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

**APPEAL No. 54 OF 2009**

Dated: 21st August, 2009

**Present : Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson**
**Hon'ble Mr. H.L. Bajaj, Technical Member**

**In the matter of:**

**NTPC Ltd.**
NTPC Bhawan,
SCOPE Complex,
7, Institutional Area,
Lodhi Road New Delhi **...Appellant**

***Versus***

**Central Electricity Regulatory Commission**
3rd & 4th Floor, Chanderlok Building
36, Janpath, New Delhi – 110 001 **... Respondent 1**

**Uttar Pradesh Power Corporation Ltd.**
Shakti Bhawan
14 Ashoka Marg
Lucknow – 226 001 **... Respondent 2**

**Delhi Transco Ltd.**
Shakti Sadan, Kotla Road
Near ITO, New Delhi **... Respondent 3**

**BSES Rajdhani Power Ltd.**
BSES Bhawan, Nehru Place
New Delhi – 110 019 **... Respondent 4**

**BSES Yamuna Power Ltd**
Shakti Kiran Building
Karkardooma
Delhi – 110 092 **... Respondent 5**

**North Delhi Power Ltd.**
Grid Sub Station Building
Hudson Lines, Kingsway Camp
Delhi – 110 009 **... Respondent 6**

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

Counsel for the Respondent (s) : Mr. Pradeep Misra
Mr. Suraj Singh

## JUDGMENT

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

1. NTPC Ld., the Appellant herein, has filed this Appeal challenging the impugned order dated 24.11.2008 passed by the Central Commission disallowing the additional capital cost incurred by the NTPC Ltd. in respect of Dadri TPS Stage-I in the financial years 2004-05 and 2005-06.

2. Mr. MG Ramachandran, the Learned Counsel for the Appellant would submit that the Appellant filed a Petition No. 34 of 2007 before the Central Commission for the revision of the fixed charges on consideration of the impact of additional capital expenditure incurred by NTPC in the Dadri TPS Stage-I in the financial years 2004-05 and 2005-06, but the Central Commission disposed

of the said Petition by the order dated 24.11.2008 disallowing the additional capital cost in regard to the:

(a) Undischarged liabilities

(b) Cost of Maintenance Spares corresponding to the additional capital cost

(c) Interest on loan by considering the depreciation as normative loan repayment while computing the interest on loan.

3. According to the Learned Counsel for the Appellant the three issues referred to above have already been dealt with by this Tribunal and the decisions have been arrived at in favour of the Appellant. On that basis, the Learned Counsel for the Appellant has been praying that the Appeal can be allowed in terms of those Judgments.

4. We have heard the Learned Counsel for the Respondent on these aspects.

5. In respect of the undischarged liabilities, the Central Commission disallowed the same on the ground that the actual cost outflow has not occurred. The very same point has been discussed by the Tribunal and it was held in favour of the Appellant in Appeal No. 151 of 2007 dated 10.12.2008. The relevant portion of the order dated 10.12.2008 reads as under:

> **"We are, therefore, of the opinion that the entire value of the capital asset, as soon as the same is put into operation is recoverable by way of capital cost under Regulation 17 itself, notwithstanding the fact that the part of the payment for the capital asset has been retained."**

On the similar line, it has been held by the Tribunal in Judgment in Appeal No. 133, 135 etc. of 2008 dated 16.3.2009. The relevant part of the said Order is as follows:

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

In view of the above ratio, which has been decided by the Tribunal on both the occasions, we feel that the Appellant is entitled to the claim of capital expenditure validly incurred pending actual disbursement to be included in the capital cost.

6. The second point relates to the disallowance of cost of Maintenance Spares. According to the Learned Counsel for the Appellant, the Central Commission has not allowed the additional capital cost in regard to the maintenance spares corresponding to the additional capitalization while computing the historical capital cost. It is strenuously contended by the Learned Counsel for the Appellant that the Central Commission has permitted the cost of spares as per the capital cost frozen on the date of commercial operation without considering the additional capitalization undertaken from the date of the commercial operation as allowable under the Tariff Regulations 2004. It is further pointed out that this point also has been covered in the Judgment in Appeal No. 139 of 2006 dated 13.6.2007. In the Judgment, it has been held that the cost of maintenance spares needs to be calculated on the total capital cost inclusive of additional capitalization. The relevant portion of the Judgment is as follows:

**"III. Treating depreciation available as deemed repayment of loan**

**Analysis and Decision**

**We are not inclined to agree with the contention of the respondents that escalation of 6% will take care of the additional capitalization. Escalation is meant to factor inflation and is allowed as per CERC Regulations whether or not additional capitalization takes place. Question before us is that: can the historical cost be frozen with the Commissioning of the station. It is quite normal and prudent to ensure earliest operation of the plant without necessarily 100% completion of plants and works, of course not at the cost of safety of the plant. Adding some of the plants and works after the commercial operation will reduce interest during construction. If technically it is possible to delay some of the plants or works, it is only prudent to do so. For example it is common to build redundancies in the plant at a little later stage. CERC's own regulations rightly recognized additional capitalization. It is pertinent to set out excerpts pertaining to additional capitalization from CERC (Terms & Conditions of Tariff) Regulation, 2004 Clause 18 as below:-**

**"Additional capitalization (1) The following capital expenditure within the original scope of work actually incurred after the date of commercial operation and up to the cut off date may be admitted by the Commission, subject to prudence check:**

**(i) Deferred liabilities**
**(ii) Works deferred for execution**
**(iii) Procurement of initial capital spares in the original scope of work, subject to ceiling specified in regulation 17.**
**(iv) Liabilities to meet award of arbitration or for compliance of the order or decree of a court; and**
**(v) On account of change in law.**

**Provided that original scope of work along with estimates of expenditure shall be submitted along with the application for provisional tariff.**

**Provided further that a list of the deferred liabilities and works deferred for execution shall be submitted along with the application for final tariff after the date of commercial operation of the generating station.**

**It is clear from the abovementioned Clause 18 of the CERC Regulations that additional capitalization after the date of commercial operation is recognized as part of the capital expenditure Historical cost does not literally mean that the cost on the date of the commercial operation. The term historical cost is used so as to distinguish it from 'book value' or 'the replacement cost'. The cost of maintenance spares limited to 1% of the historical cost corresponds to the plant and equipment and installations which are required to be maintained. If the cost of additional equipment is not included in the historical cost, how spares for the additional equipment be procured for maintenance of the additional equipment. In this view of the matter, the CERC needs to examine afresh in the light of the aforesaid observations."**

Therefore, it has to be held that the Appellant is entitled to include the cost of maintenance spares also into capital cost.

7. The next point is relating to the equating depreciation with normative loan repayment. It is contended by the Learned Counsel for the Appellant that the Central Commission has erred by treating depreciation for the purpose of repayment of loan, thereby as a tool for the funding for the current year. The deprecation is not a source of funding for the current year. It is a settled position with regard to depreciation that the depreciation is the allocation of cost so as to charge a fair proportion of the depreciable amount in each accounting period during the expected useful life of the asset. Depreciation is not linked in any manner to the loan period. It is also pointed out that the decision arrived at by the Central Commission treating the normative repayment of loan as equivalent to depreciation for the year is contrary to the judgment of this Tribunal in Appeal No. 139, 140 etc. of 2006 dated 13.6.2007. In that Judgment, it has been directed that depreciation is not to be considered as deemed repayment. The relevant portion is as follows:

> **"III. Treating depreciation available as deemed repayment of loan**
>
> **Analysis and Decision**
>
> **In the orders of this Tribunal dated November 14, 2006 and January 24, 2007 it has been laid down that the computation of outstanding loan will be on normative basis only (instead of normative or actual whichever is higher). In view of this there is no question of any adjustment of the depreciation amount as deemed repayment of loan.**

**It is to be understood that the depreciation is an expense and not an item allowed for repayment of loan. If a corporation does not borrow, it would not mean that the corporation will not be allowed any depreciation. Depreciation is an expense it represents a decline in the value of asset because of use, wear or obsolescence. The Accounting Principles Board of USA defines depreciation as under:-**

***"The cost of a productive facility is one of the costs of the service it renders during its useful economic life. Generally accepted accounting principles require that this cost be spread over the expected useful life of the facility in such a way as to allocate it as equitably as possible to the periods during which services are obtained from the use of the facility. This procedure is known as depreciation accounting, a system of accounting which aims to distribute the cost or other basic value of tangible capital assets, less salvage (if any), over the estimated useful life of the unit (which may be a group of assets) in a systematic and rational manner. It is a process of allocation, not of valuation"***

**It is well established that the depreciation is an expense and therefore, it cannot be deployed for deemed repayment of loan. In this view of the matter the CERC shall need to make a fresh computation of outstanding loan in the light of the aforesaid observations."**

We are in perfect agreement with these observations. The Central Commission cannot treat depreciation as the deemed repayment of loan. The depreciation

amount, unlike advance against the depreciation has to be allowed regardless whether there is any liability to repay the loan or not.

8. In the very same line, the above principles have been reiterated in another Judgment rendered in Appeal No. 133, 135 etc. of 2008 dated 16.3.2009. The relevant portion is as follows:

> **"i) The depreciation has to be considered as a mere expense. It should not be considered to be an item allowed for repayment of loan.**
>
> **ii) The depreciation includes depletion of resources during the process of use. In other words, depreciation is ordinarily not a source of funds under commercial accounting.**
>
> **iii) The depreciation enables a utility to work out the charges to be recovered from consumers for supply of electricity. Since the charge is recoverable from the consumer, depreciation is a source of funding for replacement of cost.**
>
> **iv) There is a difference between the concept of depreciation and the concept of advance against depreciation. In the case of advance against depreciation, loan repayment may be one of the factors, but in the case of rate of depreciation, repayment of loan is not the relevant factor."**

9. In view of the above settled position, the Central Commission ought to have allowed the claim of the Appellant in respect of depreciation as well.

10. With these observations, the impugned Order is set aside. The matter is remanded to the Central Commission for fresh determination in respect of all the three issues referred to above in consonance with our conclusion and direction. The Appeal is allowed. No costs.

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

**(Justice M. Karpaga Vinayagam)**
**Chairperson**

Dated: 21st August, 2009

Reportable / Non-reportable