute the appellant's contention on it. The appellant submits that the meter reading for NDMC and MES should be done at the sending end consistent with such metering in the case of distribution licensee. The distribution companies make bulk purchases directly from the generating companies or GENCOs. The appellant provided wheeling facilities. Therefore it should be

entitled to wheeling charges at the point of sending rather than at the point at which the wheeled electricity was received. We are of the opinion that the appellant's claim in this respect is valid and reasonable.

19) The Commission has disallowed an amount of Rs.2.28 Crores which the appellant has paid to the holding company as interest on short term loan. Since the amount has actually been paid and there is no allegation of imprudence for the borrowing done by the appellant from the holding company there is no reason why the appellant should not be allowed to recover this amount through tariff. We are therefore of the opinion that the appellant should be allowed to recover this amount as pass through in tariff.

20) In view of the above discussion the appeal succeeds. The Commission shall not treat the amounts received by DPCL as amounts coming to the credit of the appellant. The Commission shall also take the metering as reflected in the sending end. The Commission shall also allow Rs.2.28 Crores which was paid to DPCL by way of interest to be recovered through tariff. The effect of this judgment along with the carrying cost will have to be given to the truing up and subsequent tariff orders.

Pronounced in open court on this *13th day of January, 2009.*

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member