

**Before the Appellate Tribunal for Electricity**  
**APPELLATE JURISDICTION, NEW DELHI**

**Appeal No. 160 of 2005**

**Dated this 17<sup>th</sup> day of May, 2006**

**Present :** **Hon'ble Mr. Justice E. Padmanabhan – Judicial Member**  
**Hon'ble Mr. H. L. Bajaj – Technical member**

**DPSC** **... Appellant**

**Versus**

**West Bengal Electricity Regulatory Commission** **...Respondent**

Counsel for the Appellant : Dr. S. Chakraborty, Advocate with  
Mr. A.Chowdhuri, Head (F&C),  
DPSC Ltd.

Counsel for the Respondent : Mr. Pratik Dhar, Advocate and  
Mr. C. K.Rai, Advocate along with  
Mr. Anirban Guha (Director Eng.),  
WBERC

**JUDGEMENT**

The present appeal has been preferred by the appellant above named, challenging the tariff order dated 03<sup>rd</sup> June, 2004 passed by West Bengal Electricity Regulatory Commission in Case No. T.P.10 of 2002-03 and T.P. 15 of 2003-04 and Order dated 22<sup>nd</sup> August, 2005 passed in Case No. TP(R)9/2004-05 in the tariff application of DPSC Ltd. passed under Section 62(1) read with Section 185 of The Electricity Act 2003 for the years 2003-04 and 2004-05.

2. The grievances agitated by the appellant in this appeal are :
- (i) Disallowance of depreciation charge on new 10 MW DG set at Chinakuri (New) Power Station
  - (ii) Fixation of coal consumer rate at CPS determined for 2003-04 and 2004-05 and fixation of heat rate therein

- (iii) Disallowance of estimated Income tax liability as special appropriation
- (iv) Disallowance of interest and finance charges for the year 2003-04 and 2004-05
- (v) Disallowance of appreciation of interest and finance charges on cash credit and
- (vi) Disallowance of claim towards special appropriation on account of under / over realization of penalties and incentives.

3. The learned counsel for the appellant with respect to above six aspects advanced his contention during hearing and also filed written submissions. Per contra, Mr. Pratik Dhar, advocate appearing for the Regulatory Commission, contended that the contentions advanced in respect of all the six aspects by the appellant, no interference is called for with respect to tariff order. Learned Counsel for the respondent also contended that in the present appeal the appellant shall not be allowed to re-open the entire matter or other matters which has reached finality, as no appeal has been filed initially against the tariff order and the appeal being preferred against the review order, the present appeal has to be confined to the grounds raised in the review petition alone. In this respect, the learned counsel for the respondent relied upon the pronouncement of Supreme Court in Rekha Mukherjee Vs Ashish Kumar Das and Others, reported in 2005 (Vol.-III) Supreme Court Case 427.

4. The points that arise for consideration in this appeal are :

- I. Whether disallowance of depreciation charge on new 10 MW generating set installed at Chinakuri Power Station for the year 2003-04 is illegal and liable to be interfered ?
- II. Whether the coal consumer rate at Chinakuri Power Station as determined by the Regulatory Commission for the year 2003-04

and 2004-05 is liable to be interfered ? Whether heat rate of Thermal Unit is liable to be revised based upon the computation by CEA test results from the actual performance test ?

- III. Whether disallowance of estimated income tax liability as special appropriation by the Regulatory Commission is in order or liable to be interfered ?
- IV. Whether the disallowance of interest and finance charges for the years 2003-04 and 2004-05 on cash credit availed is illegal and liable to be interfered ?
- V. Whether disallowance of claim made by the appellant for such appropriation of accounts over and under realization of penalty and incentives is illegal and liable to be interfered ?
- VI. Whether the preliminary objection raised by the respondent that the appeal is barred by limitations deserves to be sustained ?

5. On the above points the counsel on either side submitted detailed arguments besides submitting Written Arguments after the conclusion of hearing. We shall first take up the last of the point's, namely preliminary objection raised by the respondent. According to the learned counsel appearing for the respondent the appeal is barred by limitation and consequently appeal is liable to be dismissed summarily.

6. The tariff order was passed on 03<sup>rd</sup> June, 2004. The appellant submitted Review Application in time before the Regulatory Commission in terms of Section 94 (1) (f) of The Act. The review petition was entertained and was disposed of on 22.08.2005. The tariff order was passed on 03.06.04 for the financial year 2003-04 and 2004-05. There after the review petition was moved by the appellant which was disposed of by the Commission by its order dated 22.08.05. The present appeal has been filed on 05.10.05. The appeal was admitted on 08<sup>th</sup> November, 2005. The learned counsel for the appellant contended the appeal is not barred by limitation, while placing reliance on the pronouncement of the

Supreme Court in Sushil Kumar Vs. State of Bihar reported in (1975) 1 SCC, 774. The said pronouncement of Supreme Court has been approved in Rekha Mukherjee Vs Ashish Kumar Das reported in (2005) 3 SCC 427. In Rekha Mukherjee Vs Ashish Kumar Das and others the Hon'ble Supreme Court held thus :

“ The suit filed by the respondents for grant of specific performance of contract was dismissed. The said decree although was appealable but in view of the order dated 15.07.2002, the said decree in its entirety ceased to operate. Order 47 Rule 1 CPC postulates filing of an application by a person considering himself aggrieved, by a decree or order from which an appeal is allowed but from which no appeal has been preferred, to file an application if he desires to obtain a review from a decree passed against him. An appeal during the pendency of the review petition was, therefore, not maintainable. In terms of Order 47 Rule 4, the court may either reject or grant an application for review. In case a review is rejected, the order would not be appealable whereas an order granting an application may be objected to at once by an appeal from the order granting the application or in an appeal from the decree or order finally passed or made in the suit. Rule 8 of Order 47 CPC postulates that when an application for review is granted, a note thereof shall be made in the register and the court may at once rehear the case or make such order in regard to the rehearing as it thinks fit.”

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“28. In Sushil Kumar Sen Mathew, J. considered the effect of allowing an application for review of a decree holding that the same would amount to vacating the decree passed, stating: (SCC pp. 776-77, paras 2-3)

“2. It is well settled that the effect of allowing an application for review of a decree is to vacate the decree passed. The decree that is subsequently passed on review, whether it modifies, reverses or confirms the decree originally passed, is a new decree superseding the original one (see Nibaran Chandra Sikdar v. Abdul Hakim, Kanhaiya Lal v. Baldeo Prasad, Brijbasi Lal v. Salig Ram and Pyari Mohan Kundu v. Kalu Khan.”

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7. Concedingly, the review application has been filed within limitation and when the review is pending, as held by the Supreme Court, no appeal is maintainable. After the disposal of the review application the present appeal is preferred. Since it is a merger of the original order with the review order, as rightly pointed out by the learned counsel for the

appellant, the present appeal has been preferred within time. In the case on hand objections raised by the learned counsel for the respondent is devoid of merits. While following the above pronouncements of Hon'ble Supreme Court, we over rule the preliminary objection raised by the learned counsel for respondent. The point No. VI is answered against respondent.

8. Nextly, we take up the first point for consideration. On 31<sup>st</sup> December, 2002 the appellant filed a tariff petition for the year 2003-04. On December 31, 2003 tariff petition for the year 2004-05 was also filed. On 03<sup>rd</sup> June, 2004 tariff order was passed for the years 2003-04 & 2004-05 by the Regulatory Commission. In the tariff order, the appellant claim for deduction of Rs. 178.96 lac towards depreciation was disallowed from the total depreciation claimed for the year 2003-04, on the sole ground that the new generating set was not in commercial operation during 2002-03 and it was only on trial run during February 2003. The review sought for in this respect stands rejected. In this respect apparently it is clear that the Regulatory Commission has proceeded on a factual misconception and its order proceeds on a wrong premises. The Regulatory Commission proceeded as if actual generation from the new unit was 0.97 MU during February and March 2003, which means according to the Commission it is only a trial run and commercial generation, if any, could have started only during 2003-04. It is claimed that the 10 MW DG Set was commercially operated from February 2003 as seen from the letter of Bharat Heavy Electrical Limited, which was the turn key contractor for the said 10 MW DG Set. In this respect the learned counsel rightly placed reliance upon a certificate issued by BHEL.

9. The certificate issued by BHEL goes to show completion of trial run of the new generator, which has been reported by BHEL, and commercial operation started before the crucial date. The said certificate is extracted for ready reference :

**BHARAT HEAVY ELECTRICALS LIMITED**  
( A Govt. of India Undertaking )

**“REF : PSER:CHK:SOZ:101**

**DT: 02.03.2003**

To,

The Additional Chief Engineer  
Dishergarh Power Supply CO. Ltd.  
Chinakuri Power Station  
P.O. Sunderchak, Distt. – Burdwan (713 360)

Dear Sir,

Sub : Completion of “Trial Run” operation of 1x10 MW  
Chinakuri Extension project.

We are pleased to intimate you that we have successfully completed the “Trial Operation” of STG package supplied by BHEL for 1x10 MW Chinakuri extension project. The machine has been running at maximum available load without any interruption since 15.00 hours on 26.02.2003 and the machine has been running at “Full Load” since 18.10 hrs on 27.02.2003. It has thus completed 72 hours of operation at full load without any interruption.

We request you therefore now to please arrange for provisional taking over of the machine.

Thanking you and assuring you our best services always.

Yours Faithfully

(L. N. Mishra )  
DGM & Site I/C”

10. The contents of Annexure 12.3.2, extracted in the tariff order has already been accepted by Commission, and it would show that Chinakuri new unit was in actual generation ever during the year 2002-03 and its generation was in the order of 5.16 MU. The commercial operation of Chinakuri unit generation has been accepted by the Commission in its FPPCA order dated 27<sup>th</sup> August, 2004 for the year 2002-03. In the said order, the generation by the said new unit has been included and taken

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for all purposes. According to the existing rules, depreciation is to be allowed for the year 2003-04 as trial run of the unit was completed on 26.02.03 and the unit has been running on full load on and after 26.02.03, after 72 hours of operation at full load. The view that depreciation could very well be allowed in the next year is not a valid reason nor the reason that at any rate depreciation for the fixed number of years will be the rule is acceptable as it is for the appellant to set off depreciation as per its financial plan. It follows that the disallowance of depreciation amounting to Rs. 178.96 lacs cannot be sustained and we direct the Commission to allow Rs. 178.96 lacs, in addition to the depreciation amount already allowed for the year in question. First point is answered accordingly.

11. As regards the second point the Commission took note of the projected consumption of coal and heat rates for old and new stations at 0.73 kg/kwh;3962 kcal per kwh. While recording the finding that the said projection is on the higher side and while pointing out that there is scope to improve the station heat rate by taking appropriate measures. The Commission allowed a specific consumption of coal and corresponding heat rate as detailed hereunder for Chinakuri (old and new) at 0.661 kg/kwh;3703 kcal/kwh :

“Dishergarh	:	0.988 kg/kwh ; 5532 kcal / kwh
Chinakuri (old & new)	:	0.661 kg / kwh ; 3703 kcal / kwh
Seebpore	:	1.25 kg / kwh ; 6999 kcal / kwh”

12. The Commission adopted the previous year’s level. Challenging the same, the present appeal is being preferred. The appellant contended that station heat rates set out in the table by it are in line with the recommendations by Central Electricity Authority. The Commission took note of the fact that an expert committee has been appointed by it to work out the heat rate and other parameters of various thermal stations located

in West Bengal, yet the report of the committee is being studied and the same is yet to be considered. In that view the Commission adopted previous years heat rate as the level for the year in question. For the year 2005-06 Commission has accepted the reports placed before it. Though the reports were available with the Commission at the relevant point of time, there is no reason to deny identical treatment for the appellant for the years in question. When the report is available the Commission could have considered the same and arrived at the heat rate of the power station. The Respondents' contention that such an appropriation has resulted in artificial load of coal consumption of the station to an unrealistic level is not acceptable. The test results, computed by CEA from the actual performance test, has already been placed before the Commission. It is not correct to state that no new disclosures were made warranting a change in parameters. While the Commission has pointed out that appellant had submitted reports by CEA, which had made recommendations on station heat rates and actual consumption rates. When the said Report of CEA is adopted for year 2005-06 there is no reason or rhyme to treat the appellant differently for the years 2003-04 & 2004-05. While sustaining the contentions advanced by the appellant, we hold that the claim under this head merits acceptance. There is justification in this claim. We direct the Regulatory Commission to adopt the same heat rate which has been accepted for the year 2005-06 as set out in its tariff order dated 29<sup>th</sup> March, 2005 and adopt the same station heat rate for 2003-04 and 2004-05 as well. We direct the Regulatory Commission to accordingly modify its directions while undertaking truing up exercise and give the benefit to appellant for the said two years.

13. Taking up the third point for consideration, namely disallowance of estimated income tax liability by way of special appropriation, we hold that the Commission had rightly taken a view that appropriation has to be on the basis of actual tax liability and not against provisions made in this respect. At the same time Commission had indicated that actual income



tax liability as and when the assessment is completed, could be adjusted under that head, while holding that Commission will allow actual income tax paid. The Commission has also indicated that as and when the tax liability is finalized it could be taken into consideration while undertaking truing up exercise. During the hearing the learned counsel for the appellant is unable to answer as to whether Income Tax assessment proceedings have been concluded or not? Therefore, it will not be proper at this stage to direct appropriation of or absorption of tax as estimated by appellant. However, as and when the assessment proceedings are completed there could be appropriation. We see no reasons to interfere with the order of Commission in this respect and we hold that no case has been made out by the appellant to interfere in this respect.

14. Taking up the fourth point for consideration, we do find that the Commission has not at all considered this point in its review order but has just made a reference without deciding the issue. As regards the interest and finance charges, the appellant projected its claim at Rs.188.05 lacs under three different headings and furnished the break up figures. The Commission has allowed 12% interest on the projected amounts of term loan of Rs. 1000 lacs. The Commission has declined to allow interest on cash credit and directed the appellant to adopt better cash management and to avoid borrowing of cash credit at higher interest rate. The Commission has also pointed out that the appellant had a cash credit of Rs.399.56 lacs as on 31.03.02 and bank balance of Rs. 362.60 lacs as on 31.03.02. In its review the appellant has pointed out the requirement of cash credit consequent to withdrawal of security deposits by innumerable consumers, by substituting it with bank guarantee, as per the WBERC miscellaneous provisions. This has resulted in consequent reduction in cash flow and liquidity crunch developed automatically. The Commission has not considered the claims made in the review petition, as seen from its review order. Even in the review petition also the Regulatory Commission has not considered the points /

contentions advanced in the review petition which has a bearing on the issue. However, on a consideration of entire matter it would be appropriate to direct the Commission to examine the point afresh while undertaking trueing up exercise and it is needless to issue a direction to consider the claim accordingly. The point is answered accordingly.

15. Taking up the fifth point, namely appropriation of accounts over and under realization of penalty and incentives, the Commission has directed that any over realization or under realization will be taken care of in the next tariff petition and utility was to keep a separate account for this. The appellant has sought for adjustment of over realization and under realization of penalty and incentives at Rs. 540.02 lacs as estimated by it. We do not find any reference or consideration in the review petition in this behalf. However, we do not find any error apparent on the face of the record as on this point as the failure to consider or advert this aspect will not affect or prejudice the appellant as Commission has directed the said appropriation be undertaken during the next tariff petition. We do not find any illegality or error warranting interference in this respect. Therefore the fifth point is answered against the appellant.

16. In the result the appeal is allowed in part as indicated above. The points, 1 & 2 are answered in favour of appellant and points 3, 4 & 5 are ordered accordingly as set out above. We have already answered point 6 against respondent and over ruling the preliminary objections raised in this appeal.

Pronounced in open court on this 17<sup>th</sup> day of May 2006.

**(Mr. H. L. Bajaj)**  
**Technical Member**

**(Mr. Justice E Padmanabhan)**  
**Judicial Member**

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