

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

Appeal No. 39 of 2010

Dated: 21st October, 2011

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member**

In the matter of:

**Jaiprakash Hydro Power Ltd. (JHPL),
(now known as Jaiprakash Power Ventures Ltd.) (JPVL)
JUIT Complex, Wagnaghat,
P.O. Dumehar Bani, Kandaghat-173215.
Distt. Solan (H.P.)**

... Appellant

Versus

**1. Himachal Pradesh State
Electricity Regulatory Commission
Keonthal Commercial Complex,
Khalini, Shimla-02.**

**2. H.P. State Electricity Board,
Vidyut Bhawan, Shimla-171 004**

... Respondents

Counsel for the Appellant(s):

Mr. Jayesh Gaurav,
Mr. Pawan Upadhyay
Mr. A.B. Chaugh
Mr. Param Kumar Mishra
Mr. S.B. Upadhyay

Counsel for the Respondent(s):

Mr. R.K. Mehta
Mr. Antarayam Upadhyay
Mr. S. Lakhi Singh &
Mr. David A for R-2

JUDGMENT

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

1. This appeal has been filed by Jaiprakash Power Ventures Ltd., a generating company, challenging the Multi Year Tariff Order dated 30.3.2009 passed by the Himachal Pradesh Electricity Regulatory Commission ('State Commission') for the period FY 2008 -09 to FY 2010-11 and true up of financials for the period 2003-04 to 2007-08 for the appellant's hydro power station and the review order dated 10.09.2009.

2. The appellant is a generating company which has set up Baspa-II Hydro Electric Power Station with an installed capacity of 300 MW. The State Commission is the 1st respondent. The HP State Electricity Board ('Electricity Board') is the 2nd respondent.

3. The brief facts of the case are as under:

3.1. An MOU was signed between the Holding Company of the appellant and Government of Himachal Pradesh on 23.11.1991 for implementation of 300 MW Baspa-II Hydro Electric Power Project. This was followed by Implementation Agreement which was signed on 1.10.1992.

3.2. On 4.6.1997 a Power Purchase Agreement ('PPA') was signed between the appellant and the respondent no. 2 for sale of power from Baspa-II Power Project. The appellant's power project was exempt from payment of Income Tax for a period of ten years under Section 80-IA of Income Tax Act, 1961. The PPA also provided for payment of income tax on the income to company on account of Return on Equity (ROE), depreciation/ advance depreciation, as applicable and

50 % of income on account of incentive, by the respondent no. 2.

3.3. The Power Project of the appellant achieved commercial operation on 8.6.2003. On 21.11.2005 the appellant submitted an application to the State Commission for determination of tariff for sale of power from its Baspa-II hydro project to the respondent no. 2. On 24.2.2007 the State Commission issued the tariff order determining the tariff for Baspa-II for the period FY 2003-04 to FY 2007-08. Subsequently the appellant and the respondent no. 2 filed review petitions seeking review of the State Commission's order. The State Commission passed the review order on 7.2.2008 in which the State Commission stated that it would inter alia review the trueing up of tax on income on

presentation of case by the appellant supported by documentary proof.

3.4. On 30.11.2007 the appellant filed Multi Year Tariff (MYT) application with the State Commission for determination of tariff for the period FY 2008-09 to FY 2010-11. The State Commission issued MYT order dated 30.3.2009 for the period FY 2008-09 to FY 2010-11 and true up of the financials for the period FY 2003-04 to FY 2007-08. In this order the State Commission decided reimbursement of income tax to be computed on the ROE, applicable depreciation and 50% of income on account of incentive for higher plant availability and secondary energy.

3.5. The appellant filed review applications seeking review of the order on 30.3.2009. The appellant contended in the review petition that its company is

entitled to reimbursement of MAT calculated on book profit. The State Commission passed the review order on 10.09.2009 in which the State Commission only rectified some errors and mistakes in the order dated 30.3.2009. However, the State Commission rejected the contention of the appellant to allow reimbursement of MAT on the book profit of the appellant. Aggrieved by the review order dated 10.9.2009 read with the MYT tariff order dated 30.3.2009, the appellant has filed this appeal.

4. The only issue which has been raised by the appellant in this appeal is relating to reimbursement of Minimum Alternate Tax (MAT) on the book profit of the appellant as a result of change in law.

5. The appellant has made the following contentions in support of its case.

5.1 The PPA was signed on 4.6.1997. At that time Baspa-II Hydro-Electric Project was exempt from payment of Income Tax, for a period of ten years from Commercial Operation Date ('COD') under Section 80- IA of the Income Tax Act, 1961.

5.2 While negotiating the PPA, the appellant agreed to 50% rebate in respect of incentives in payment of the Income Tax keeping in view the fact that the appellant is eligible for a tax holiday for a period of ten years from date of commercial operation of the hydro project and that the debt liability would have been paid by that time.

5.3 MAT was introduced on 1.4.1988 but was withdrawn w.e.f. 1.4.1991. On 1.4.1997 MAT was reintroduced in the Income Tax Act, 1961 by insertion of Section 115 JA. However, MAT was not applicable to

Power Generating Companies till 31.3.2001. Section 115 JA was withdrawn w.e.f 1.4.2001 and MAT was reintroduced by insertion of section 115 JB in the Income Tax Act and made applicable to all corporate entities including Power Generating Companies.

5.4 The appellant commenced generation of power w.e.f 8.6.2003 and is, therefore, entitled to tax holiday from FY 2003-04 onwards for a period of ten years as per section 80-IA of the Income Tax Act.

5.5 The State Commission passed the first tariff order on 24.2.2007, for the period FY 2003-04 to FY 2005-06 and allowed reimbursement of MAT at actual for the FY 2003-04 and the FY 2004-05 and on estimation basis for the FY 2005 -06. The said tariff order was not challenged and has since attained

finality. The State Commission could not change its position in the true up order.

5.6 However, the State Commission in the MYT order dated 30.3.2009 for the period FY 2008-09 to FY 2010-11 while truing up the tariff from FY 2003- 04 to FY 2005- 06 has wrongly reversed its own decision and denied full reimbursement of MAT at actuals taking shelter under 8.11.1 of the PPA and restricted the entitlement of the appellant only on account of :

- (i) ROE (16%)
- (ii) Depreciation (as applicable)
- (iii) 50% of income on incentive for higher plant availability and secondary energy charges.

Thus, the State Commission has frustrated the provisions of section 80-IA of the Income Tax Act and

has put the appellant in a disadvantageous position than what was envisaged under the PPA by wrongly applying the provisions of clause 8.11. Clause 8.11 will be applicable only after the tax holiday period.

5.7 The subsequent amendment or introduction of Section 115 JB of the Income Tax Act by the legislature to levy MAT on the generating companies with effect from 1.4.2001 squarely falls under clause 20. 21 of PPA regarding change in law.

6. The respondent no. 2 on the above issues has made the following submissions:

6.1. The definition of 'law' in the PPA does not include any "amendment of existing law". Thus, re-introduction of MAT with effect from 1.4.2001 by insertion of Section 115 JB in the Income Tax Act,

1961 is not covered by the definition of “change in law” under sub-clause (b) of clause 20.21 of the PPA.

6.2. Once MAT which is in nature of Income Tax is imposed, the same has to be governed by clause 8.11.1 of the PPA.

6.3. In its order dated 24.2.2007 the State Commission had allowed the claim of the appellant without any consideration of the provisions of the PPA and the relevant provisions of the Income Tax Act. However, in the Review Order dated 7.2.2008, the issue of MAT was specifically left open. The issue of MAT was considered and decided on merits for the first time in the order dated 30.3.2009. Thus the submission of the appellant that the State Commission had rightly interpreted clauses of the PPA and had allowed MAT to be passed through in full in the order

dated 24.2.2007 and that the said decision has been reversed in the truing up proceeding is misconceived and untenable.

7. On the above issues Shri S.B. Upadhyay, learned senior counsel for the appellant made detailed submissions assailing the impugned order of the State Commission. On the other hand, Shri R.K. Mehta, learned counsel for the respondent no. 2 made submissions in support of the findings of the State Commission.

8. After considering the contentions of both the parties, the following questions would arise for our consideration:-

- i) Whether the State Commission in the impugned order while truing up the financials for the past period had reversed its earlier decision in its tariff

order dated 24.2.2007 of allowing MAT as a pass through?

- (ii) Whether the State Commission could reverse the decision taken in the earlier tariff order dated 24.2.2007 which has since attained finality, while truing up the financials in the impugned order dated 30.3.2009?
- iii) Whether insertion of Section 115 JB in the Income Tax Act, 1961 which is only an amendment to the existing Act, will be covered under the definition of 'change in law'?
- iv) Whether the appellant is entitled to payment of Minimum Alternate Tax payable as per section 115 JB of the Income Tax Act by the respondent no. 2 or such payment is to be computed on ROE (not exceeding 16%), applicable depreciation and

50% of income on account of incentive and secondary energy as per clause 8.11 of the PPA?

9. As all the four issues are interconnected we would be taking them up together.

10. Let us first examine the treatment to MAT given by the State Commission in its order dated 24.2.2007 determining the capital cost and tariff for the appellant's hydro power station. Perusal of the relevant clause 5.11 indicates that the State Commission allowed MAT as per actuals for the FY 2003-04 and FY 2004-05 and on estimated basis for FY 2005-06 to be tried up subsequently. The relevant paragraph is 5.11.2 which is reproduced below:

“5.11.2. In the above table, the actual tax paid by the applicant as per its accounts has been considered by the Commission, while the taxes for FY 2005-06 are estimated at this juncture, and require to be trued up during the subsequent filing by the applicant”.

11. The State Commission in its Review order dated 10.9.2009 has referred to relevant paragraph of its review order dated 7.2.2008 regarding tax liability of the Electricity Board (R-2). The relevant paragraph of the Review Order dated 10.9.2009 is reproduced below:

“2.29 The Commission in its order on review petition dated February 7, 2008 had said that:

.....

“3.8.2 Commission’s View

The Commission in para 5.11 of the Tariff Order has mentioned that the taxes for FY 2005-06 are estimated at this juncture, and require to be trued-up during the subsequent filing based on supporting computations provided by the petitioner. The HPSEB in its response to the review petition filed by JHPL has contended that as per Clause 8.11.1 of the PPA executed on 06.09.1997 between the Board and JHPL, the tax liability of the Board is to be determined by considering the income to JHPL on account of ROE (not exceeding 16%), Depreciation/ Advance depreciation as applicable and 50% of the income on account of incentives for secondary energy and higher plant availability. JHPL has not furnished such calculations while seeking approval of the Commission with regard to payment of actual tax paid for FY 2005-06. The Commission agrees with the viewpoint of HPSEB. The JHPL may accordingly present its case supported by documentary proof in the subsequent filing and it will be considered on merits.”

Thus, the State Commission in the review order dated 7.2.2008 decided to consider the tax liability for the FY 2005-06 on merits after the appellant filed the documentary proof in the subsequent filing.

12. The above orders indicate that the liability of the second respondent determined for FY 2003-04 and FY 2004-05 in the State Commission's order dated 24.2.2007 had attained finality but the tax liability for the FY 2005-06 was required to be re-examined and tried up.

13. Let us now examine the provisions of the PPA dated 4.6.1997 relating to Tax on Income and change in law. The relevant clauses 8.11, 20.8 and 20.21 are reproduced below:

“8.11. TAX ON INCOME

8.11.1. Tax on income in accordance with explanation given below will be payable as an

expense to the company. If any, advance tax shall be payable by the Company in any month based on income relating to the Project, the Company shall submit a tax bill to the Board at least 40 days prior to the required date of payment of such tax/advance tax by the Company reflecting the detailed calculations for such tax/advance tax. Each bill for tax/advance tax shall be supported by a certificate of the Auditors of the Company. The Board shall pay to the company an amount equal to the amount of such tax/advance tax after 30 days from the receipt of such bills or ten days prior to the last date of payment by the Company, whichever is later. After the tax assessment is completed for any tariff year/tariff period the excess/shortfall so determined will be reflected in the regular monthly bill for the Billing Month in which such assessment is completed.

Explanation:-

Income Tax payable by the Board shall be determined by considering the income to the company on account of ROE (not exceeding 16%),

depreciation/advance depreciation as applicable, and 50% of income on account of incentives as per Section 8.9 and 8.10, in respect of the project as per the Income tax law. Rebate on account of depreciation and any other rebate/exemption admissible under law shall be considered for purposes of calculation of tax liability of the Board. Under no circumstances tax liability payable by the Board shall be more than the income tax actually payable by the Company.

No Income tax shall be payable by the Board on any other income accrued to the Company.

The Company shall maintain separate record in respect of income tax liability of the Board. These shall be reconciled with the Board annually”.

“20.8. GOVERNING LAWS

This Agreement and the rights and obligations hereunder shall be interpreted, construed and governed by the laws of India as in force from time to time”.

“20.21. CHANGE IN LAW

(a) Definition of Law

For the purpose of this Agreement, “Law” means any act, rule, regulation, notification directive order of instruction having the force of law enacted or issued by any competent legislature, Government or Statutory Authority in India.

(b) Definition of Change in Law

For the purpose of this Agreement, “Change in Law” means:-

(i) any enactment and enforcement of any new law,

(ii) any amendment, alteration, modification or repeal of any existing law by a competent court, Tribunal or legislature in India which is contrary to the existing accepted interpretation thereof.

In each case coming into effect after the December 1993, and directly or indirectly affecting the parties to this Agreement in their performance of their obligation under this Agreement, and provision for

which has not been made elsewhere in the Agreement”.

14. According to clause 8.11.1 of the PPA, the income tax payable by the 2nd respondent is to be determined on the income of the company on account of ROE (not exceeding 16%), applicable depreciation and 50% of income on account of incentives. However, the tax liability of the 2nd respondent is not to exceed the income tax actually payable by the appellant. According to clause 20.8 the PPA, the rights and obligations of the parties have to be interpreted, construed and governed by the laws of the country as in force from time to time.

15. The definition of law as given in clause 20.21 (a) of the PPA covers any act, rule, regulation, notification, directives, order or instruction having the force of law

enacted or issued by any competent legislature, Government or Statutory Authority of India. The change in law includes amendment or modification of any existing law by the legislature.

16. According to learned counsel for the respondent no. 2, the definition of 'law' does not include any amendment of existing law.

17. Let us now examine if the reintroduction of MAT with effect from 1.4.2001 by insertion of Section 115 JB will be covered in the definition of change in law.

18. According to Section 80-IA of the Income Tax Act, 1961 the appellant was entitled to tax holiday for ten consecutive assessment years out of 15 years from the

date of operation. The relevant extracts of Section 80-IA are reproduced below:

“80-IA. (1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with an subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.

(2) The deduction specified in sub-section (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility.

- (4) *This section applies to*
- (iv) *an undertaking which-*
- (a) *is set up in any part of India for the generation or generation and distribution of power if it begins to generate power at any time during the period beginning on the 1st day of April, 1993 and ending on the 31st day of March, 2011”.*

Tax holiday under Section 80-IA was applicable to the appellant at the time of signing of the PPA. Section 80-IA is still in vogue. Accordingly, the appellant is availing tax holiday for 10 years beginning from the year of commercial operation of its Baspa-II Project i.e. from FY 2003-04 onwards. However, by insertion of Section 115 JB in the Income Tax Act w.e.f. 1.4.2001, the appellant and such other companies availing tax holiday under Section 80-IA are subjected to payment of MAT.

19. MAT came into force w.e.f. 1.4.1988 by introduction of Section 115J in the Income Tax Act, 1961. The legislative changes made in respect of MAT since its introduction are indicated below:

Date	Legislative changes	Applicability on Power Generating Companies
01-04-1988	Section 115J was introduced in the Income Tax Act, 1961	MAT was made applicable to all Corporate entities including Power Generating Companies.
01-04-1989	Section 115J was amended.	Power Generating Companies were exempted from MAT.
01-04-1991 to 31-03-1997	Section 115J was withdrawn from Income Tax Act, 1961	Applicability of MAT was withdrawn w.e.f. 1.4.1991
01-04-1997 to 31-03-2001	MAT was reintroduced in the Income Tax Act, 1961 by insertion of Section 115 JA.	MAT was not applicable to Power Generating Companies.
01-04-2001	Section 115JA was withdrawn. MAT was reintroduced by insertion of Section 115 JB in the Income Tax Act, 1961	MAT was made applicable to all Corporate entities including Power Generating Companies

Thus, MAT was not applicable to the appellant on the date of signing of the PPA i.e. 4.6.1997. However, MAT was made applicable to the appellant w.e.f.

1.4.2001 due to insertion of Section 115 JB in place of 115 JA.

20. The relevant extracts of Section 115 JB are reproduced below:

“115JB. (1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2001, is less than seven and one half per cent of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of (seven and one-half percent).

Every assessee, being a company, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in

accordance with the provisions of Parts II and III of the Schedule VI of the Companies Act, 1956 (1 of 1956):

Provided that while preparing the annual accounts including profit and loss account.

- (i) The accounting policies;*
- (ii) The accounting standards adopted for preparing such accounts including profit and loss account;*
- (iii) The method and rates adopted for calculating the depreciation.*

*Shall be the same as have been adopted for the purpose of preparing such accounts including profit and loss account and laid before the company at its annual general meeting in accordance with the provisions of Section 210 of the Companies Act, 1956 (1 of 1956)”.
.”.*

Thus, according to Section 115 JB(1) the appellant is subjected to MAT on the book profit derived from the profit and loss account even during the period of tax holiday under Section 80-IA i.e. 10 year period from the FY 2003-04.

21. In our opinion, the definition of law as given under clause 20.21 (a) of the PPA and change in law given in clause 20.21 (b) (ii) of the PPA would clearly establish that the amendment/modification of the Income Tax Act by insertion of Section 115 JB in place of Section 115JA by legislature squarely falls under 'change in law' covered under clause 20.21 of the PPA.

22. According to learned counsel for the respondent no. 2 since MAT was already provided in the Income Tax Act before signing of the PPA, the same cannot come under the purview of enactment or enforcement

of any new law, envisaged in sub clause (b) (i) of clause 20.21 of the PPA. Only if some tax other than Income Tax is introduced/enacted, the same will be covered under “Change in Law”. We do not agree with the contention of the learned counsel for the respondent no. 2. Even though MAT was introduced on 1.4.1997 by insertion of Section 115 JA, it was not applicable to power generating companies such as the appellant. By insertion of Section 115JB by Finance Act, 2000 w.e.f. 1.4.2001, it was made applicable to power generating companies such as the appellant. Thus, it was an amendment/modification of the existing law by the legislature which is covered under the definition of “change in law” under Section 20.21 (b) (ii) of the PPA.

23. According to learned counsel for the respondent no. 2 the appellant’s plant achieved commercial operation only in the year 2003 i.e. after MAT had

been made applicable to the appellant and, therefore, there was no change in law from the date of commercial operation of the appellant's plant.

24. We notice from Clause 20.21 (d) of the PPA that any additional expenditure or any reduction in expenditure due to change in law even prior to the date of commercial operation of the Unit-III shall also be adjusted in the capital cost of the project. Even otherwise the change in law is reckoned from the date of signing of the agreement unless the effective date is specifically indicated in the agreement. Thus, we find no substance in the argument of the learned counsel for the respondent no. 2 regarding application of change in law with respect to date of commercial operation of the appellant's plant.

25. The State Commission in the tariff order dated 30.3.2009 has determined the income tax liability of the respondent no. 2 as per clause 8.11.1 of the PPA. The relevant extracts of the tariff order are reproduced below:

“4.167. For the Petitioner, the Minimum Alternative Tax is applicable for the first 10 years from the date of commissioning.

4.168. In the Tariff Order dated 24th February, 2007, the Commission had approved the tax on income for the years FY 04 and FY 05 as per the Petitioner’s annual accounts and had estimated the taxes for FY 06. The Commission in the order had stated that the taxes shall be trued up during the subsequent tariff filing of the Petitioner.

4.169. The Commission during the course of analysis of the Petition directed the Petitioner to submit in detail the actual income tax paid during the period FY 04 to FY 08 calculated as per the Income Tax Act and in terms of the Section 8.1.1 of

the PPA. The Petitioner submitted the required details to the Commission on 11th September, 2008.

4.170. The Commission has calculated and trued up the tax liability of the Board as per the Section 8.11.1 of the PPA for the period FY 04 to FY08. The tax on income as approved by the Commission is tabulated in table below:

Trued up Tax on Income for the Period FY04 to FY08 (Rs. Crs.)

<i>Particulars</i>	<i>Past Tariff Order</i>					<i>True Up</i>				
	<i>FY04</i>	<i>FY05</i>	<i>FY06</i>	<i>FY07</i>	<i>FY08</i>	<i>FY04</i>	<i>FY05</i>	<i>FY06</i>	<i>FY07</i>	<i>FY08</i>
	4.98	4.39	7.10	-	-	4.21	5.52	5.92	9.09	7.97

We find that in the tariff order dated 24.2.2007, the State Commission had allowed the MAT as per actuals for the FY 2003-04 and FY 2004-05 and for FY 2005-06 the tax was estimated. The State Commission had only decided to true up the tax expenses for the FY 2005-06 only. However, in the impugned order the State Commission has again re-determined and trued up the tax expenses as per

clause 8.11.1 for the FY 2003-04 and the FY 2004-05 which had already been decided earlier in the tariff order dated 24.2.2007 and had attained finality.

26. In the review order dated 10.9.2009, the State Commission has held as under:

“2.28. JHPL has submitted that the Commission in its Tariff Order dated February 24, 2007 had allowed MAT at actuals in accordance with article 20.21-change in law- of the PPA. However, in its Tariff Order dated March 30,2009, the Commission has erroneously computed MAT as per income tax as per article 8.11.1 of the PPA, which provides for payment of tax on income”.

“2.32. Since MAT is in the nature of tax on income, it has to be allowed in tariff, subject to limitation/guidelines provided in PPA.

2.33. From the above, it is clear that the Board is liable to pay income tax at the applicable income tax rate only for the above mentioned parameters and the Commission has not made any mistake. The Commission rejects the applicant's contention on this point".

Thus, the State Commission has held that the MAT is in the nature of tax on income and has to be dealt with as per clause 8.11.1 of the PPA. However, the State Commission did not examine the aspect of 'change in law' which was raised by the appellant.

27. The learned counsel for the respondent no. 2 has stated that since specific provision for Income Tax has been made under clause 8.11, the provision relating to change in law under clause 20.21 will not be applicable in the present case.

28. Section 115 JA was introduced in the Income Tax Act on 1.4.1997 by which MAT was reintroduced. However, MAT was not applicable to Power Generating Companies such as the appellant in terms of Section 115JA (2)(iv). Section 115 JB was introduced in the Income Tax Act, 1961 under which MAT was made applicable on Power Generating Companies w.e.f. 1.4.2001. This change falls within the definition of 'change in law' as discussed above. The appellant is also eligible to the benefit of tax holiday under Section 81-IA under which the appellant is exempt from payment of income tax for a period of 10 years from the date of commercial operation of Baspa-II Hydro Project i.e. w.e.f. FY 2003-04. On conjoint reading of the provisions of the PPA and the Sections 80-IA, 115 JA and 115 JB of the Income Tax Act, 1961 we would conclude that the appellant is entitled to

reimbursement of MAT under clause 20.21 of the PPA as per actual payment during the tax holiday period of 10 years. After the expiry of the tax holiday period, the appellant will be entitled to reimbursement of Income Tax as per clause 8.11 of the PPA.

29. Even though MAT is tax on income, the method of determination of MAT is different from the normal corporate tax applicable to the company. While the normal corporate tax is computed to arrive at the taxable profit, MAT is chargeable on the book profit as determined from profit and loss account of the company under Section 115 JB of the Income Tax Act. We find that the State Commission in its tariff order and the review order has not gone into the aspect of 'change in law' due to introduction of Section 115 JB in Income Tax Act and has decided the issue only on

the basis that MAT is tax on income even though the appellant had specifically raised the issue of change in law before the State Commission. We have drawn a different conclusion on conjoint reading of the clause 8.11, 20.8 and 20.21 of the PPA and Sections 80-IA, 115 JA and 115 JB of the Income Tax Act.

30. Learned counsel for the respondent no. 2 has relied on the following judgments of the Hon'ble Supreme Court to establish that MAT is in the nature of Income Tax and therefore, the same has to be governed by clause 8.11.1 of the PPA:

- i) Ajanta Pharma Ltd. vs. Commissioner of Income Tax- (2010) 9 SCC 455;
- ii) Indo Rama Synthetics India Ltd. vs. Commissioner of Income Tax- (2011) 2 SCC 168.

In (2010) 9 SCC 455 the Hon'ble Supreme Court

has held as under:

“As stated earlier Section 115 JB is a self-contained code. It taxes deemed income”.

In the decision reported in (2011) 2 SCC 168 the respondent no. 2 has relied on paragraph 9 of the judgment, the relevant extracts of which are reproduced below:

“9. MAT was introduced by the Finance Act of 1996 w.e.f. 01.04.1997. This was necessary due to a rise in the number of Zero-tax companies paying marginal tax which situation arose in view of preferences granted in the form of exemption, deductions and high rates of depreciation. The rate of minimum tax was kept at 30% of the book profit as deemed total income.”

In our opinion, the findings in the above judgments are not relevant in the present case in view of the provisions of the PPA relating to Governing Laws (Clause 20.8) and change in law (Clause 20.21).

31. The learned counsel for the appellant has referred to findings of the Hon'ble Supreme Court in the decision reported in 1966(2) SCR 828 in which it was held that "the true effect of transaction may be determined from the terms of the agreement considered in the light of the surrounding circumstances". Accordingly, we have decided the issue in terms of the PPA entered into between the appellant and the respondent no. 2.

32. In view of above we decide the issue in favour of the appellant.

33. Summary of our findings:

- i) The definition of 'law' and 'change in law' as per the PPA would clearly establish that the amendment of Income Tax Act, 1961 by introduction of Section 115 JB by legislature squarely falls under the definition of change in law under clause 20.21 of the PPA.**

- ii) The appellant is entitled to payment of MAT by the respondent no. 2 under clause 20.21 of the PPA as per actuals during the tax holiday period available to the appellant under Section 80-IA of the Income Tax Act, 1961. After the expiry of the tax holiday period, the appellant will**

**be entitled to payment of Tax on Income
as per clause 8.11 of the PPA.**

34. In view of above, the appeal is allowed and the impugned tariff order and the review order are set aside to the extent indicated above. No order as to costs.

35. Pronounced in the open court on this
21st day of October, 2011.

**(Justice P.S. Datta)
Judicial Member**

**(Rakesh Nath)
Technical Member**

REPORTABLE / NON-REPORTABLE

vs