APPELLATE TRIBUNAL FOR ELECTRICITY
(APPELLATE JURISDICTION)

Appeal No. 49 of 2010

Dated: 10th September, 2010

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

Appeal No. 49 of 2010

In the matter of:

Tamil Nadu Electricity Board
144, Anna Salai
Chennai-600 002

Appellant

Versus

1. **Neyveli Lignite Corporation Limited**
Neyveli House
135- E.V.R., Periyar Road
Kilpauk
Chennai-600 010

… Respondent-1

2. **Central Electricity Regulatory Commission**
3rd and 4th Floor, Chanderlok Building
36 Janpath,
New Delhi-110 001

… Respondent-2

Counsel for the Appellant(s)	**Mr. Parvin H. Parekh, Sr. Adv. with Ms. Shakun Sharma Mr. Kumar Shashank & Mr. Ashish Vaid with Mr. Basha & Ms. Maheshwari Bai (Rep.)**
Counsel for the Respondent(s)	**Mr. N.A.K. Sharma, Sr. Adv with Ms. Raji Joseph & Mr. R. Suresh (Rep-1) for NLC**

JUDGMENT

AS PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. Tamil Nadu Electricity Board (TNEB) is the Appellant herein. Neyveli Lignite Corporation (NLC) is the 1st Respondent. Central Electricity Regulatory Commission (Central Commission) is the 2nd Respondent.

2. The Appellant has filed this Appeal challenging the order dated 07.01.2010 passed by the Central Commission in the Petition No. 163/08 filed by the NLC, the Ist respondent herein

allowing their prayer seeking for the refund of the excess rebate availed by the Appellant and praying for reimbursement of the Income-tax by the Electricity Board to NLC. To understand the core of controversy of this case, it is better to refer to the relevant facts. They are as follows.

3. The Appellant Electricity Board (TNEB) is the Distribution Licensee. The Ist Respondent NLC is owning generating stations at Neyveli. There were several agreements between them for the purchase and supply of Power. The Ist agreement was in the year 1999. On 18.02.1999, Bulk Power Supply Agreement (BPSA) was entered into between NLC, the Respondent and the TNEB, Appellant and other beneficiaries for the supply of power from their Thermal Power Station-II for the period from 01.04.1996 to 31.03.2001. According to this Agreement, the purchaser, the Appellant had to make the due payments through irrevocable Letter of Credit (LC) opened in favour of the Respondent NLC. It also provided that the NLC was to allow a rebate of 2.25% on the amount of the bill

negotiated through the LC provided that the credit for the amount was transferred to NLC's account on the date of presentation of the bill. This Agreement further provided for the allowance of the said rebate if the payment was made within 3 working days from the date of receipt of bills even without establishment of LC. If the payment is delayed beyond 30 days from the date of receipt of the Bill, the purchaser, namely the Appellant, shall pay surcharge calculated @ 1.5% per month on the amount of the bill for the actual period of delay.

4. The next agreement was in the year 2001. On 09.03.2001, the Appellant (TNEB) and Respondent (NLC) entered into a Bulk Power Supply Agreement for the supply of electricity by NLC to TNEB from NLC Thermal Power Station I. This Agreement was effective from 01.04.1997 to 31.03.2002. This agreement also provides for the rebate of 2.5% when the payment is made on presentation of the bill through LC or within 3 working days from the date of presentation of the bill.

5. On 26.03.2001, the Central Commission notified the Tariff Regulations 2001 for the period 2001-04. Even as per the Regulations 2001, if the payment of the bill was made through LC, rebate of 2.5% was allowed. If the payment was made through a mode other than LC, the rebate of 1% should be allowed, if the payment was made within 1 month. In other words, no rebate is allowed if the payment is made beyond 30 days.

6. On 20.09.2001 another Bulk Power Supply Agreement was entered into between the TNEB and NLC for the supply of power from Thermal Power Station-1 (Extension). This agreement allowed a rebate of 2.5% on the amount of the bill negotiated through LC immediately on presentation of the bill.

7. On 20.03.2003, a Tripartite Agreement was entered into between the Government of India, Reserve Bank of India and the Government of Tamil Nadu. As per this Agreement, the

arrears outstanding as on 30.09.2001 from TNEB, the Appellant and other Board to various Public Sector Units, including NLC would be securitised. The said agreement is valid up to 30.09.2016. As per this agreement, the Electricity Board was to open and maintain irrevocable LC not later than 30.09.2002 and failure to do so would attract reduction in supply from Central Public Sector Undertakings (CPSU) equivalent to 2.5% of the average daily supply for the preceding 90 days in addition to the suspension of the Accelerated Power Development and Reforms Programme. By this time , the Tariff Regulation 2001 had come into force with effect from 1.4.2001.

8. On 05.06.2003, the Chairman-cum-Managing Director of NLC wrote a letter to the Chairman, Electricity Board, with a request to settle the arrears accrued after 1.10.2001 together with the surcharge accrued. With regard to these issues, a meeting was held between the NLC and TNEB on 22.12.2003 to discuss and sort out the issue of outstanding payment from the TNEB for the period 01.10.2001 to 30.11.2003. After discussions, the

parties agreed that the total outstanding amount payable by the TNEB was Rs. 191.62 crores which was payable over 10 equal monthly instalments. On 26.3.2004, the Regulation 2004 were notified with effect from 1.04.2004.

9. The NLC filed a Petition No. 33/2004 before the Central Commission praying for determination of tariff from 01.04.2002 to 31.03.2004. On 31.08,2004 the Central Commission passed the order in petition No. 33/2004 permitting the determination of the Tariff as per the norms and terms and conditions contained in Bulk Power Supply Agreement.

10. On 26.10.2004, a letter was sent by NLC to TNEB stating that NLC was hitherto allowing a rebate of 2.5% for the timely payment but the Notification dated 26.03.2004 issued by the Central Commission provides that the rebate of 2% shall be allowable for the payment of bills of power supply only through a LC but, however, rebate of 1% is allowed if the payment is made through the mode other than the LC, if it is made within

one month. It was also informed through this letter that rebate from 01.04.2004 shall be retrospectively adjusted and from November 2004 onwards the rebate up to 2% on the bill amount can be availed of for the payment made within 3 working days. The Regulations, 2001 came into force from 01.04.2001 itself. Even then the TNEB was making direct payment within 3 working days from the date of presentation of the bills as per the Agreement between the parties and availed 2.5%/2.25% rebate without opening LC. There was no response to this letter. Under those circumstances, NLC filed a Petition on 09.08.2005 before the Central Commission as against the TNEB in Petition No. 97/05 alleging that the TNEB had availed 2.5% rebate unilaterally till October 2004 contrary to the Regulations, 2001 of the Central Commission without opening the LC and prayed for the refund of the Excess Rebate. The TNEB filed a reply stating that the claim for refund of the excess rebate was contrary to the Agreement reached between the parties earlier.

11. On 19.10.2005, the Central Commission allowed the Petition No. 97/05 ordering for the refund of the Excess Rebate and holding that the TNEB could claim rebate only on opening of the LC in line with the Regulations, 2001 of the Central Commission and the TNEB cannot claim rebate of 2.5% but it was entitled to a rebate of 1% for any payment made within 3 working days in case the payment is made by any mode other than the LC.

12. Thereupon, the subsequent meetings were held between NLC and the Appellant Board. In those meetings the NLC advised the Board that in the case of payment of all the bills, the proposal of the Board to open the backup LC, as in the case of other Central generating stations was acceptable to NLC provided the payment is made immediately on presentation of the bills. Despite this, there was no response from the TNEB. Hence the NLC filed another Petition in Petition No. 17/06 on 28.02.2006 seeking direction for the refund of excess rebate in

accordance with the Central Commission's earlier order dated 19.10.2005 in Petition No. 97/05.

13. On 14.09.2006 after hearing the parties, the Central Commission allowed the Petition No. 17/06 rejecting the TNEB's reliance on the expired agreements and holding that the TNEB was entitled to 1% rebate till such time it opens LC and directed the TNEB to refund or adjust the excess Rebate amount within a period of 2 months. So, on 31.12.2007 acting on the proposal of the NLC, the TNEB opened a back-up LC and has been availing the benefit of 2% rebate upon making the payment of the bills on the date of the presentation of the bill itself. But the amount of arrears towards excess rebate as ordered by the Central Commission was not refunded. Hence NLC filed another Petition No. 163/08 on 23.12.2008 bringing to the notice that their earlier orders have not been complied with and seeking for direction to TNEB to refund the excess rebate availed to the tune of Rs. 79.52 crores and also to direct

the TNEB to reimburse the Income Tax dues of Rs. 481.46 crores paid by NLC in advance.

14. On 31.03.2009, the Central Commission allowed the Petition 163/08 directing the Appellant to refund the excess rebate of Rs. 79.52 crores on or before 30.04.2009 and further directing the Appellant to show cause against the initiation of penalty proceedings for the non-compliance of its earlier orders regarding the refund of the excess Rebate. Even though, there were two prayers namely (1) Refund of the excess Rebate and (2) Reimbursement of Income Tax made by the NLC in their petition, the Central Commission had not given any finding with reference to the 2nd prayer for Reimbursement of income tax, as the same was deferred.

15. Challenging the said order dated 31.03.2009, on the issue of Refund of Excess Rebate, the Appellant filed the Appeal No. 78/09. Challenging the earlier orders dated 19.10.2005 and 14.09.2006, passed by the Central Commission directing for the

Refund of Excess Rebate, the Appellant filed 2 other separate Appeals before the Tribunal in Appeal No. 79, and 80 of 2009. However, the Appellant without pursuing the said Appeals being No. 79 and 80 of 2009 sought permission from the Tribunal to withdraw their appeals to enable them to approach the Central Commission for filing review of the Orders dated 19.10.2005 and 14.09.2006. Accordingly, the Tribunal by the order dated 20.05.2009 passed order dismissing the above-said 2 Appeals, Appeal No. 79 and 80 of 2009 as withdrawn. So far as Appeal No. 78/09 is concerned, the Appeal was entertained and the matter was heard. During the course of hearing, this Tribunal noticed that one of the Hon'ble Members of the Central Commission comprising the Bench which passed the order dated 31.03.2009 was the Ex-Chairman of the NLC and he was a party to the correspondence exchanged between NLC and TNEB during the relevant period. Hence, on that ground the Tribunal allowed the Appeal by its order dated 20.5.2009 by setting aside the Central Commission's order dated 31.03.2009 and remanded

the matter directing the Central Commission to hear the matter again and to decide the matter afresh in accordance with law.

16. Accordingly, in pursuance of the Remand Order dated 20.05.2009 by the Tribunal, a fresh Bench was constituted by the Central Commission and Petition No. 163/08 was restored. The matter was heard afresh on 12.11.2009. After hearing the parties, the Central Commission passed the impugned order dt. 07.01.2010 by disposing of the said petition holding in favour of NLC, the Respondent herein, in respect of both the prayers made by NLC in petition No. 163/08.

17. Aggrieved over this, the Appellant has filed the present Appeal raising these 2 issues (1) Reimbursement of Income tax by the TNEB and (2) Refund of the excess rebate availed by the Appellant. The Learned Counsel for the Appellant would make the following submissions as regards these two issues.

18. In regard to the first issue relating to the Reimbursement of Income-tax, he has made the following submissions.

(A) "A plain reading of clause 2.12 of Regulation, 2001 and clause 7 of Regulation, 2004 would clearly indicate that the tax on the amount of tax recovered from the beneficiaries is not recoverable by the beneficiaries as it is not income from core activity. The earlier order dated 21.12.2000 and the order dated 26.03.2004 passed by the Central Commission in other cases would clearly indicate that the request for change in the existing methodology for Income-tax was rejected. On the other hand, it was directed that the present specified post tax ROE norms to be retained. However, the Central Commission in the impugned order dated 07.01.2010 having not considered the said two orders earlier passed by the Central Commission has passed the order contrary to those orders.

(B) The impugned order relies upon section 195A of the Income Tax Act 1961. This is wrong. This section is not

concerned with the Reimbursement of tax or tax paid on reimbursement known as grossing-up. In other words, this section has no application to the payment of tax by the Appellant Electricity Board to the Respondent Corporation on income of Corporation from core activities.

(C) The total amount which has been claimed towards Income-tax by the Corporation is Rs. 481.46 crores. In the reply, the Appellant disputed the amount and submitted that specified various amounts have got to be adjusted against the alleged income-tax dues. None-the-less, the Central Commission, without considering any of the above objections, allowed the claim of the NLC in total. This is not a judicious approach. As a matter of fact, when this Appeal is pending before the Tribunal, the Corporation itself has written a letter mentioning that the figure of Rs. 481.46 crores mentioned in the impugned order is not correct and that correct figure would be Rs. 306 crores after all the adjustments. Therefore, the Central

Commission even without considering the correctness of the figure projected by the Corporation before the Central Commission, has simply passed the order directing the said amount to be paid. This is non application of mind.

(D) If the grossing up of tax is allowed from 01.04.2001 to 30.11.2008, as prayed for by the Corporation, the same will cause undue hardship to the Electricity Board as the Board cannot pass on the financial burden to its past consumers for the past period. The Corporation has raised this issue only in 2008 for the period from 01.04.2001 onwards. This claim is barred by time, delay and laches. The Regulations are quite clear and the same do not provide for grossing-up."

19. In respect of the second issue namely refund of excess rebate, the Learned Counsel for the Appellant submitted the following to substantiate his plea that the finding regarding the Refund of excess rebate confirming its earlier order dated 31.03.2009 is wrong.

(A) "As against the order earlier passed on 31.03.2009 with regard to the very same issue namely the Refund of excess rebate, the Appellant filed an Appeal in Appeal No. 78/09 before this Tribunal. After hearing the Counsel for the parties, the Tribunal set aside the impugned order dated 31.03.2009 and directed the Central Commission to rehear the matter afresh since the Bench which passed the said order dated 31.03.2009 was comprising of members, one of whom was a party to the proceedings when he was Chairman of the NLC. After remand, the Central Commission restored the Petition No. 163/08 and heard the matter and passed the final order on 07.01.2010. In the said order the only issue considered was with reference to the Reimbursement of Income-tax and not on the issue of Refund of excess rebate. On the other hand, the Central Commission retained the earlier order passed by it on 31.03.2009 in respect of this issue as if the order relating to this issue was not set aside by the Tribunal. On the contrary, the Tribunal set aside the whole order dated 31.03.2009 and remanded for consideration

of the said issue afresh by another Bench. But, the Central Commission has failed to consider this issue. Thus, this is in violation of the Remand Order passed by the Tribunal

(B) The earlier orders passed by the Central Commission on 19.10.2005 and 14.09.2006 directing for the refund of excess rebate did not consider the material documents namely the letter dated 05.06.2003 sent by the Chairman of the Corporation to the Chairman of the Electricity Board and the letter dated 26.10.2004 sent by the General Manager (Commercial) of the Corporation to the Chief Financial Controller, TNEB. Both these documents would clearly indicate that the Corporation admitted that the NLC, even though the Electricity Board had not opened the LC, granted 2% rebate on the bill amount on the basis of payments made by the Electricity Board within 3 working days from the date of presentation of the bills. This fact also has been acknowledged by the Corporation to the Power Ministry through its letter dated 14.07.2003. In addition to this, the minutes of the meeting held between both the parties, held

on 22.12.2003 decided about the issue and sorted out their dues. Without referring to these documents, the Central Commission passed the earlier order.

(C) In the present case, the Corporation had agreed to extend the benefit of rebate of 2.5% to the payments made within 3 working days by the Board by the mode other than through LC. Therefore, it cannot be said that the benefit of 2.5% or 2.25%/2% allowed by the Corporation to the Board was opposed to the Regulations. In fact, the Regulations do not contain any prohibition against such agreement/arrangement. It is further clarified in the Regulation 1.11 that the norms prescribed herein are the ceiling norms only and this shall not preclude the generating company and other beneficiaries from agreeing to improve the norms.

(D) Even assuming that the agreement between the Board and the Corporation as to rebate is contrary to the Regulations, even then the Corporation is liable to restore the benefit which has

accrued to it under the contract. Under section 65 of the Indian Contract Act 1872, it is the obligation of the person who has received advantage under the agreement to restore that advantage or to make compensation for it to the person from whom he received it.

(E) The Tariff Regulations came into force in the year 2001. The Corporation filed the first petition, claiming the Refund of Excess Rebate Rate, only in the year 2005 based on Tariff Regulations, 2001, i.e. long after the Tariff Regulations, 2001 had come to exist that too on the objections raised by the Auditors.

(F). The benefit of rebate allowed to the Board by the NLC for long number of years had been passed on to the ultimate consumers of Board. The tariff for the supply of electricity by the Board was fixed on the basis of what was paid by the Board to the Corporation. The benefit of rebate availed by the Board pursuant to the agreement with the Corporation had been passed

on to the consumers as it is clear from the tariff order for 2003. Hence, the order for refund of rebate by the Board to the Corporation would lead to cascading effect and would lead to affecting the public at large which would ultimately have to devise ways to pass on the additional financial liability to the present consumers. Therefore, the direction regarding refund of rebate is not valid one."

20). In addition to these two issues, the learned Senior counsel for the Appellant would raise one more issue questioning the jurisdiction of the Central Commission to decide about these issues. The contention of the learned counsel for the Appellant is as follows:

"The Central Commission has no inherent jurisdiction to adjudicate upon the money claim. It does not have the power to decide the disputed question as to the Reimbursement of income tax or with regard to the Refund of the Excess Rebate. The functions of the Central Commission as mentioned in section

79(a) of the Act 2003 does not involve the present dispute with reference to the money claim which is the dispute of civil nature and said dispute could be adjudicated upon only by the Civil Court and not by the Central Commission as the dispute in question falls outside the purview of section 79 of the Electricity Act 2003

21. In support of these grounds referred to above, the Learned Counsel for the Appellant has cited the following authorities

(1) *Power Grid Corporation Limited v. Rajasthan Rajya Vidyut Prasaran Nigam Limited & Ors.* Appeal No. 51/2008

(2) *PTC India Limited v.* CERC – (5 JJ). Judgment of the SC in Civil Appeal No. 3902/2006.

(3) Torrent Power Limited. V. Gujarat Electricity Regulatory Commission. Appeal No. 68 of 2009 before APTEL

(4) *TNEB v. M/s PPN Power Generation Co. Limited & Another*. Appeal Nos. 41, 59 and 60 of 2009 before APTEL

(5) *TNEB v. NTPC & Ors.* Petition No. 253/2009 before CERC.

(6) *Central Power Distribution Company v. CERC*. 2007(8) SCC 197.

(7) *Central Bank of India v. Rajagopalan* . AIR 1964 SC 743.

(8) *K. Ramanathan v. State of TN*. 1985 (2) SCC 116.

(9) *Gujarat Urja Vikas Nigam vs. Essar Power Limited*. (2008) 4 SCC 755.

(10) *Uttar Pradesh Power Corporation v. National Thermal Power Corporation Limited & Ors.*

(11) *State of Jharkhand v. Govind Singh.* (2005) 10 SCC 437.

(12) *S.P. Changa*l*varya Naidu v. Jagannath*. (91994)1 SCC 1.

(13) *Hamza Hazi v. State of Kerala*. (2006) 7 SCC 416.

(14) *Commissioner of Customs, Mumbai v. Virgo Steels, Bombay (2002)4 SCC 316*

(15) *Secretary, Irrigation Department, Government of Orissa & Ors. Vs. G.C. Roy*. (1992) 1 SCC 508.

(16) *Executive Engineer, Dhenkanal Minor Irrigation Division vs. N.C. Budharaj* (2001) 2 SCC 721

(17) *Tarsem Singh vs. Sukhminder Singh (*1998) 3 SCC 471.

(18) *Bharat Petroleum Corporation Limited vs. Maddula Ratnavalli & Ors*. (2007) 6 SCC 81.

(19) *Nobel Resources Limited vs. State of Orissa & Anr*. (2006) 10 SCC 236.

(20) M/s Dwarkadas Mafatia and Sons Vs. Board of Trustees of the Port of Bombay (1989) 3 SCC 293.

22. In reply to these submissions, made by the Appellant , the learned counsel for NLC would elaborately argue in justification of the impugned order and contended that the reasoning given in the impugned order are perfectly valid and justified and as such it does not call for any interference

23. In support of his submissions and the impugned order, the learned Counsel for the Respondent has cited the following *decisions:*

(1) *U.P. Panchayat Adhikari Sangh v. Daya Ram Saroj*. (2007) 2 SCC 138.

(2) *Dawoodi Bohra Community v. State of Maharashtra*. (2005) 2 SCC 673.

(3) *Bharat Petroleum Corporation Limited v. Mumbai Shramik Sangha*. (2001) 4 SCC 448**.**

(4) *Pradip Chandra Parija vs. Pramod Chandra Patnaik.* (2002) 1 SCC 1.

(5) *Commissioner of Income Tax & Anr. Vs. ONGC*. (2003) 264 ITR 340.

(6) *Union of India vs. R. Gandhi, President, Madras Bar Association*. Civil Appeal No. 3067 of 2004.

(7) *S.P. Sampath Kumar vs. Union of India*. (1987) 1 SCC 124.

(8) *Kiran Singh vs. Chaman Paswan*. AIR 1954 SC 340.

24. In the light of the rival contentions urged by the respective parties, the following questions would arise for consideration in this Appeal:

(i) Whether the Central Commission, under section 79 of the Electricity Act, 2003, have got inherent jurisdiction to adjudicate upon money claim which is said to be the dispute of civil nature in the nature of recovery proceedings as if it is a civil court?

(ii) Whether under the Regulations, the generating company, namely NLC is entitled only for reimbursement of the actual tax on income earned by them from the core activity or whether they are entitled to grossed up tax on income and claim the same from the beneficiary namely the Appellant Board herein?

(iii) Whether the impugned order on refund of rebate is liable to be set aside on the ground that the Central Commission had wrongly proceeded on the footing that the earlier order passed by it on 31.03.2009 in Petition No. 163/08 filed by the NLC had been in

existence even though the said earlier order dated 31.03.2009 was set aside by this Tribunal through its order dated 20.05.2009 remanding the matter and directing the Central Commission to decide the issue afresh?

25. Let us now consider each issue one by one.

26. The first issue is relating to the jurisdiction to go into the money claims. The question is whether the Central Commission has the inherent jurisdiction to adjudicate upon the money claim. According to the Appellant, the Central Commission being a creation of a statute is bound by the provisions of the Electricity Act, 2003 and its jurisdiction is limited to the extent spelt out in section 79 of the Electricity Act, 2003 and the present dispute which falls outside the purview of the section 79 of the Electricity Act could be adjudicated upon only by the civil court and not by the Central Commission.

27. We will deal with this issue now.

28. According to the Appellant the Central Commission does not have a jurisdiction to decide the disputed question as to whether reimbursement of Income Tax ought to be on grossed up basis or not and the same is vested only in the civil court. This does not merit acceptance for the following reasons:-

(i) Electricity Act, 2003 has vested power on the Central Commission to adjudicate the dispute which has been carved out by the Act. Section 79(1)(f) of the Act has carved out a limited and narrow specialized field wherein the Central Commission is empowered to adjudicate. The scope of the power in dispute involves one or more generating companies, and to matters connected with clauses (a) to (d) of section 79 (1). The matter that come before the Central Commission for adjudication are not private civil disputes affecting individual rights but matters and disputes which are relevant to the field of electricity

as governed by the related national policies and the Act, 2003. The composition of the Central Commission is such that by virtue of the knowledge, skill and experience, the Central Commission undoubtedly is not only well equipped to discharge the adjudicatory functions bestowed on it but it is more suited to appreciate the technical and factual questions arising in the matters that come before them.

(ii) It is established law that power of the Commission to regulate and make regulations include the power to enforce regulations. This is laid down in the following decisions.

(1) Central Power Distribution Company vs. CERC (2007) 8 SCC 197.

(2) Indu Bhushan Bose v. Rama Sundari Debi (1969) 2 SCC 289.

(3) K. Ramanathan v. State of Tamil Nadu (1985) 2 SCC 116.

(4) Deepak Theatre v. State of Punjab (1992) Supp (1) SCC 684.

29. As per these decisions, where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution. In fact, clause 1.7 of the Regulations 2001 empowers the generating company for recovery of Income Tax from the beneficiaries even without filing a petition before the Central Commission. If any objection is raised by the beneficiary with regard to quantum of the amount by way of reimbursement of income tax, the generating utility may file an appropriate petition before the Central Commission for recovery. Thus, the right of the Corporation to file a petition for reimbursement of income tax before the Central Commission where the beneficiary omitted to make a reimbursement of income tax as due, is a statutory right available to the Corporation under

Regulations. It, therefore, follows that the Central Commission possesses the right not only to entertain such an application but also dispose the same in accordance with law by doing such acts which are necessary for is execution.

30. The dispute raised by the Corporation before the Central Commission praying for recovery of the reimbursement of the income tax amount is a dispute involving generating company, the 1st Respondent and the Appellant, which is a State Electricity Board. The dispute relating to a matter connected with the regulation of tariff of the generating company owned and controlled by the Central Government, can be dealt with by the Central Commission which has the competence to enforce the regulations published by it and also to adjudicate upon dispute involving the generating company owned or controlled by the Central Government in matters connected with tariff.

31. The tariff is the price for capacity charges and other charges under the scheme of the Regulations. There can be no

doubt that the reimbursement of income tax by the beneficiary is a part of the power tariff contemplated under the Regulations. If the actual income tax on core activity of the generating station is not reimbursed by the beneficiary, there would be a shortfall in realisation of the due tariff to the extent of deficiency in the reimbursement of the income tax.

32. The Corporation filed an application in Petition No. 163/08 praying for reimbursement of income tax since the Appellant raised objection to pay reimbursement of income tax as provided under clause 2.12 of Regulations, 2001. In fact, clause 1.7 of Regulations 2001 and clause 10 of Regulations, 2004 clearly contemplate that the generating company may file an appropriate application before the Central Commission if the generating company is unable to recover the income tax from the beneficiary. Admittedly, the Appellant has not challenged these Regulations before proper forum as ultra vires. In such circumstances the Appellant cannot raise the contention that the Central Commission does not have jurisdiction to adjudicate on

the matter. Furthermore, the Electricity Act, 2003 is a special legislation. It specifically provided that the Central Commission shall have power to adjudicate upon disputes involving generating companies and transmission licensees with reference to the issues covered under clauses (a) to (d) of section 79. In other words, the Act, 2003 is a composite code relating to the field of electricity. It is not as if the Parliament has substituted the Central Commission in place of regular court with respect to adjudication of dispute in money matters. Under section 79(1) (a) to (d) the Central Commission is vested with the power to adjudicate upon disputes involving the generating companies and the transmission licensees. As per Objects of the Electricity Act, 2003, this is an Act which confers power to regulate with reference to generation, transmission, distribution, trading and use of electricity and for taking measures conducive to development of electricity for promotion of efficient supply of electricity to all the areas.

33. Thus, this Act is a special legislation for taking measures conducive to development of electricity industry and it is within the competence of the Parliament to vest the Commission with such powers, functions, responsibilities and duties which the Parliament consider necessary and desirable for achieving the objects of the Act. It is not the case of the Appellant that section 79(1)(f) is violative of any particular provision of law and it has merely contended that certain functions which can be decided by civil court have now been passed on to the Commission. There is no provision of law which prohibits the Parliament from enacting such a legislation on a subject in terms of the Electricity Act, 2003. The legislation is within the competence of the Parliament.

34. The Central Commission Tariff Regulations have been promulgated under section 178 of the Electricity Act, 2003. These Regulations have been framed by the Central Commission after giving opportunities to the stakeholders to state their views and objections and only then these Regulations

have been framed and notified. Being so, the Regulations are binding on all the concerned utilities which included the Appellant Electricity Board and the 1st Respondent Corporation.

35. In the recent judgment of the Hon'ble Supreme Court in PTC India V/s CERC JT 2010 (3) SC I, the Five-Judge Bench of the Hon'ble Supreme Court have held as follows:

"***Summary of Our Findings:***

(i) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by Orders.

(ii) A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides

the existing contracts between the regulated entities inasmuch as it cast a statutory obligation on the regulated entities to align their existing and future contracts with the said regulations.

(iii) *A regulation under section 178 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the court and not by way of Appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act.*

(iv) *……..…*

(v) *If a dispute arises in adjudication on interpretation of a regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall be on the validity of a regulation made under Section 178.*

(vi) *Applying the principles of "generality versus enumeration", it would be open to the Central Commission to make a regulation on any residuary item under Section 178(1) read with Section 178(2)(ze). Accordingly, we hold that the CERC was empowered to cap the trading margin under the authority of delegated legislation under Section 178 vide the impugned notification dated 23.01.2006.*

In para 40, the Hon'ble Supreme Court has stated as follows;

"*40. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the*

functions assigned to it under the Act. On reading Section 76(1) and 79(1) one finds that Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licenses, to adjudicate upon dispute, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc. These measures, which the Central Commission is empowered to take, have got to be in conformity with the Regulations under section 178, wherever such regulations are applicable. Measures under section 79(1), therefore, have got to be in conformity with the regulations under section 178.´

36. From the foregoing paragraphs in the judgment rendered by the 5-Judge Bench of the Hon'ble Supreme Court, it is apparent that the Central Commission is a decision making as

well as regulations making entity simultaneously. Making of a regulation under section 178 of the Act is not a pre-condition for the Central Commission to take any measures under section 79 of the Act but the measures taken under section 79 of the Act have to be in conformity with the said regulations.

37. Applying the above dictum to the present case, it follows that the challenge to the jurisdiction of the Central Commission to adjudicate upon the dispute with reference to the reimbursement of the income tax or refund of excess rebate, is not tenable. Similarly, it follows that the Central Commission while adjudicating upon those disputes has to act in conformity with the applicable clauses contained in the regulations. Accordingly, the Central Commission while adjudicating the dispute in respect of reimbursement of income tax was required to act in conformity with the clause 2.12 of the Regulations 2001 or clause 7 of the Regulations 2004. Like-wise the Central Commission while adjudicating upon the dispute in respect of Refund of the of excess rebate, the Central Commission was

required to act in conformity with the clause 2.15 of the Regulations 2001 and clause 25 of the Regulations 2004.

38. As mentioned earlier, the Apex Court judgment in the PTC India Limited amply clarifies that the regulations under section 178 intervenes and even overrides the existing contracts. Admittedly the dispute raised by the Respondent Corporation before the Central Commission is a dispute involving a generating company, the Corporation and the Appellant, Electricity Board, a transmission and distribution licensee. The dispute related to a matter connected with the regulation of tariff of a generating company owned and controlled by the Central Government. Hence, the Commission has the competence and jurisdiction to enforce the regulation duly promulgated by the Central Commission and also to adjudicate upon the dispute involving a generating company and the transmission licensee. In this context, it would be worthwhile to refer to the observations made by the Hon'ble Supreme Court in K.

Ramanathan Vs State of Tamil Nadu in 1985 (2) SCC 116, as under:

> "*The power to regulate carry with it full power over the things subject to the regulations and in the absence of restrictive words, the power must be regarded as plenary over the entire subject. The power to regulate implies the power to check and may imply the power to prohibit under certain circumstances in modern statutes concerned, as they are with a economic and social activities, the regulation must of necessity, receive so wide an interpretation that in certain situations, it must exclude competition to the public sector from the private sector.*"

39. In view of the above dictum laid down by the Hon'ble Supreme Court in the decisions referred to above and also in view of the above discussions, the contention urged by the learned Counsel for the Appellant questioning the jurisdiction of the Central Commission is not tenable and the same is liable to

be rejected. **Thus, In regard to the first issue, we are of the view that the Central Commission has got jurisdiction to deal with the present dispute raised by the Respondent Corporation as against the Board, the transmission and distribution licensee. This point is answered accordingly**.

40. Now let us come to the next question. The question is whether under the Regulations, the generating company, namely NLC is entitled for Reimbursement of the actual tax only on income earned by them from the core activity or whether they are entitled to grossed up tax on income and claim the same from the beneficiary namely the Appellant Board herein. According to the Appellant, the directions which have been issued by the Central Commission by the impugned order dated 07.01.2010, directing the Appellant Board for Reimbursement of the income tax on the basis of calculation by adopting the grossed up process is wrong since the Regulations do not provide for grossing up process and as it relates only to the amount of tax paid by the NLC to the Income Tax Department

and not the grossed up amount. The details of the contentions urged by the Appellant are as follows:

(i) NLC is not entitled to reimbursement of Income Tax on grossed up income since clause 2.12 of Regulations 2001 and Clause 7 of Regulations, 2004 do not provide for grossing up of Income Tax.

(ii) Section 195A of the Income Tax Act relied upon by the Central Commission has nothing to do with the grossing up of the Income Tax as it only relates to tax deduction at source under the Income Tax Act.

(iii) The decision in Torrent Power Limited case in Appeal No. 68/09 rendered by this Tribunal dated 23.03.2010 relied upon by the NLC would not apply to this case since that decision is applicable only to Independent Power Producers (IPPs) and not to Public Sector Undertakings (PSUs) like NLC and hence it has no relevance to the present Appeal.

41. In justification of the impugned order, the Learned Counsel for the Respondent NLC has made the following submissions.

42. The Regulations, 2001 and Regulations, 2004 are very much applicable to this issue. As per clause 1.3 of Regulation 2001, the Regulation shall apply where the capital cost based tariff is determined by the Central Commission. As per clause 1.4 of the Regulation 2001, the generation tariff shall be determined station-wise and the transmission tariff shall be determined line-wise, sub-station wise as the case may be and aggregated to regional tariff. The relevant clause of Regulations, 2001 is clause 2.12. The clause 2.12 is quoted below :-

Clause 2.12 Tax on Income

Tax on income from core activity of the Generating Company, if any is to be computed as an expense and shall be recoverable by the Generating Company from the beneficiaries.

Any under or over recoveries of tax shall be adjusted every year on the basis of certificate of statutory auditors.

Provided that:

i) Tax on any income streams other than income from core activity, if any, accruing to the Generating Company shall not constitute as a pass through component in the tariff. Tax on such other income shall be payable by the Generating Company.

ii) The station-wise profit before tax as estimated for a year in advance shall constitute the basis for distribution of the Corporate tax liability to all the stations.

iii) The benefit of Tax Holiday where applicable as per the provisions of the Income Tax Act, 1961 shall be passed on to the respective stations.

iv) The credit for carry forward losses, if any, shall be given in an equitable manner for all stations.

v) The tax allocated to stations shall be charged to the beneficiaries in the same proportion as annual fixed charges.

43. In the light of this clause, let us now deal with this issue.

44. Prior to the advent of the Regulatory mechanism, the Appellant Electricity Board and the first Respondent NLC entered into a Bulk Power Supply Agreement (BPSA) as per Agreement dated 09.03.2001 in respect of Thermal Power Station-1. The Appellant has to reimburse the grossed up amount of income tax under clause 12.1 of the BPSA. Similarly the other Agreement dated 20.09.2001 in respect of Thermal Power Station-1 (Extension), clause 9.1 provides for reimbursement of the grossed up amount. Similarly,` the Ist Agreement dated 18.02.1999, in respect of Thermal Power Station-II, clauses 6.2 to 6.5 provide for reimbursement of the grossed up amount. So, this is not a new concept or practice introduced by the Regulations, 2001 alone.

45. Although Regulations 2001 and Regulations 2004 do not use the expression “gross up”, those Regulations require tax on income from core activity to be computed as an expense and recovered from the beneficiary by the generating company. As indicated above, clause 2.12 of Regulations, 2001 and Clause 7 of Regulations, 2004 are identical. The Statement of Objects of Regulations, 2004 state that ‘the tax on income shall be pass through’. Thus the intent` of the Regulations is that the income in the hands of the generating company is net of tax, since the entire income tax on income from core activity is recoverable from the beneficiaries as expense. Sum received as reimbursement of income tax under Clause 2.12 of Regulation, 2001 by the generating company has to be treated as income from core activity and that sum has to be subjected to multi stage grossing up to determine the sum total of tax on income from core activity of the generation company. Thus the entire tax inclusive of grossed up tax is relatable to the core activity of the generating company. However, the income tax on income from non-core activities such as consultancy is not to be

recovered from beneficiaries and has to be borne by the generation company.

46. The legal position from the Regulations, 2001 and Regulations, 2004 relating to the reimbursement by the beneficiary of the Income Tax on grossed up basis is evident from the extract from para 14.3 of the Statement of Objects and Reasons of the CERC (Terms and Conditions of Tariff) Regulations, 2009. The same is as follows:

> "Under post tax rate of return on equity, the beneficiaries are paying tax on the net income of the utilities and the tax burden is calculated by grossing up."

47. So, both under during the BPSA period and under Regulations, 2001 and Regulations, 2004, the requirement of reimbursement of income tax by the beneficiaries was on grossed up basis. Dr. K.P. Rao Committee also contemplated for reimbursement by the beneficiaries on actual income tax paid by the generating station.

48. Even while the provisional tariff was being followed pending determination of the lignite transfer price, all the beneficiaries including the Appellant, reimbursed Income Tax on gross up basis. In fact, the Appellant made the payment on gross up basis till 2003-04. Thereafter he stopped the payment on gross up basis.

49. In the light of the above factual situation, the reliance on the order passed by the Central Commission on 21.12.2000 in Appeal No. 4/2000 in some other matter cannot be said to be valid as the same was prior to the framing of the Regulations 2001 and Regulation 2004.

50. It is settled law that in the hierarchy of the regulatory process, the power of the Central Commission to make regulation under section 178 of the Electricity Act is wider than the power under section 79(1) to pass order on tariff matters. As held by the Hon'ble Supreme Court in PTC India Vs. CERC, JT

2010 (3) S 1, the regulations cannot be questioned in the Appeal before the Tribunal.

51. If the reimbursement is not on gross up basis, it will amount to violation of clause 2.12 of Regulations, 2001 and clause 7 of Regulations, 2004 because the reimbursement will be deficient of the tax on income of core activity which is to be treated as expenditure in the tariff. While dealing with the similar question in respect of clause 7 of Regulation, 2004 which is identical to the Clause 2.12 of 2001 Regulation, this Tribunal in Torrent Power Limited V/s GERC in Appeal No. 68/09 and also on the applicability of the Income Tax, has clearly held that the recovery of Income Tax paid as an expense by the beneficiaries requires to be grossed up till the actual tax paid is fully recovered in tariff. The relevant observations of the Tribunal are as follows;

> "*A conjoint reading of the Regulation 7, Regulation 66 of the State Commission and Section 195(A) of the Income Tax Act, 1961 leaves no doubt that the recovery of income*

tax paid as an expense from the beneficiaries requires to be grossed up in such a manner as to ensure that the actual tax paid is fully recovered through tariff. Grossing up of the return would ensure that after paying the tax, the admissible post tax return is assured to the Appellant. In this way the Appellant would neither benefit nor loose on account of tax payable which is a pass through in the tariff. This would ensure that the Appellant earns permissible return of 14% stipulated in Regulation 66 of the Regulations and mandate of Section 195(A) of the Income Tax Act is also complied with. The National Tariff Policy stipulates that the Regulatory Commission may adopt rate of return as notified by the Central Commission with appropriate modifications taking into view the higher risk involved in distribution and that a uniform approach is desired in respect on investment.

The above provisions of Regulations 2004 also make it clear that income tax payable on the income from the core business of the company is to be treated as an

expense and recovered from the tariff payable by beneficiaries. The income earned by the licensee is net of tax and the tax payable is treated as a separate expenditure recoverable from the beneficiaries.

In view of the foregoing discussion and analysis, we set aside the order of the State Commission in this view of the matter and direct that it allows the income tax by grossing up to ensure the stipulated post tax return by the State Commission to the Appellant.

52. In view of the above ratio decided by this Tribunal, the contention urged by the Learned Counsel for the Appellant that the said Regulations and provisions of Income Tax Act would not apply to the present case is baseless.

53. It is contended by the Appellant that the judgment of this Tribunal in Torrent Power Limited case is related to Independent Power Producers (IPPs) alone and not to the Public Sector Undertakings (PSUs) like NLC and therefore the said

decision would not apply to the present case is also entirely misconceived. In Torrent Power Limited case this Tribunal has specifically held, referring to the Regulations, that the required income tax is to be determined on gross up basis. Furthermore, these Regulations do not distinguish between the generating companies in the Private Sector and those in the Public Sector. Hence the decision of this Tribunal in Torrent Power Limited case is squarely applicable.

54. Section 195(A) of the Income Tax Act is a provision which comes into play in all cases where an employer/purchaser makes payment net of tax as in the present case. This is required under the Income Tax Act. Neither the Appellant nor the 1st Respondent is exempted from complying with this requirement in letter and spirit. The concept of grossing up is restatement of the basic proposition that where any part of the Income Tax which is due to the Government is borne by the purchaser, then the tax borne by such purchaser has to be necessarily treated as further income in the hands of seller thereby making it eligible

to Income Tax again. Under those circumstances, the finding given by the Central Commission on this issue is valid. Consequently on this point also, we hold in favour of the Respondent.

55. Let us now come to the last question. The question is whether the impugned order on refund of Excess rebate is liable to be set aside on the ground that the Central Commission had wrongly proceeded on the footing that the earlier order passed by it on 31.03.2009 in Petition No. 163/08 filed by the NLC had been in existence whereas the said order had already been set aside by this Tribunal through its order dated 20.05.2009, while remanding the matter to the Central Commission for a fresh consideration.

56. According to the Appellant, the earlier order which was passed by the Central Commission on 31.03.2009 on the question of refund of the excess rebate was actually challenged by the Electricity Board in Appeal No. 78/09 and in the said

Appeal, the Tribunal, without going into the merits of the matter, set aside the said order on the ground that the Bench of the Central Commission which decided the issue between the NLC and the Board was comprising of one of the Members who was a party to the dispute when he was Chairman of the NLC and therefore the Tribunal directed the Central Commission to hear the matter by constituting another Bench and to consider the issue afresh by giving opportunities to the parties, but despite this direction of this Tribunal, the Central Commission though constituted a new Bench, it did not consider and decide this issue afresh and on the other hand retained the said order dated 31.03.2009 and directed the Appellant to comply with the said order as if it was in existence, ignoring this fact that the Tribunal had already set aside the said order and as such the impugned order is wrong.. The Learned Counsel appearing for the Respondent Corporation while admitting that even though the earlier order dated 31.03.2009 was set aside by the Tribunal, no fresh finding has been given by the Central Commission on the said issue, in this impugned order since the Learned Counsel

for the Appellant did not choose to argue the matter on the said issue and on the other hand the arguments were advanced only on the question of reimbursement of the income tax and not on the issue of refund of the excess rebate and, therefore, the Central Commission cannot be faulted with. The Central Commission has not represented through the Counsel to refute the assertion made by the Appellant.

57. In the light of the respective stand taken by the learned Counsel for the Appellant, the Electricity Board and the Respondent NLC, it would be appropriate to refer to the order dated 20.5.2009 passed by the Tribunal while disposing the Appeal No. 78/09 challenging the order dated 31.03.2009 passed by the Central Commission for verification of the stand taken by the Appellant. The relevant observations made by this Tribunal are quoted below.

> *" Heard the Learned counsel for the parties. Several issues have been raised by Mr. P.H. Parekh, learned Senor counsel assailing the order impugned. One of the points*

raised by Mr. Parekh is that one of the Commission members was a party to the proceedings which culminated into the order passed by the Commission earlier on 19.10.2005 and 14.09.2006.

As fairly conceded by Mr. Parekh, this point regarding the bias had never been raised before the Commission. However, on seeing some documents, it is clear that one of the Members of the Commission has had correspondence with the Appellant through the letters. Therefore, it would be appropriate to remand the matter to the Commission to give opportunity to the Appellant to argue the point regarding bias and the Commission can consider the same and decide about the matter in accordance with law.

With regard to the other issues, we are not inclined to give any opinion especially when it is submitted that in respect of the two orders earlier passed on 19.10.2005 and 14.09.2006, the review Applications have been filed by the Appellant before the Commission on the basis of some

fresh documents. We make it clear, we are not expressing any opinion over the document referred to above.

Accordingly, the impugned order is set aside and the matter is remanded to the Commission for considering the matter on the aspect above indicated.

No costs.

58. The above order dated 20.05.2009 passed by the Tribunal would clearly indicate that the impugned order dated 31.03.2009 was set aside and the matter was remanded to the Central Commission for considering the matter afresh after hearing the parties. Thus it became evident that the order dated 31.3.2009 passed by the Central Commission was no more in existence thereafter.

59. Even though a fresh Bench was constituted by the Central Commission, as directed by the Tribunal, the Central Commission did not deal with the issue of refund of excess rebate but it dealt with other issue namely reimbursement of

income tax after retaining its order dated 31.03.2009 in respect of the issue relating to the refund of the excess rebate, without noticing that the order dated 31.3.2009 was set aside by the Tribunal by its order dated 20.5.2009.

60. As a matter of fact, the Central Commission mentioned about the details of the order in para 4 of its order dated 07.01.2010, stating that the said order dated 31.03.2009 was set aside by the Tribunal in Appeal No. 78/09 by the order dated 20.05.2009. It is also referred in that order that the Review Petition filed by the Appellant before the Central Commission in respect of 2 other orders passed on 19.10.2005 and 14.09.2006 passed by the Central Commission was dismissed by the Central Commission. While referring to those facts in its order dated 07.01.2010, the Central Commission has dealt with the order dated 31.03.2009 with reference to the claim for refund of excess rebate . The following is the relevant observation:-

“Refund of excess rebate availed

> *7. In our order dated 31.03.2009, we had directed the respondent to refund Rs. 79.52 crore on account of excess rebate retained by it by 30.04.2009. The respondent without complying with our order dated 31.03.2009 filed Appeal Nos. 79/2009 and 80/2009 challenging the orders dated 19.10.2005 in Petition No. 97/2005 and order dated 14.09.2005 in Petition No. 17/2006 in the Appellate Tribunal. Subsequently, the respondent choose to withdraw the Appeal Nos. 79/2009 and 80/2009 in order to file the review petitions against the said orders dated 19.10.2005 and 14.09.2006.* ***The review petitions filed by the respondent having been dismissed, our order dated 31.03.2009 regarding refund of excess rebate remains to be complied with by the respondent.***"

61. So this portion of the order passed by the Central Commission would clearly indicate that the Central Commission did not go into the aspect of refund of excess rebate on merits after hearing the parties afresh and on the other hand the earlier

order dated 31.3.2009 was retained on the impression that Review Petitions were dismissed by the Central Commission. It is to be noted that Review Petitions were filed only as against the orders dated 19.10.2005 and 14.09.2006 and not against the order dated 31.03.2009. Therefore, the Central Commission ought to have considered the said issue by hearing the Appellant, as directed by this Tribunal in its Remand Order dated 20.5.2009. The learned Senior Counsel for the Appellant has urged several contentions with reference to the said issue requesting the Tribunal to give a finding on this aspect, instead of again remanding the matter to Central Commission. He also referred to several letters exchanged between the parties with reference to the Refund of excess rebate. However, we do not propose to go into those aspects and to give finding with regard to this issue especially in the light of the fact that the said issue had already been decided by the Central Commission in 2 earlier orders dated 19.10.2005 and 14.09.2006. Further, this issue has not been dealt with in the impugned order dated 07.01.2010. Under the circumstances the Central Commission should be

permitted to deal with this issue after hearing the parties. Therefore, it would be appropriate to direct the Central Commission to decide the said issue alone in the light of the various contentions urged by the Counsel for the Appellant. We make it clear that we are not expressing any opinion on the points urged by the Counsel for the Appellant on this issue on the strength of various documents produced before this Tribunal as we are of the considered view that it is for the Central Commission to consider the documents and submission made by the parties and to decide the said issue.

62. Accordingly, we set aside the order to this extent and direct the Central Commission to hear the parties and decide this issue, in accordance with law. We reiterate that we do express any opinion on this issuie.

63. As regards the Issue Nos. 1 and 2, as indicated above, we hold that the Central Commission has got the jurisdiction to go into the disputes raised by the Respondent Corporation as

against the Appellant Board and the Appellant is liable to pay the grossed up amount as decided by the Central Commission. Thus, while we confirm the finding of the Central Commission on first two issues, i.e. in regard to the jurisdiction as well as to the direction relating to the reimbursement of income tax, we remand the matter to the Central Commission to decide about the third issue alone, namely Refund of Excess Rebate, to decide the matter according to law, after hearing both the parties.

64. **SUMMARY OF OUR FINDINGS:**

(i) Challenging the jurisdiction of the Central Commission to adjudicate upon the disputes with reference to the reimbursement of income tax or refund of Excess Rebate is not tenable. The Central Commission while adjudicating upon the dispute has to act in conformity with the applicable clauses contained in Regulations. In this case the Central Commission, while adjudicating the dispute in respect of reimbursement of income tax has acted in conformity with the clauses 2.12 of Regulation, 2001 and clause 7 of

Regulation, 2004 and while adjudicating upon the dispute in respect of refund of Excess Rebate, the Central Commission has acted in conformity with clause 2.15 of Regulation 2001 and Clause 25 of Regulation 2004. Admittedly, the dispute presently raised by the Respondent NLC before the Central Commission is a dispute involving a Generating Company, the Respondent and the Electricity Board, transmission and distribution licensee. Hence the Central Commission has the competence and jurisdiction to adjudicate upon the dispute raised by the generating company as against the transmission and distribution licensee.

(ii) Section 195A of Income Tax Act is a provision which comes into play in all cases where an employer/purchaser makes payment net of tax as in the present case. The concept of grossing up is restatement of basic proposition that where any part of income tax, which is due to the Government, is borne by the purchaser, then the tax borne by the said purchaser has to be necessarily treated as further income in

the hands of seller, thereby making it eligible for income tax again. A reading of section 195A of Income Tax Act leaves no doubt that the recovery of income tax paid as an expense from the beneficiaries requires to be grossed up in such a manner so as to ensure that the actual tax paid is fully recovered through tariff. Under those circumstances, the finding given by the Central Commission in regard to grossing up is perfectly valid. The contention of the Counsel for the Appellant contrary to the concept of grossing up is misconceived.

(iii) The order passed by the Central Commission on 31.03.2009 with reference to refund of Excess Rebate was challenged by the Appellant in Appeal No. 78/09 before the Tribunal. The said order was set aside by this Tribunal on 20.05.2009 directing the Central Commission to re-hear the matter on this issue afresh. Therefore, the order dated 31.03.2009 passed by the Central Commission was no longer in existence. In the present case, the Central Commission did

not decide the said issue afresh as directed by the Tribunal. Instead it simply constituted a fresh Bench and heard the matter on other issue namely reimbursement of income tax and gave finding only on that issue and retained its earlier order dated 31.03.2009, ignoring the directions of the Tribunal. Therefore, the impugned order dated 07.01.2010 is set aside on this issue and the matter remanded to the Central Commission to hear the matter on the issue of refund of Excess Rebate afresh and decide the matter according to law. However, it is made clear that we have not considered the issue on merits and as such we are not expressing any opinion on this issue. Consequently, it is open to the Central Commission to decide the issue on the basis of the submissions and materials placed by the parties and pass the order in accordance with law.

65. In view of the above findings, We conclude that we reject the contention urged by the learned counsel for the Appellant in respect of the jurisdiction as well as the reimbursement of

income tax. However, we remand the matter to the Central Commission for considering the issue of refund of Excess Rebate afresh.

66. With these observations, the Appeal is partly allowed.

No costs.

(RAKESH NATH) **(JUSTICE M. KARPAGA VINAYAGAM)**
TECHNICAL MEMBER **CHAIRMAN**

REPORTABLE/NON-REPORTABLE

Dated: 10th September, 2010