Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeals No. 133/08, 135/08, 136/08 & 148/08

Dated: 16th March, 2009

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. A.A. Khan, Technical Member

IN THE MATTER OF:

Appeal No. 133/08

National Thermal Power Corporation Ltd.
NTPC Bhavan, Scope Complex, Core-7,
Institutional Area, Lodhi Road
New Delhi-110003 ..... Appellant

Versus

1. Central Electricity Regulatory Commission (CERC)
Chanderlok Building, 3rd & 4th Floor
Janpath, New Delhi-110001

2. Transmission Corporation of Andhra Pradesh (APTRANSCO)
Vidyut Soudha, Khairatabad,
Hyderabad 500082 (Andhra Pradesh)

3. AP Eastern Power Distribution Co. Ltd. (APEDCL)
P&T Colony, Seethammadhara
Visakhapatnam-530013 (Andhra Pradesh)

4. AP Southern Power Distribution Co.Ltd. (APSPDCL)
H.No.193-93 (M) Upstairs, Renigunta Road
Tirupathi – 517501 (Andhra Pradesh)

5. AP Northern Power Distribution Co. Ltd. (APNPDCL)
H.No. 1-1-504, Opp. NIT Petrol Pump, Chaitanyapuri
Warangal-506004 (Andhra Pradesh)

6. AP Central Power Distribution Co.Ltd. (APCPDCL)
Singareni Bhavan, Red Hills
Hyderabad – 500004 (Andhra Pradesh)

7. Tamil Nadu Electricity Board (TNEB)
144, Anna Salai
Chennai 600002 Tamil Nadu.

8. Karnataka Power Transmission Corporation Ltd. (KPTCL)
Kaveri Bhavan, K.G.Road, Bangalore 560009
Karnataka

9. Bangalore Electricity Supply Co.Ltd. (BESCOM)
Krishna Rajendra Circle, Bangalore 560009
Karnataka

10. Mangalore Electricity Supply Co.Ltd. (MESCOM)
Paradigm Plaza, A.B.Shetty Circle
Mangalore 575001 (Karnataka)

11. Chamundeshwari Electricity Supply Corp.Ltd. (CESC, Mysore)
Corporate Office, No. 927, L.J.Avenue,
New Kantharaj Urs Road, Saraswathipuram,
Mysore 570009

12. Gulbarga Electricity Supply Co. Ltd. (GESCOM)
Main Road, Gulbarga 585102, Karnataka

13. Hubli Electricity Supply Co. Ltd. (HESCOM)
Corporate Office, P.B.Road, Navanagar
Hubli 580025, Karnataka.

14. Kerala State Electricity Board (KSEB)
Vaidyuthi Bhavanam, Pattom
Thiruvananthapuram 695004, Kerala.

15. Electricity Department, Govt. of Puducherry
137, NSC Bose Salai, Puducherry 605001

16. Electricity Department, Govt. of Goa
Vidyut Bhavan, Panaji, Goa 403001.

..... Respondents

Learned Counsel for the Appellant(s): Mr. M.G.Ramachandran
Mr. Anand K.Ganesan
Ms. Swapna Seshadri

Learned Counsel for the Respondent(s): Mr. Pradeep Misra
Mr. Suraj Singh
for Resps. 2 & 6

Appeal No. 135/08

National Thermal Power Corporation Ltd.
NTPC Bhavan, Scope Complex, Core-7,
Institutional Area, Lodhi Road
New Delhi-110003 ..... Appellant

Versus

1. Central Electricity Regulatory Commission (CERC)
Chanderlok Building, 3rd & 4th Floor
Janpath, New Delhi-110001

2. Transmission Corporation of Andhra Pradesh (APTRANSCO)
Vidyut Soudha, Khairatabad,
Hyderabad 500082 (Andhra Pradesh)

3. AP Eastern Power Distribution Co. Ltd. (APEDCL)
P&T Colony, Seethammadhara
Visakhapatnam-530013 (Andhra Pradesh)

4. AP Southern Power Distribution Co.Ltd. (APSPDCL)
H.No.193-93 (M) Upstairs, Renigunta Road
Tirupathi – 517501 (Andhra Pradesh)

5. AP Northern Power Distribution Co. Ltd. (APNPDCL)
H.No. 1-1-504, Opp. NIT Petrol Pump, Chaitanyapuri
Warangal-506004 (Andhra Pradesh)

6. AP Central Power Distribution Co.Ltd. (APCPDCL)
Singareni Bhavan, Red Hills
Hyderabad – 500004 (Andhra Pradesh)

..... Respondents

Learned Counsel for the Appellant(s): Mr. M.G.Ramachandran
Mr. Anand K.Ganesan
Ms. Swapna Seshadri

Learned Counsel for the Respondent(s): None

Appeal No. 136/08

National Thermal Power Corporation Ltd.
NTPC Bhavan, Scope Complex, Core-7,
Institutional Area, Lodhi Road
New Delhi-110003 ... Appellant

Versus

1. Central Electricity Regulatory Commission (CERC)
Chanderlok Building, 3rd & 4th Floor
Janpath, New Delhi-110001

2. Uttar Pradesh Power Corporation Ltd. (UPPCL)
Shakti Bhavan, 14, Ashok Marg,
Lucknow 226001 Uttar Pradesh

3. Jaipur Vidyut Vitaran Nigam Ltd. (JVVN)
Vidyut Bhavan, Janpath, Jaipur 302005
Rajasthan.

4. Ajmer Vidyut Vitaran Nigam Ltd. (AVVN)
Old Power House, Hathi Bhata,
Jaipur Road, Ajmer 305001 Rajasthan

5. Jodhpur Vidyut Vitaran Nigam Ltd. (Jd.VVN)
New Power House, Industrial Area,
Jodhpur 342003, Rajasthan

6. Delhi Transco Ltd. (DTL)
Shakti Sadan, Kotla Road, near ITO
New Delhi 110002

7. Haryana Power Purchase Centre (HPPC)
Shakti Bhavan, Sector VI, Panchkula
Haryana 134109

8. Punjab State Electricity Board (PSEB)
The Mall, Patiala 147001, Punjab.

9. Himachal Pradesh State Electricity Board (HPSEB)
Kumar Housing Complex Building-II
Vidyut Bhavan, Shimla 171004 H.P.

10. Power Development Department (J&K)
Government of Jammu & Kashmir
Secretariat, Srinagar 191009 J&K

11. Power Department (Chandigarh)
Union Territory of Chandigarh
Addl. Office Building, Sector 9-D
Chandigarh 160009.

12. Uttaranchal Power Corporation Ltd. (UPCL)
Urja Bhavan, Kanwali Road
Dehradun 248001, Uttaranchal.

..... Respondents

Learned Counsel for the Appellant(s): Mr. M.G.Ramachandran
Mr. Anand K.Ganesan
Ms. Swapna Seshadri

Learned Counsel for the Respondent(s): Mr. Pradeep Misra
Mr. Mayur Chaturvedi, Advocate
For UPPCL-R2 and DTL R-6

Appeal No. 148/08

National Thermal Power Corporation Ltd.
NTPC Bhavan, Scope Complex, Core-7,
Institutional Area, Lodhi Road
New Delhi-110003 ..... Appellant

Versus

1. Central Electricity Regulatory Commission (CERC)
Chanderlok Building, 3rd & 4th Floor
Janpath, New Delhi-110001

2. Chief Engineer (Commercial)
Madhya Pradesh Power Trading Co.Ltd.
Shakti Bhavan, Vidyut Nagar, Jabalpur 482008

3. Chief Engineer (Commercial)
Maharashtra State Electricity Distribution Co.Ltd.
'Prakashgad', Bandra (East), Mumbai 400051
Maharashtra

4. GM(Commercial), Gujarat Urja Vikas Nigam Ltd.
Vidyut Bhavan, Race Course, Vadodara 390007
Gujarat

5. Chief Engineer (Commercial)
Chhattisgarh State Electricity Board
Dhagania, Raipur 492013 (Chhattisgarh)

6. Chief Electrical Engineer
Electricity Department
Government of Goa, Vidyut Bhavan, 3rd Floor
Panaji, Goa 403001

7. Executive Engineer, Electricity Department
Administration of Daman & Diu (DD)
Daman 396210

8. Executive Engineer, Electricity Department
Administration of Dadra and Nagar Haveli (DNH)
Silvassa, Via Vapi 396320

..... Respondents

Learned Counsel for the Appellant(s): Mr. M.G.Ramachandran
Mr. Anand K.Ganesan
Ms. Swapna Seshadri

Learned Counsel for the Respondent(s): Mr.S.Ravishankar
Ms.Jaya Kedia for Resp. No.2

JUDGMENT

Per Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson

1.0 There are four appeals, Appeal No. 133, 135, 136 and 148 of 2008. All these appeals would arise out of the four impugned orders disposing of the Petitions filed by NTPC for approving the revised fixed charges in respect of NTPC's four units situated in different States.

1.1 In all these appeals, four issues would arise. Since one of the issues is common in these appeals, a common judgment is being rendered.

1.2 NTPC is the Appellant in all the four appeals. It filed four different petitions in respect of the four projects, before the Central Commission for approval of the revised fixed charges after considering the impact of additional capitalization for the period 2004-2009. These projects are (1) Ramagundam Super Thermal Power Station; (2) Simhadri Super Thermal Power Station; (3) Rihand Super Thermal Power Station; and (4) Vindhyanchal Super Thermal Power Station.

1.3 The Central Commission ultimately passed the final orders on various dates namely 30/7/08, 18/6/08, 10/7/08 and 30/7/08 respectively. In these Orders, though the Central Commission allowed the capital cost and expenditure shown by NTPC in respect of some counts, it disallowed the portion of the expenditure shown by NTPC for fixation of tariff. Aggrieved by the said disallowance of expenditure, NTPC has filed these four different appeals. In these Appeals, totally four questions would arise. The common question which is involved in all the four Appeals is this (Appeal No. 133/08, 135/08, 136/08 and 148/08):

a. **"Whether the Central Commission was right in excluding committed liabilities in relation to the capital assets established, commissioned and put to use to the extent of the amount which has not been paid and has been retained by the NTPC by way of retention of the money, security deposit or similar such things to ensure performance of the work undertaken by the contractors and others in accordance with the contract and is to be released in due course?"**

1.4 Two other questions regarding Vindhyanchal Super Thermal Power Station in Appeal No. 148/08 which have been raised in that Appeal are as under:

b. **"Whether the Central Commission was right in treating the depreciation as the deemed repayment of loans wherever depreciation is higher than the normative repayment of loan?"**

c. **"Whether the Central Commission has dealt appropriately the tariff adjustments for repayment of the Common loan taken by the NTPC in its balance sheet for two or more generating stations in regard to the interest during construction, which should form part of the capital cost?"**

1.5 Another issue which has been raised in Appeal No. 133/08 relating to the Ramagundam Super Thermal Power Station is as follows:

d. **"Whether the Central Commission was right in disallowing the amount of Rs. 323.45 lakhs validly incurred by NTPC towards the Central Electricity Authority (CEA) approved Renovation and Modernization Scheme and the Residual Life Assessment Studies to be capitalized on the ground that the actual Renovation and Modernization works have not yet been completed by NTPC?"**

1.6 Let us now discuss each of the issues separately, one by one.

1.7 The first issue which is common in all the four appeals, is relating to the exclusion of the part of the capital expenditure validly incurred, and not actually paid from the capital cost for the purpose of determination of tariff.

1.8 Mr. M.G.Ramachandran, the Learned Counsel appearing for NTPC would urge the following contentions to elaborate this issue:

> **"The Central Commission, by wrong interpretation relating to the Regulations 17 and 18 has wrongly held that part of the expenditure for the liability incurred for which payment was not made would not come under the category 'actual expenditure incurred', therefore, the said amount not deployed should be excluded for determining the tariff. The Central Commission has misconstrued the provisions of regulations in not appreciating that the Regulation 17 which is relevant to the question does not deal with the actual payment but deals with the incurring of expenditure and the actual capital expenditure incurred cannot be restricted to the actual cash outflow, but it refers only to the liability incurred and the obligations served.**
>
> **The Central Commission has wrongly held thus, on the strength of the Regulations 18 which deals with the deferred liabilities, and not deferred payments, and as such, the Central Commission has failed to appreciate the difference between deferred payment and deferred liabilities in the context of Regulations 17 and 18.**

Therefore, the order of the Central Commission relating to the exclusion of deferred payments has to be held wrong.

Further, this point has already been decided by the Bench of this Tribunal in Appeals No. 151/07 and 152/07 dated 10/12/08 in favour of the present appellant and the said dictum laid down by the Tribunal will squarely apply to this case also."

1.9 One of the Respondents in Appeal No. 148/08, the Madhya Pradesh Power Trading Corporation while justifying the order passed by the Commission with regard to the exclusion of the deferred payments, would submit as follows:

"The wordings contained in Regulation 17 namely, the actual expenditure incurred means the money actually spent and disbursed. The intention of the Commission which framed the regulations in 2004 has been clarified by the subsequent Regulations in 2009 in which it has been clearly stated that the expenditure incurred means only the funds which have actually been paid in cash and does not include the liabilities for which no payments have been made. Therefore, the interpretation given by the Central Commission in the impugned order is correct and interpretation given by the other Bench holding otherwise is incorrect."

2. Let us now discuss the above issue in detail:

2.1 It cannot be debated that the capital cost of a project is a major determinant of tariff. The capital cost is to be allowed as a

'pass through' in tariff as required by Regulations 17 and 18 of the Tariff Regulations 2004. At this juncture, it would be proper to refer to the relevant portions of these regulations to have a clear understanding about the scope of these regulations.

Regulation 17

"Capital Cost:

Subject to prudence check by the Commission, the actual expenditure incurred on completion of the project shall form the basis for determination of final tariff. The final tariff shall be determined based on the admitted capital expenditure, actually incurred up to the date of commercial operation of the generation station ....."

2.2 A reading of the above regulation would make it clear that the actual capital expenditure incurred on completion of the project i.e. upto the date of commercial operation shall form the basis of determination of the final tariff. The term actual expenditure incurred used in Regulation 17, is in the context of capital cost incurred prior to the date of commercial operation to be determined for the project.

2.3 Let us now see Regulation 18, which deals with additional capitalization:

Regulation 18

"Additional Capitalization:

"The following capital expenditure within the scope of work actually incurred after the date of commercial operation and

up to the cut-off date as may be admitted by the Commission, subject to the prudence check .....

(1) Deferred Liabilities

(2) Works deferred by execution

(3)

(4)

(5)

2.4 A perusal of the above regulation would indicate that this Regulation is dealing with the additional capital expenditure incurred after the date of commercial operation and the nature of such capital expenditure can be deferred liability and work deferred for execution and the like.

2.5 On the strength of both these Regulations, namely Regulations 17 and 18, the Central Commission gave an interpretation that the words 'Actual Expenditure Incurred' mean the expenditure or the amount spent on account of liabilities incurred and not the amount not actually spent or deployed. On the basis of the said interpretation, the Commission disallowed the portion of the capital cost claimed by the Appellant, NTPC in respect of the liability incurred and the payment deferred.

2.6 The question now arises for consideration is as to whether the above interpretation is correct or not.

2.7 According to the Learned Counsel for the Appellant, the actual expenditure incurred cannot be restricted to actual cash outflow; and the liability incurred or obligations served would form

part of the actual expenditure incurred as referred to in Regulation 17, and since it does not deal with deferred payments, the cost of the liability cannot be excluded. This point has been accepted by the other Bench of the Tribunal and decided in the Appellant's favour in Appeals No. 151/07 and 152/07 dated 10/12/08.

2.8 Let us refer to the gist of the relevant observations made by the other Bench. They are as follows:

> **"Regulation 18 deals with the capital expenditure incurred after the date of commercial operation and up to the cut-off date. The nature of such capital expenditure can be deferred liability and work deferred for the execution, and the like. Such capital expenditures which were contemplated for being undertaken originally but was deferred and actually undertaken after the date of commercial operation will be treated as additional capitalization. In Regulation 18, the word repeatedly used is 'deferred liability'. Obviously, the deferred liability is the liability which has not yet been assumed. When a capital asset is purchased, the liability is assumed, and when such liability is assumed, and the payment is deferred, Regulation saves the situation. But Regulation 18 is dealing with the deferred liabilities only and not with deferred payments. Work deferred for execution means 'works not already undertaken'. Certain works within the original scope of work may not have been undertaken before the date of commercial operation. Such work may be undertaken after the date of commercial operation. If it is so done, the same will be available for recovery through tariff only under Regulation 18 as additional capitalization. However, it must be ensured that**

no capital expenditure, which has been claimed under Regulation 17, is claimed again as additional capitalization under Regulation 18. We are therefore, of the opinion that the entire value of the capital asset as soon as the same is put into operation, is recoverable by way of capital cost under Regulation 17 itself, notwithstanding the fact that a part of the payment for the capital asset has been retained."

2.81 This observation of the other Bench in the Tribunal in the context of the Regulation 17 and 18 is perfectly justified for the following reasons:

2.82 As indicated above, the context of Regulation 17 is entirely different from that of the context of Regulation 18. Admittedly, the claim by NTPC for the inclusion of actual expenditure incurred for the completed liability is only under the caption 'capital cost' as provided in Regulation 17 and not under the caption "Additional capitalization" as provided in Regulation 18. In other words, the question of additional capitalization under Regulation 18 would refer to the capital expenditure actually incurred after the date of commercial operation in respect of deferred liabilities and in respect of the works deferred for execution. But Regulation 17 would refer to the actual expenditure incurred before the date of commercial operation of the generating station after completion of the project that too in respect of the liabilities served and incurred. So the meaning of the actual expenditure incurred as contained in Regulation 17 has to be understood in the context of the liabilities incurred. On the other hand, the meaning of capital expenditure as additional capitalization as provided in Regulation 18 has to be

understood in the context of the liabilities deferred, that too after the date of commercial operation. As indicated above, the claim of the appellant in these cases is only with reference to the Regulation 17 in respect of the expenditure on account of the liabilities already incurred and not in respect of the deferred liabilities.

2.9 This can be viewed from yet another angle. It is pointed out by the Learned Counsel for the Appellant that before the constitution of the Central Commission in 1999, the tariff was regulated by the notification issued by the Central Government under Sections 43 and 43(a) of the Electricity Supply Act 1948. The notification dated 13/3/92 issued by the Government of India under the above Sections provided for capital cost-based tariff. The said notification states as under:

> **"The actual capital expenditure incurred on completion of the project shall be the criteria for fixation of tariff."**

2.91 Similarly, in the notification issued by the Central Commission for the period 1/4/01 to 31/3/04, the similar expression has been used which is as under:

"The actual capital expenditure incurred on the project shall form the basis for fixation of tariff."

2.92 In Regulation 17 of the Tariff Regulations framed in 2004, which is relevant to the present case, the Central Commission has followed the same expression as used before. As referred to above,

the term 'actual expenditure incurred' used in Regulation 17 is in the context of the capital cost to be determined for the project. The capital cost is also with reference to the date of commercial operation. So from this, it is clear that notwithstanding the fact that some payments have not been made under the terms of the contract in respect of an asset which has already been purchased and has been put to use and is generating power as on the date of commercial operation, there is a committed liability to make such payments and the same should be taken into account for the purpose of the capital cost. In other words, when the asset is put to use as on the date of commercial operation and is subject to depletion right from that point of time, it cannot be said that there is no use to the extent that cash outflow has not been made. As on the date of commercial operation, there are many assets which have been put to use and are kept under the capital works in progress.

2.93 Similarly, this can be looked at from a different angle. As on the date of commercial operation of this station, there are many assets which have not been put to use and are kept under the capital works in progress for which cash outflow has already been made. This amount cannot be considered as part of the capital cost for the computation of tariff, since such an asset has not been put to use. It is pointed out by the Learned Counsel for the Appellant that from the beginning, the NTPC generating stations have been allowed to show the capital expenditure based on the volume of capital assets installed on committed liabilities even when the

actual cash payment in respect of the said liabilities had not been made.

2.94 Besides this, the Learned Counsel for the Appellant, would refer to various dictionaries to understand the meaning of the terms 'incurred' and 'actual':

1. Black's Law Dictionary: the 7th edition defines the term 'incurred' as 'to suffer or bring on oneself' (the liability of expense). The term 'actual' in the said dictionary is termed as 'expenses in fact', 'real'.

2. Law Lexicon (P.Ramanathan) 1997 Edition defines the word 'incurred' as 'to become subject to or liable for by an act or operation of law'. The word 'incurred' means 'brought on'.

3. The Stroud's Judicial Dictionary states the following:

"the phrase 'having incurred expenses' means at least that the legal authority had paid those expenses, or become liable to pay them as distinct from estimated expenses".

2.95 The Learned Counsel for the Appellant also referred to some of the decisions which defines the meaning of the relevant terms:

2.96 In Madras Industrial Investment Corporation Vs. C.I.T (*1997 (4) SCC* 666), it is held as follows:

"This 'expenditure' is not necessarily confined to the money which has been actually paid out. It covers the liability which has accrued or which has been incurred although it may have to be discharged at a future .....

It also refers to some of the amount which the assessee has accrued in the presente which is payable in the futuro ------

In 1975 (Supplementary) SCC 1, Indira Gandhi Vs. Raj Narain, the word 'incurred' according to the dictionary meaning means to become liable to. The work incurred means 'to undertake the liability even if the actual payment may not be made immediately'.

In 1968 Vol.I SCR 37, C.I.T. Gujarat Vs. Tejaji Farasram Karwala Ltd., it is held as follows:
'In the context in which the expression 'incurred' occurs in Section 4(3)(IV) of the Income Tax Act 1922, it undoubtedly means 'incurred' or 'to be incurred'. To qualify for exemption, the allowance must be granted to meet the expenses incurred or to be incurred only and necessarily in the performance of the duties of an office or employment of profit'."

2.98 The above authorities as well as the dictionary meaning would give the actual meaning of the words contained in Regulation 17. The conjoint reading of the Regulations 17 and 18 of the Tariff Regulations would make it clear that the scheme of Regulation 17 is quite different from Regulation 18. The Regulation 17 deals with the actual expenditure incurred till the completion of project i.e. till the date of commercial operation date. Regulation 18 deals with

capital expenditure incurred as additional capitalization after the commercial operation date. Once the expenditure falls within the Regulation 17, and it is claimed under Regulation 17, the said expenditure cannot at all be claimed under Regulation 18.

2.99 Regulation 18 uses the expression "Deferred Liabilities" and not "Deferred Payments". The deferred liabilities would mean that the incurring of the liabilities is deferred. Regulation 17 does not deal with deferred liabilities. Similarly, Regulation 18 does not deal with the deferred payments. The deferred liabilities used in Sub-Clause (1) of Regulation 18 is by way of itemizing the expenditure incurred which will be considered only after the commercial operation date. In other words, the liabilities which become due after the date of commercial operation would not cover the liabilities which had become due before the date of commercial operations. Thus, it is obvious that the generator is entitled to recover the tariff for the capital asset put into operation and all the expenditure which has gone into the value of the capital asset, shall be taken into account in spite of the deferment of payment of such expenditure. The deferment of payments is made in order to ensure that the contractors duly perform their responsibilities, obligations etc. So the mere deferment payments will not disentitle the generators from recovering the tariff for the capital asset which was already put into operation.

3.00 Mr. Ravi Prakash, the Learned Counsel for the Madhya Pradesh Power Trading Ltd., the R-2 in Appeal No. 148/08 would contend that the Central Commission recently issued a regulation

on 19/1/09 in its endeavour to settle the ambiguity on the different interpretations of the terms 'actual expenditure' incurred and in that Regulation 2009, the Central Commission defined the term 'expenditure incurred' by giving the meaning as the amount paid in cash for the asset purchased and it does not include the liabilities for which payment has not been made and on the basis of these clarificatory regulations issued in 2009, this Tribunal has to understand the actual meaning of Regulations 17 and 18 of 2004. He read out the new definition of the term 'expenditure incurred' in the 2009 Regulations, which is as follows:

> **"Expenditure incurred means the fund where the equity or debt or both annually deployed and paid in cash or cash equivalent, for creation or acquisition of a useful asset, and it does not include commitments or liabilities for which no payment has been released".**

3.01 Quoting the above regulation, it is submitted that if there is any ambiguity in the earlier legislation, the subsequent legislation may be taken as the external aid for the proper interpretation of a statute as laid down in AIR 1966 SC 1995, State of Bihar Vs. S.K.Rai.

3.02 The above contention has to be rejected for two reasons (1) Central Commission which passed the impugned orders did not give the finding on the basis of the fresh tariff regulations treating it as a clarificatory regulation to the Tariff Regulations 2004. Admittedly, this new Regulation has been introduced and comes into effect only from 1/4/09 onwards. The Regulations 2009

framed by the Central Commission for a change in the tariff regulations are for future applications, and not for the past and as such, this is not a clarificatory regulation. (2) The previous Regulations 2004 would contain the word 'actual expenditure incurred'. Now, the present Regulation would define the word "Expenditure incurred". The word "actual" is missing. Thus there is a significant departure in the language, scope, context and content, in the present Regulation from the 2004 Regulation.

3.03 Further, as pointed out by the Learned Counsel for the Appellant, the decision rendered by the Supreme Court in State of Bihar Vs. S.K.Rai, AIR 1966, SC 1955 does not lay down any ratio, but an incidental observation to the effect that when there is an ambiguity, the subsequent legislation which is clarificatory can be used for understanding the scope of the provisions in the earlier legislation. This observation is not a 'ratio decidendi' and it is not an authority to hold that the subsequent legislation shall be considered to understand the scope of the earlier legislation. As a matter of fact, as pointed out by the Learned Counsel for the Appellant, the Supreme Court in 1996 Vol.3 SCC 75, Peddinti Venkatesa Murali Ranganatha Desika Iyengar *In re.,* 1975 Vol.2 SCC 76 M/s. Murari Lal Mahavir Prasad Vs. Mr. B.R.Vad, and AIR 1967 SC 193, Nalinikant Ambalal Modi Vs. S.A.L.Narayana Rao, has categorically held that the subsequent legislation should not be considered as an additional aid for understanding the scope of previous legislation.

3.04 This apart, in the Appeals No. 151/07 and 152/07, the other Bench of the Tribunal has given an interpretation which was considered to be the rational interpretation settling the position without any ambiguity. Therefore, it is not correct to contend that only to avoid the ambiguity, this fresh clarificatory regulation has been framed by the Commission. It is settled law that when the meaning of the words contained in the provisions are not clear, and when there is an ambiguity which is capable of making several interpretations, only then the intention of the legislature has to be gathered from the object and reasons and not otherwise, as laid down by the Supreme Court in 2001 Vol. 7 SCC 358, District Mining Officer Vs. TISCO. In the present case, the words contained in the Regulations 2004 in Regulations 17 are very clear as there is no ambiguity. As indicated above, this Tribunal on the earlier occasion correctly held that only rational interpretation could be that the words 'actual expenditure incurred' contained in Rule 17 would only refer to 'liabilities incurred' and not with reference to the 'actual cash outflow'. This point is answered accordingly.

3.05 Let us now go to the second question, which is raised in Appeal No. 148/08. The question is this **"whether the Central Commission was right in treating the depreciation as the deemed repayment of loan wherever depreciation is higher than the normative repayment of loan?"**

3.051 Mr. M.G.Ramachandran, the Learned Counsel appearing for the Appellant, NTPC while assailing the order of the Central Commission treating the depreciation as a deemed loan repayment

has contended that this point also, has already been decided by the Tribunal in Appeal No. 139-144 of 2006 vide Judgments 13/6/07 and also by the Supreme Court vide 2007 Vol.35 SCC 33 DERC Vs. BSES Yamuna Power Ltd.

3.06 On the strength of these Judgments, Mr.M.G.Ramachandran, on behalf of the Appellant has made the elaborate submission. The crux of his submission is as follows:

> **"In regard to computation of outstanding loan, for all intent and purposes, it should be on normative basis only. The depreciation is admissible notwithstanding any loan is taken or not. The concept of depreciation is not to enable the utilities to repay the loan obligations. The depreciation is available to a utility irrespective of the fact whether the loan amount is taken or not. The depreciation amount, unlike advance against depreciation has to be allowed notwithstanding the consideration whether there is any liability to pay the loan or not. The advance against depreciation is to enable sufficient cash availability with the utility for repayment of the loan. It is entirely different than the normal depreciation admissible, and is to be allowed."**

3.07 This point urged by the Learned Counsel for the Appellant in the earlier Judgments dated 13/6/07 by the Tribunal had been accepted by the Tribunal. The Tribunal in the earlier Orders had elaborately dealt with this issue and ruled as follows:

> "**The depreciation is an expense and not an item allowed for repayment of loan. If a corporation does not borrow, it would**

not mean that the corporation will not be allowed any depreciation. Depreciation is an expense and it repays the decline in the value of the asset because of the use, wear, or obsolescence. As such, it is well established that the depreciation is an expense and therefore, it cannot be deployed for deemed repayment of loan".

3.08 On similar lines, the Supreme Court has also given a Judgment in 2007 Vol.3 SCC 33 in DERC Vs. BSES Yamuna Ltd. The crux of this Judgment is as follows:

"Depreciation includes amortization of assets whose useful life is pre-determined. It includes depletion of resources during the process of use. Depreciation reduces the distributable profit without reducing the cash profit. Depreciation is ordinarily not a source of funds under commercial accounting. The depreciation enables the utility to work out the charges to be recovered from consumers from supply of electricity. One has to follow the provisions of the schedule to the Electricity Act. Since the charge is recoverable from the consumers, depreciation is a source of funding for replacement cost. The accepted principle behind providing for depreciation is to recover the original capital invested in the purchase of assets. The revenue is required to be held back in order to keep the original capital intact. There is a difference between the concept of depreciation and the concept of advance against depreciation. In the case of advance against depreciation, loan repayment may be one of the relevant factors. But when we are concerned with the reduction in the rate of depreciation, the repayment of loan is not the relevant factor. The basic

object of providing depreciation is to allocate the amount of depreciation of an asset over its useful life and not actual life so as to exhibit a true and fair view of the financial statement of an enterprise. Useful life is pre-determined by contractual limits or by amount of extraction of consumption depending on the extent of use, and physical deterioration on account of wear and tear, which happens on operational factors such as the number of shifts, repair and maintenance policy of the utilities."

3.09 The above observations in Judgments rendered by the Tribunal as well as by the Supreme Court would provide the ratio with reference to this point. The following guidelines emerged from the dictum laid down in the above Judgments:

i) The depreciation has to be considered as a mere expense. It should not be considered to be an item allowed for repayment of loan.

ii) The depreciation includes depletion of resources during the process of use. In other words, depreciation is ordinarily not a source of funds under commercial accounting.

iii) The depreciation enables a utility to work out the charges to be recovered from consumers for supply of electricity. Since the charge is recoverable from the consumer, depreciation is a source of funding for replacement of cost.

iv) There is a difference between the concept of depreciation and the concept of advance against depreciation. In the case of advance against depreciation, loan repayment may be one of the factors, but in the case of rate of depreciation, repayment of loan is not the relevant factor.

The above guidelines made in the Judgments rendered by the Tribunal as well as the Supreme Court would squarely apply to the present facts of the case and as such, the arguments advanced by Mr. M.G.Ramachandran, the Learned Counsel for the Appellant on this point have to be accepted. Accordingly, it has to be held that the finding given by the Central Commission treating depreciation as a deemed repayment of loan is not correct.

3.10 The next question is relating to the repayment of loan and interest during construction, which is raised in Appeal No. 133/08. The relevant question is as follows:

> **"Whether the Central Commission has dealt with appropriately the tariff adjustments for repayment of the common loan taken by NTPC on its balance-sheet for two or more generating stations in regard to interest during construction which should form part of the capital cost."**

3.11 According to Mr. M.G.Ramachandran, the Learned Counsel for NTPC, the Appellant that this point has also been decided in the earlier Judgments in Appeal No. 151/07 dated 10/12/08. In those Judgments, though the Tribunal rejected the contention urged by the Learned Counsel for the NTPC with reference to the

principle 'First in First out' (FIFO) method. It however, held that repayment assumed for generating stations during the construction period prior to the date of commercial operation be deemed as a loan from NTPC and interest during construction be allowed on such loans. On the basis of this finding, the Learned Counsel for the Appellant prays that this Hon'ble Court may give a similar finding with reference to the point relating to the repayment of loan and interest during construction.

3.12 Let us now first see the crux of the Judgments rendered by the Tribunal in Appeal No. 151/07:

> **"The Appellant, NTPC has several generating stations and it takes loans from FIs on the strength of its corporate balance sheet and allocates the borrowed funds to its generating stations in stead of borrowing separately for each projects. When a plant is under construction, the Appellant is entitled to interest during construction on the funds which had been borrowed.**
>
> **It is contended on behalf of the Appellant that if the loans repaid are attributed to various projects under construction for which tariff is yet to be fixed, such repayment should be deemed to have been made out of the internal or borrowed funds. If the repayment alone taken by NTPC is accounted for the period prior to commercial operation in the ratio of allocation alone to respective generating stations, the amount of repayment should be considered as having come from the internal sources of NTPC or from other borrowings, this contention is quite logical in as much as the project under**

construction prior to the date of commercial operation does not earn any revenue and does not generate any funds from which loan can be repaid. In such a situation, if the project under construction repays a part of the loan, the said funds for the repayment have to come either from the NTPC or from the funds borrowed from other sources. In either case, such a sum will entail a return in the form of interest.

Therefore, it has to be held that the NTPC should be entitled to claim notional interest on such loans as interest during construction. Even if NTPC employs its own funds over and above the equity, the NTPC should be allowed to earn interest thereon. Therefore, the repayment assumed for generating stations during the period prior to the date of commercial operation shall be deemed as loan from the NTPC and NTPC is entitled to the interest during construction of such loans."

3.13 The above finding rendered by the Tribunal would support the plea made by the Learned Counsel for the Appellant on this point. It is not disputed that NTPC enters into loan agreements with the lenders at different times with varying interest rates. Some of the loan agreements are based on fixed interest rates while some of the loans carry floating rate of interest. Further, NTPC borrows loans based on its corporate balance sheet which are for more than one generating station. Even if the 'First in First out' method is not adopted, the deployment of internal sources of NTPC which is in addition to the equity contribution should be considered as a deemed loan from the NTPC to the project. Accordingly, NTPC is

entitled to claim deemed interest on such loans during construction.

3.14 The fourth issue relates to the disallowance of cost incurred by NTPC towards the R&M works and the Residual Life Assessment Studies approved by the Central Electricity Authority. This issue has been raised in Appeal No. 133/08. The question is this:

"Whether the Central Commission was right in disallowing Rs. 323.45 validly incurred by NTPC towards the R&M Scheme and the Residual Life Assessment Studies approved by the CEA to be capitalized on the ground that the actual R&M scheme and works have not yet been completed out by the NTPC?"

3.15 Mr.M.G.Ramachandran, the Learned Counsel for the Appellant, assailing the finding with regard to the disallowance by the Central Commission would submit as follows:

> **"The Residual Life Assessment Studies are an essential part of the successful execution of the R&M works. Before the renovation programme is taken up, it is mandatory that a comprehensive residual life assessment study of all critical components is undertaken in order to increase the performance level and life of the generating station. The residual life assessment study assesses the current condition of the critical parts of the generating station. This is done to avoid premature retirement of critical components on the basis of its designed life. The total R&M expenditure is Rs. 323.45 lakhs out of which Rs. 152.01 lakhs is the expenditure**

on residual life assessment. Admittedly, the expenditure on this work is approved by the Central Electricity Authority, which is the technical wing of the Ministry of Power. The expenditure on the Residual Life Assessment Studies was actually incurred in 2004-05 and 2005-06. Even though most of the works have been completed and only some of the works have to be completed and they are in the process of execution, which takes some time, when the Residual Life Assessment Studies have already been completed, there is no proper reason for postponing the expenditure on the Residual Life Assessment Studies till completion of the R&M works."

3.16 It is an admitted fact that the total expenditure of Rs. 323.45 lakhs approved for Renovation & Modernization includes Rs. 152.01 lakhs for Residual Life Assessment (RLA) Study and Rs. 171.44 lakhs on the R&M works as recommended by the Study. While RLA study has been completed and the expenditure on it has been incurred in the year 2004-05 and 2005-06, the R&M works amounting to Rs. 171.44 lakhs have not been fully completed yet and will take some more time. NTPC, the Appellant has in its petition claimed additional capitalization of the entire approved expenditure of Rs. 323.45 lakhs for the year 2004-05 and 2005-06, even though some portion of the aforesaid expenditure was charged to revenue expenditure and booked to the Profit and Loss Account. The Central Commission has disallowed the claim for capitalization of an amount of Rs. 323.45 without the completion of R&M works and has decided that expenditure on the completed RLA Study may only be considered along with the cost incurred on R&M works after completion of the said works.

3.17 In the light of the above factual position, the point raised by the learned Counsel for appellant has no merit for the reasons given below:

Firstly, the R&M works may involve refurbishment/repair/ replacement and the benefit to the plant would accrue only from the day such works are completed and put to use. Mere completion of RLA study without the timely implementation of its recommendations, does not add any benefit to the Plant. Secondly, the claim for additional capitalization for Residual Life Assessment Study and R&M works admissible under Regulation 18(2)(iv) is subject to 'Note 4' which reads as under:

> **"Note 4:**
> Any expenditure admitted by the Commission for determination of tariff on **renovation and modernization and life extension** shall be serviced on normative debt-equity ratio specified in Regulation 20 **after writing off the original amount of replacement assets** from the original project cost."

From the above, it is clear that the cost incurred on Renovation and Modernization and Life Extension could only be allowed to be capitalized after decapitalization of the replaced assets. Thirdly, the cost incurred on studies such as pre-feasibility report / Detailed Project Report leading to establishment of a Plant is allowed to be capitalized only on commissioning of the Plant from its Date of

Commercial Operation (COD). If the proposal to build the plant is dropped, the cost of studies is borne by the owner and is charged to revenue expenditure and booked to Profit and Loss account. Thus, the expenditure on Residual Life Assessment study leading to R&M works has to be similarly treated.

3.18 In view of the above, we reject the contention of the learned Counsel of the appellant as in our opinion, the Central Commission has correctly decided on this point.

4.00 To sum up, our conclusions on the four issues raised in these Appeals are as under:

a. The words 'actual expenditure incurred' contained in Regulation 17 of the Act would refer to the liabilities incurred and the same would not refer to the actual cash outflow. Since the wordings in Regulation 17 are very clear, the only rational interpretation would be that the appellant would be entitled to recover the actual capital expenditure incurred without reference to the actual cash outflow.

b. The Central Commission cannot treat depreciation as the deemed repayment of loan, where the depreciation is higher than the normative repayment of loan. The depreciation amount, unlike advance against depreciation has to be allowed regardless of whether there is any liability to repay the loan or not. The depreciation is admissible notwithstanding any loan is taken or otherwise.

c. The 'First in First out' method cannot be adopted. However, the deployment of internal resources of NTPC which is in addition to the equity contribution should be considered as a deemed loan from the NTPC to the project. NTPC is entitled to claim deemed interest on such loans during construction.

d. The cost incurred on Renovation and Modernization and Life Extension could only be allowed to be capitalized after decapitalization of the replaced assets. Mere completion of the Residual Life Assessment Studies without the timely implementation of its recommendations does not add any benefit to the plant. Any expenditure admitted by the Commission for determination of tariff on Renovation and Modernization and Life Extension shall be serviced on normative debt equity ratio after writing off the original amount of the replacement assets from the original project cost. So, the finding given by the Central Commission that the expenditure on the completed RLA Study may only be considered along with the cost incurred on R&M works after completion of the said works is perfectly justified.

4.01 The Central Commission is accordingly directed to give effect to the above conclusions, and implement these directions.

4.02 With these observations, all the appeals are disposed of.

(A.A. Khan)
Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 16th March, 2009.

REPORTABLE / NON – REPORTABLE