

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 64 of 2010

Dated: 18th July, 2011

**Present: Hon'ble Mr. Justice M. Karpaga
Vinayagam, Chairperson
Hon'ble Mr. V J Talwar, Technical Member,**

IN THE MATTER OF

NTPC Ltd.

... Appellant

Versus

**C.E.R.C & Ors.
....Respondent(s)**

**Counsel for Appellant(s): Mr.M.G Ramachandran,
Mr.Anand K. Ganesan,
Ms. Sneha Venkataramani,**

**Counsel for Respondent(s):Mr. Pradeep Misra,
Mr. Manoj Kr. Sharma**

JUDGMENT

1. The following issues have been raised by the Appellant in this Appeal:

(i) Exclusion of part of the capital expenditure validly incurred but pending actual disbursement/payment from the capital cost for the purpose of tariff;

(ii) Equating Depreciation with normative loan repayment;

(iii) Disallowance of cost of Maintenance Spares;

(iv) Disallowance of interest during construction;

(v) Disallowance of cost of capitalized spares applying the principles of cut-off date;

(vi) Opening capital cost on 1.4.2004;

(vii) Non-consideration of inter-unit transfers

2. According to the Learned Counsel for the Appellant the issue No.1 namely exclusion of the part of the Capital Expenditure validly incurred, has already been decided in favour of the Appellant by the judgement of this Tribunal in Appeals No.133, 135 etc of 2008 NTPC v. CERC & Ors. 2009 ELR (APTEL) 337 and Appeal

No.151 & 152 of 2007 NTPC v. CERC & Ors. 2008 ELR (APTEL 916.

3. With regard to the issue No.2, namely equating depreciation with normative loan repayment, it is pointed out that this issue has also been covered and decided in favour of the Appellant by the judgement of this Tribunal in Appeal No. No.133, 135 etc of 2008 NTPC v. CERC & Ors. 2009 ELR (APTEL) 337 and Appeal No.139 & 140 of 2006 NTPC v. CERC & Ors. 2009 ELR (APTEL) 337.

4. The Appellant has also brought to our notice with regard to third issue namely disallowance of cost of maintenance spares. This issue has been decided in favour of the Appellant in Appeal No.139, 140 etc of 2006 NTPC v. CERC & Ors. 2009 ELR (APTEL) 337 and

Appeal No.54 of 2009 NTPC v. CERC & Ors 2009 ELR (APTEL) 705.

5. With regard to 4th issue, namely disallowance of interest during construction, the Appellant stated that the issue has also been covered in favour of the Appellant in judgement given as below:

- (a) Appeals No.133, 135 etc of 2008 NTPC v.CERC & Ors. 2009 ELR (APTEL) 337
- (b) Appeal No.151 & 152 of 2007 NTPC v. CERC & Ors. 2008 ELR (APTEL) 916.

6. The next issue is disallowance of cost of capitalized spares applying the principle of cut-off date. It is pointed out that this issue also has been covered and decided in favour of the Appellant in the following judgements:

(a) Appeals No.66 of 2008 NTPC v.CERC & Ors.
2010 ELR (APTEL) 1096

(b) Appeal No.92 of 2010 NTPC v. CERC

7. With regard to the next issue namely Opening capital cost on 1.4.2004, it is submitted that the consequential relief on the basis of the first issue to be decided in favour of the Appellant with regard to un-discharged liability.

8. The last issue is non-consideration of inter-unit transfers. This is new issue which needs to be considered.

9. In regard to all the issues, we have heard the Learned Counsel for the parties. The Learned Counsel for the Appellant would submit that in respect of the issues 1 to 6 this Tribunal already decided in favour of the Appellant and therefore, a similar order may be

passed. On the other hand, it is submitted by the Learned Counsel for the Respondent in respect of these issues already the Appeal has been filed before the Hon'ble Supreme Court which is pending and these issues cannot be pressed before this Tribunal in view of the undertaking given by the Appellant before the Hon'ble Supreme Court to the effect that above issues would not be pressed for fresh determination.

10. On the other hand, the Learned Counsel for the Appellant would bring to our notice the judgement of Hon'ble Supreme Court in Sree Chamundi Mopeds Ltd v. Church of South India Trust Association Madras (1992) 3 SCC 1 in which it has been held that mere undertaking given by the parties and even on the stay of the order of this Tribunal in the earlier case do not render the decision of this Tribunal non est or non effective and the decision would continue to operate as a binding

precedent till the decision is set aside in the second Appeal by the Supreme Court.

11. The Learned Counsel for the Appellant cited the judgement of this Tribunal in Appeal No. 92 of 2010 dated 4.2.2011 reported in 2011 ELR (APTEL) 224 and contended that these issues have been considered and the findings has been rendered in favour of the Appellant on the basis of the earlier judgement of this Tribunal.

12. We have gone through the judgement of the Hon'ble Supreme Court as well as the judgement of this Tribunal reported in 2011 ELR (APTEL) 224 and in the light of the view taken by us earlier, we are unable to accept the contention urged by this Respondent. Therefore, this Appeal is allowed in respect of above issues No. 1 to 6 in terms of the judgement referred above.

13. The next issue which is a fresh issue is non consideration of inter unit transfers. In respect of this issue the submissions made by the Appellant is as follows.

14. The Central Commission has disallowed additional capitalization of items brought from other stations and capitalized at the Talcher Station for the purposes of tariff. An amount of Rs.2,12,60,157 was capitalized at Talcher Station during the period from 1.11.2004 to 31.3.2005 with regard to Inter Unit Transfer of LOCO from Faraka Super Thermal power Station to Talcher Station. The Central Commission has also disallowed the capitalization amount of Rs.8,47,77,932 with regard to "diversion of LOCOs from Barh Super Thermal power Project" another station during the period 1.4.2007 to 31.3.2008. The Central Commission disallowed this

item at both the stations namely, at the Faraka Station as well as Barh Station through its order dated 22.7.2008 on the ground that the same has been transferred to other station. In the impugned order, the Central Commission has disallowed the capitalization of the same item relating to Talcher Station as such there is double jeopardy to the Appellant.

15. Further, capitalized items were brought directly from manufacturer works to Talcher Station and as such this item did not get any depreciation with regard to the issue and subsequently the amount transferred as inter unit transfer. As such, the Central Commission ought to have accepted the submissions and allowed the capitalization of the LOCO.

16. In regard to this aspect, the Central Commission has dealt with the same and passed the following orders rejecting the said claim. The findings are as follows:

"12. The claim of the Petitioner in respect of inter-unit transfer of various items (both positive and negative) is annexed to this Order. The petitioner has several generating stations and inter-unit transfer of assets occur at frequent intervals. In the books of account, inter-unit transfers are effected by the Petitioner by de-capitalization of asset at the sending generating station and capitalization at the receiving station. The Commission in its various orders pertaining to additional capitalization petitions of the petitioner has consistently taken a view that inter-unit transfers would not be considered in tariff as it results in frequent revision of tariff at both the generating stations and subsequent adjustments in depreciation and other factors of tariff at both the generating stations. In view of this, the positive and negative entries arising out on inter-unit transfers have been ignored for the purpose of tariff".

17. The view taken by the Central Commission that the inter unit transfers would not be considered in tariff as it results in frequent revision of tariff at both the

generating stations and other factors of tariff at both the generating stations, in our view is perfectly justified.

18. Therefore, the submissions on this issue made by the Learned Counsel for the Appellant do not merit consideration. Therefore the claim on this issue is rejected. As indicated above, issue No.1 to 6 is allowed and Issue No.7 is rejected.

19. The Appeal is partly allowed. No order as to cost.

(V J Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 18th July, 2011

REPORTABLE/NON-REPORTABLE