Before the Appellate Tribunal for Electricity

(Appellate Jurisdiction)

Appeal No. 93 of 2011

Dated 27th April, 2012

Coram : Hon'ble Mr. Justice P.S. Datta, Judicial Member

Hon'ble Mr. V.J.Talwar, Technical Member

In the matter of

1. Kanan Devan Hills Plantation Company Pvt. Ltd.
KDHP House,
Munnar – 685 612, Kerala,
Represented by its Executive Director
Mr. P.M. Srikrishnan.

2. M/s Tata Global Beverages Limited,
(Formerly Tata Tea Ltd.)
Special Projects Office,
General Hospital Complex,
Munnar – 685 612, Kerala,
Represented by its
Senior Manager – IR
(Legal and Administration)
Mr.Pratap Ramdas …Appellants

vs.

1. Kerala State Electricity Regulatory Commission,
C.V. Raman Pillai Road,
Vellayambalam,
Thiruvananthapuram-695 010

2. The Kerala State Electricity Board
Vidyuthi Bhavan, Pattom,

Thiruvananthapuram-695 004,
Represented by its Secretary … Respondents

Counsel for the Appellants:- Mr. Joseph Kodianthara
Senior Advocate
Mr. M.P. Vinod,

Counsel for the Respondent(s) : Mr.Ramesh Babu for R-1
Mr. George M.T. for R-2
Mr. G.Sreenivasan

Hon'ble Mr. Justice P.S. Datta, Judicial Member

The two appellants, namely Kanan Devan Hills Plantations Company Private Limited, and M/S Tata Global Beverages Limited (formerly Tata Tea Limited) have preferred this appeal against the order dated 26.4,2011 passed by the Kerala State Electricity Regulatory Commission, the respondent no 1 herein, on series of grounds which we will notice as we proceed to consider the merit of the appeal.

2. The first appellant who is the successor-in interest of the second appellant and supplies electricity as a distribution licensee u/s 14 of the Electricity Act,2003 to various consumers in Munnar including its captive load had filed ARR & ERC petitions for the year 2007-08, 2008-09, &2009-10 for approval of the Commission, the respondent no 1 herein and prior thereto the appellant no 2 had also filed ARR & ERC before the Commission for the years

2005-06 and 2006-07. The first appellant said to be a transferee from the second appellant in the matter of business of distribution of electricity. The Commission passed orders thereon against which the two appeals were preferred by the first appellant, being the appeals no 160of 2009 and the appeal no 193 of 2009 before this Tribunal which were also disposed of on 24.11.2010.

3. It is the case of the appellants that the Commission took up true up proceedings for a period of five years i.e., FYs 2005-06 to 2009-10 out of which the second appellant was the distribution licensee for two years and three months. The business of the second appellant was transferred to the first appellant along with transfer of license by the Commission in favour of the first appellant with effect from 1st July,2007. The Commission is said to have passed an order on 09.01.2007 transferring distribution license in favour of the first appellant. An Indenture was also executed by and between the two appellants on 23.6.2007 in respect of transfer of business of distribution in favour of the first appellant. The first appellant filed truing up petitions for the period of their operation, namely for FY 2007-08,2008-09, & 2009-10 mentioning that it took over the business as a licensee from the second appellant on 01. 7.2007. After the initial hearing held on

16.8.2000 the Commission is alleged to had erroneously assumed the second appellant to be the first appellant's major stake holder and the distribution business as a continuing function, directed the first appellant to file true-up petition from the FY 2005-06 onwards which was illegal because such direction should have been made against the second appellant and that the second appellant was not given an opportunity of being heard particularly when it was the separate distribution business of the second appellant having no nexus with the business of the first appellant. The Commission passed however a composite true-up order covering five financial years on the said truing up petitions on 26.4.2011 which is impugned herein. The grounds of the appeal are as follows:-

a) The Commission erred in not distinguishing the first appellant as a distinct entity. The Commission ought to have trued up the accounts of each licensee differently and independent of each other.

b) The Commission also erred in computing the revenue from sales during the period 2005-06 & 2006-07 under the premise that own consumption should be treated at par with sales to any other consumer when the Commission itself had approved the ARR & ERC petitions filed by the second appellant during the relevant years. The Commission now

proceeded to change the operational surplus of the second appellant to true up the account of the first appellant.

c) No opportunity was given of hearing to the second appellant as a distribution licensee for the two financial years as mentioned above and the second appellant was a necessary party to the true up proceedings.

d) The order impugned is without jurisdiction in the context of the orders passed in the ARR & ERC in respect of the second appellant.

e) The Commission erred in including in or adding to the surplus arrived at as regards the operations of the second appellant for the FYs 2005-06 & 2006-07 and the first quarter of 2007-08 into the first appellant' true-up for the years thereafter up to 200-09-10 and thereby creating a totally non-existent, artificial and erroneous surplus in the hands of the first appellant .

f) The Commission illegally treated the two appellants as one entity in the impugned order.

g) The Commission failed to see the operational differences between the two appellants in the impugned order.

h) The method adopted and the conclusions arrived at in the impugned order is legally unsustainable.

i) There could not be any surplus in the hands of the first appellant to the tune of Rs622.43lakh.

j) The Commission was not justified in imposing the additional cost incurred due to excess T&D loss for the years 2005-07and 2006-07 on the first appellant when the second appellant was operating as the distribution licensee.

k) The Commission was not right in holding that own consumption by the second appellant has to be treated at par with sales to any other consumer when such differential amount was allowed to be maintained by the second appellant during its operation as a distribution licensee.

l) The Commission was not justified in disallowing the employees' cost of the first appellant without considering that the distribution business of the first appellant was a separate business.

m) The Commission was not right in considering the income from sale of scraps in the years 2007-08 and 2008-09 as revenue.

n) The Commission was not justified in considering Rs.58.62lakh as non-tariff income for the year 2008-09 when the actual non-tariff income for the first appellant was only Rs.18.94lakh.

o) The Commission was not justified in deducting duty and thermal charges for the year 2009-10 while the same was already deducted by the first appellant in the power purchase cost.

4. The Commission filed a counter affidavit contradicting all the points. It contends as follows:-

a) Since the second appellant has no stake in the distribution business and the license for distribution of electricity has been rested with the first appellant the second appellant is really a non-entity.

b) True up of accounts has to be done for all the years in respect of which orders on ARR and ERC have been issued. The order on true up cannot be limited to the years in which the Appellant has been in operation.

c) All the assets, liabilities, interests, rights, obligations etc. have to be transferred to the first appellant and when the first appellant has taken over the distribution business, it is the duty of the first appellant to see that all the necessary records are properly handed over to function as a growing concern.

d) The transferee has the responsibility to provide all information regarding the distribution operation. The Executive Director of both the entities is the same individual and it was the first appellant who produced the records needed for truing up for the years 2005-06 and 2006-07 before the Commission. It is not practical for the Commission to track the descendents and antecedents of the transferor.

e) During the proceedings before the Commission the first Appellant has never argued that the second Appellant should be made a party.

f) No major adjustment / disallowance was made on the accounts presented by the licensee even for the period prior to the takeover except for the power purchase in excess T&D loss.

g) The presence of the second appellant in the true up proceedings was not necessary and whatever information was provided by the first appellant was sufficient. The Commission accepted the actual accounts provided by the first appellant for the period 2005-06 and 2006-07 in respect of which the second appellant in this appeal did not challenge to the accounts. Therefore, the accounts

for 2005-06 and 2006-07 as produced by the first appellant were correct.

h) There was no need of undertaking exercise of true up accounts of the two appellants separately because after the transfer of license the second appellant has no role in the distribution business.

i) It is now a settled issue that there cannot be any distinction between licensee's own consumption and sales to other consumers and this issue was upheld in Appeal No.160 of 2009 and 193 of 2009.

j) The reconciliation statement provided by the licensee needs to be read along with the revenue from sale of power treating own consumption at the applicable tariff.

k) The Commission has taken into consideration the additional cost on account of revision of BST based on the calculation provided by the licensee itself. While truing up, an amount of Rs.667.88lakh has been additionally provided for meeting the cost on account of revision of BST.

l) Since the electricity distribution business is a continuous one, the change of ownership should not be allowed to affect the interests of the consumers. After the transfer of

license, the first appellant has taken over all liabilities, assets, interest and obligation of the second appellant during continuation of the business.

m) Since license has been transferred the first appellant is responsible for having the surplus arrived at after the truing up process for the period prior to the takeover. The surplus available with the transferor over and above Return on Equity allowable has to be ploughed back to the business for the benefit of the consumers. The transferor cannot be allowed to run away with the surplus generated.

n) The Commission has treated the own consumption of the second appellant also at par the prevailing tariff in the first ARR&ERC order itself which has been upheld by this Tribunal in Appeal.

o) The Commission is correct in treating interest on loan.

p) The Commission has allowed employees cost for the distribution business as per the details provided by the first appellant.

q) The income received from the sale of asset has to be considered as revenue item and the revenue booked under sale of scraps was on account of sale of existing

copper cables which was rejected by the Appellant. As such, the amount of sale has to be treated as an income of the distribution business.

r) Thermal surcharge is the fuel surcharge imposed on the consumers which has to be collected from the consumers as per the rate approved by the Commission and passed on to KSEB by other licensees. The licensee cannot treat this amount as cost.

s) Electricity duty cannot be a part of the power purchase cost and only the net power purchase cost has been allowed in the impugned order.

5. The Kerala State Electricity Board, who is the Respondent No.-2 herein has filed a counter affidavit challenging all the contentions of the Appellants as follows:-

a) In terms of the Indenture dated 23.6.2007, the license for distribution of electricity was transferred to the first appellant from the second appellant and clauses (2) and (3) would clearly show that on the date of passing of the impugned order, the second respondent lost its legal entity and all

assets and liabilities stood transferred to the first appellant with the transfer of license.

b) There was no necessity from the legal point of view of serving any notice on the second appellant.

c) The Commission directed the first appellant to produce all documents, materials and information in relation to the true up for the years in question.

d) The order impugned is within the jurisdiction of the Commission to pass.

e) The Commission rightly passed on the surplus to the first respondent in course of true-up.

f) The methodology adopted during true-up was applied uniformly in respect of all the licensees.

g) Revenue from sale of scraps was rightly treated as non-tariff income.

h) The reason for deducting the duty and thermal surcharge has rightly been spelt out by the Commission in the impugned order.

i) The Appeal is without any merit.

6. The two appellants filed rejoinders to the two counter affidavits of the two respondents but since mostly they are the

reiterations of what have already been stated in the memorandum of appeal we desist from reproducing the same once again. The points that arise for consideration of the Tribunal are as follows:-

a) Is the impugned order vitiated by illegality because of the second appellant not being made a party before the Commission in course of true- up proceedings?

b) Is the order bad in law because of undertaking the exercise of truing up of the financials of the second appellant for the FYs 2005-06 and 2006-07 without hearing the second appellant and by casting obligation illegally on the first appellant to produce audited accounts of the second appellant as alleged?

c) Was the Commission justified in treating the two appellants as one entity?

d) Was the Commission justified in determining artificial surplus in the hands of the first appellant?

e) Is the method adopted and the conclusions arrived at by the Commission in the impugned order dated 26.4.2011 correct and justified?

f) Was the Commission justified in holding that own consumption by the second appellant has to be treated at par with sales to any other consumer when

allegedly such difference was allowed to be maintained by the Commission during its operation as a distribution licensee?

g) Was the Commission right in imposing the additional cost incurred due to excess T&D loss for the years 2005-06 and 2006-07 on the first appellant when the second appellant was operating as the distribution licensee?

h) Was the Commission right in disallowing the interest for the loan amount used for taking over the distribution business?

i) Was the Commission justified in disallowing the employees' expenses of the first appellant without allegedly considering that the business of the first appellant is a separate business?

j) Was the Commission justified in treating sale from the scraps as non tariff income of the first appellant?

k) Was the non-tariff income rightly assessed by the Commission?

l) Was the Commission justified in deducting duty and thermal charges for the FY 2009-10?

7. We have heard Mr. Joseph Kodianathara, learned Senior Advocate and Mr. M.P.Vinod, learned Advocate appearing for the appellants and Mr. Ramesh Babu, learned Advocate for the respondent no 1 and Mr. George M.T and Mr. G. Sreenivasan learned Advocates for the respondents 2 The learned counsels appearing for the respective parties elaborated through their arguments what have been averred in their respective pleadings, and since we have narrated the pleadings somewhat in great details we refrained from again reproducing their oral submissions. Further, the parties have filed their written note of arguments which we have in course of our deliberations extensively dealt with.

8. Issue No. a), b), and c) call for integrated approach. Reading between the lines of the Memorandum of Appeal it appears that one of the principal grievances of the AppellantNo.1 is that the appellant No.2 was not given an opportunity of being heard in course of hearing of the true-up proceedings as it was a necessary party with whom all materials and documents were available and which could not be made available with the appellant No.1 because of the fact that the two Appellants have been and are two separate and distinct entities. This line of reasoning does

not stand to reason. Going by the principles of Order 1, Rule 10, Civil Procedure Code the second appellant for the purpose of an order in a true up proceedings by the Commission is not a necessary party especially in view of the facts and circumstances of the case . A necessary party is one whose presence is necessary for final adjudication of the matter in controversy and whose presence cannot be dispensed with. The concept of necessary party invariably pre-supposes existence of the party for the purpose of the adjudication of the dispute. Originally, it was the Appellant No.2 who was the predecessor-in-interest of the Appellant No.1. It is not in dispute that by an Indenture dated 23.6.2007 Tata Tea Limited transferred its business of distribution of electricity to the Appellant No.1. All the assets and liabilities of the business together with rights, interest and obligation were transferred to the Appellant No.1 and Clauses 3 of the preamble reads as follows:

> *"The aforesaid 17 estates together with the buildings, factories and other structure were transferred in the manner as above by the Company in favour of KDHP as a growing concern pursuant to the resolution passed by the Board of Directors of the Company at their meeting held on 11th February 2005 to transfer as a growing concern the business undertaking pertaining to its tea plantations in Kerala amongst others connected service departments subject to the approval of the shareholders of the Company and the shareholders approved the proposal subsequent by postal ballot."*

Further the Indenture discloses that in consideration of a sum of Rs1,14,00,000/- the second Appellant transferred/assigned the distribution business in favour of the first Appellant together with all electrical lines, electrical plant, buildings, works and materials as described in the first schedule to the said Indenture. Again Clause 3 reads as follows:

"That KDHP shall be entitled to institute, conduct and carry on and defend all suits, actions and proceedings in any court or tribunal or before any Authority in respect of the utility hereby transferred in the manner aforesaid and shall also be entitled to continue, conduct, carry on and defend all suits, actions and proceedings in any court or tribunal or before any Authority in respect of such utility and to take all steps and proceedings as may be necessary for the future conduct and prosecution, of the said suits, actions and proceedings. The Company shall, as and when required by KDHP and at the cost of KDHP execute in favour of required to effectually institute or carry on or conduct or defend the suits, proceedings and actions."

9. Thus, we find that so far as the distribution business is concerned it was transferred to the Appellant No. 1 by the Appellant No.2. Though there is a clause in the indenture that notwithstanding the transfer of utility the Appellant No. 2 shall continue to buy electricity from the Kerala State Electricity Board so long as a fresh agreement is not entered into by and between the first Appellant-transferee and the Kerala State Electricity Board this Clause does not lead to the conclusion that despite the transfer of the utility by the Appellant No.2 to Appellant No.1 the

Appellant No. 2 continues to remain still as a separate distribution entity. It was for the last time in the FY2006-2007 that ARR & ERC petition was filed by the Appellant No.2 before the Commission which passed an order thereon. So far as the true-up proceeding is concerned, true-up petitions for FY2005-2006 and FY 2006-2007 were filed along with materials and documents by the Appellant No.1 but with demur, along with the true-up petitions for the FY 2007-2008, 2008-2009 and 2009-2010, and the Commission passed a composite order thereon on 26.4.2011 which is impugned herein. Therefore, so far as the distribution system is concerned the appellant No. 2 became a non-entity and unless a party is existent in the eye of the law the question of making it a party does not arise.

10. The Commission while transferring the license in favour of the first Appellant passed an order on 26.3.2007 which is as follows:

"Tata Tea shall transfer all the assets used for carrying out the business of distribution of electricity to Kanan Devan Hills Plantations Company Private Ltd. within three months from date of publication of this amendment order in the official gazette. The transfer should cover the assets in the area where the ownership of lad has not been transferred to Kanan Devan Hills Plantations Company Private Ltd."

11. The learned Advocate for the Appellant refers to the decision in *Rustom Cavasjee Cooper v. Union of India reported in AIR 1970 SC 564* and the decision reported in *AIR 1982 SC 697* to bolster his argument that the two Companies being separate and distinct the true-up proceedings should have been drawn up separately and the Appellant No.1 must have no responsibility to file true-up petitions for the period when the appellant no 2 had been carrying on business ,and as such has no concern with the alleged surplus of the Appellant No.2 and the said surplus cannot be carried on to the account of the business of the appellant no1 because it is the separate business of the said appellant The English decision in *Solomon v. Solomon of the House of Lords* and the aforesaid two decisions of the Supreme Court have no application to the present Appeal because in the instant case the very distribution business of the second appellant has been transferred with transfer of assets and the second appellant's distribution business has been eclipsed with such transfer. It is not the case pleaded of winding up of a company in respect of the erstwhile distribution business of the second appellant The appellant no 2's now carrying an altogether different business with change of name under the Companies Act,1956 does not alter the situation.

12. The Commission has rightly observed that the first Appellant has taken over the distribution business as a going concern from the second appellant and all the assets, liabilities, interest, rights and obligations stood transferred to the first Appellant and when this is done the responsibility lay upon the first Appellant to carry on the duties and activities consequential to the transfer of business of the second appellant. We find from the records and the impugned order of the Commission that initially the first appellant was reluctant to produce particulars in respect of the true-up proceedings of the Appellant No.2 but ultimately the Appellant No.1 by letter dated 1.12.2010 filed audited accounts for the year 2005-2006 of distribution business held by the Appellant No.2 but stated that the accounts for the year 2006-2007 and for the period from 1.4.2007 to 30.6.2007 were not readily available but in course of hearing of the true-up proceedings the appellant No. 1 provided the details and the clarifications required by the Commission through subsequent letter 1.12.2010 and then on 1.3.2011 the appellant No. 1 filed a petition showing the comparison of actual and approved expenses and income for the years 2005-2006, 2006-2007 and the first quarter of 2007-2008 through a forwarding letter dated 12.3.2011. It was the first appellant that produced a ‘Reconciliation Truing up Petition for FYs

2005-06 to 2009-10, and it was duly accepted and allowed upon examination by the Commission. The first appellant, as it appears from the impugned order, refers to 17 communications made by the first appellant to the Commission in relation to detailed particulars/materials/statements in connection with the true-up proceedings of five financial years including the FY2005-2006 and 2006-2007. It is not the case of the first Appellant nor of the second appellant that any document or material relevant to the true-up proceedings for the FY 2006-2007 could not be furnished before the State Commission. Nor is it the finding of the Commission that whatever material and information were produced was not sufficient for the Commission. On the contrary, the Commission maintains the stand that no additional information was necessary that could drastically alter the true-up proceedings. Before the Commission it was not urged by the first Appellant that the presence of the second Appellant was at all necessary, nor in this appeal, the Commission has maintained that it does not appear that the accounts provided by the first appellant for the period 2005-06 and 2006-07 was not correct and sufficient. Neither of the two appellants does furnish any material to show that because of non-production of any certain documents or materials, the true up proceeding for the year 2006-07 could not attain

perfection. Therefore, the presence of the second appellant before the Commission was not necessary. It has not been demonstrated as to what case the second appellant would have intended to present if it had been invited to participate in the proceedings before the Commission. In the present appeal it has not been argued that any certain document was left out to be considered by the Commission, which if considered would have altered the situation and the said document could not be in the custody of the first appellant. Nor is it the case of the second appellant that the accounts furnished by the first appellant were not correct and no surplus could be arrived at on the basis of the documents furnished by the first appellant. as The Commission has rightly observed that the business is a continuing one with the transfer of assets and the true up proceedings is a ongoing concern and it has also been rightly argued by the learned Counsel for the Kerala State Electricity Board that the second Appellant cannot run away with the amount of surplus found after the true up proceedings. When assets were ordered to have been transferred to the first appellant, surplus has to be taken into account and the question of existence of two distinct and separate distribution entities running parallel to each other is misnomer. This answers Issue No. a), b) & c) against the Appellants.

13. With respect to Issue No. d) & e), it has been contended by the appellants but without supporting materials that the truing up of the financials of the second appellant for the Financial Year 2005-06 and 2006-07 were illegal or bad in law, except the points advanced above by the appellant and which we have traversed. In this appeal, the second appellant also did not challenge the actual accounts furnished by the first appellant for the purpose of truing up which shows that the accounts provided by the first appellant for the two periods in question were correct. The argument of learned Counsel for the first Appellant that since the second appellant had run the electricity operations as an integral part of its plantation operations most of the expenses relating to the operations were absorbed by the tea operations cannot be accepted. As the other business of the second Appellant cannot be intermingled with the erstwhile business of distribution of the second Appellant till the date of transfer of assets, similarly the other business of the first Appellant has also to be dealt with separately from the distribution business. Thus, the activities of distribution business and other sorts of business have to be treated separately and any loss on account of distribution business has to be compensated accordingly to law. The contention of the first appellant that the labourers engaged in other business of the

first appellant will be affected cannot be accepted. The contention of the first appellant that it has been carrying on other business and the entire labour force of 13,000 workers being share holders and the resources are available with the first appellant are very meagre is beside the point. It is not the case of the first appellant that after the transfer of business, the second appellant has been carrying on similar and parallel distribution business so that two businesses were different. It is difficult to accept the argument that the determination of surplus from electricity distribution operations through truing up exercise beyond the actual surplus would have to be funded out of the first appellant's plantation operations would be highly detrimental to the alleged viability of the plantation operations and interest of the workers in as much as the true up proceedings were carried out only in respect of the distribution business of the first appellant and the said true up proceedings followed the orders passed on the ARR & ERC petitions filed by the first appellant only in respect of that business and the other business of the first appellant has no concern in the matter in question. The very argument of the Appellant No.1 that the alleged surplus found in respect of the second appellant' tenure could not be accounted for legally in the business of the first Appellant after the true up proceedings of the second Appellant is

in view of the analysis made above untenable in law. As pointed out earlier, the second appellant cannot run away with the surplus since orders are passed upon ARR and ERC filed by the distribution companies and the true up proceedings are drawn up with reference to those ARR and ERC petitions filed by them and in the interest of the consumers the transactions of accounts have to be reckoned with continuously and as a ongoing process. Since the license has been transferred, the first appellant is responsible legally with respect to the surplus arrived at after the truing up processes for the period prior to the take over and the surplus available with the transferor over and above the return on equity and the return on equity allowable has to be ploughed back to the business for the benefit of the consumers. Again, it is difficult to agree with the appellant that the surplus of Rs450.52lakh has been arrived at by the Commission by arbitrarily altering the figures especially with respect to the own consumption of the second appellant. It cannot be gainsaid that the tariff applicable to the different categories of consumers does have nexus with surplus or deficit. The grievance of the first appellant that before 1st of April, 2007 surplus ,if any , of the second appellant should have been discovered by the Commission so that the first appellant could not be put to prejudice is misnomer on the premises advanced above.

It does not appear that the regulatory principles followed in the normal course of business have not been followed. It has been unsuccessfully argued by the learned Counsel for the appellant that the method adopted and the conclusions arrived at by the Commission in the impugned order dated 26.4.2011 was not correct and justified as the argument is not backed by any earthly reason. The Issue No. d) & e) are answered against the Appellants.

14. With respect to Issue No. f), it is vehemently argued by the learned Counsel for the appellant that the Commission illegally treated the own consumption by the second appellant at par with the sales to any other consumer particularly when such difference was allowed to be maintained by the Commission during its operation as a distribution licensee, while it has been argued by the Commission that that the Commission had treated the own consumption of the second appellant and that too as per the prevailing tariff has been accepted by this Tribunal earlier in Appeal No. 160/2009 & 193/2009 which attained finality. According to the learned Advocate for the Commission in respect of the second appellant in the first ARR&ERC Order itself, the Commission has treated the revenue from own consumption at

HT-1 and this principle is not new and it was adopted by the Commission to avoid discrimination between the other consumer categories and licensee's own units. At page 322 of the Memo of Appeal, it appears that the revenue from self-consumption has been considered at HT-1 tariff rates and the second appellant's internal energy consumption was 40% of the total intake and 40% of the total demand has been allowed as MD on self consumption. Total revenue from self-consumption was found to be 576.90lakh, while revenue from energy sale came to be Rs.337.46lakh for 2005-06. It is submitted by the learned counsel for the Commission that the first appellant through a letter dated 6.1.2010 reported that income would increase by Rs159.57lakh if the energy charges for the own consumption are billed at HT 1 rates but the Commission was unable to accept the estimation since the proportionate increase in demand charges were not accounted for. However, the Commission directed that the licensee within one month from the date of the order of the Commission would provide a detailed list of connections under 'own consumption ' showing appropriate tariff category , load details and consumption details with the details of tariff category under which they are billed for their different supply points, and in the meantime the Commission for the purpose of truing up allowed the sales to other consumers and

provisionally accepted the ‘own consumption’ reported by the first appellant. The Commission has noted the decision of this Tribunal dated 18.5.2010 passed in Appeal nos.160 of 2009 and 193 of 2009 relating to the self- same parties where at paragraph 19 it was held that the Act does not permit differential treatment The Commission in that case contended that using costlier power through own generator and imposing cost on the other consumers when cheaper power was available is not the way of reducing the MD. In the impugned order the Commission referred to the aforesaid decision of this Tribunal and decided the point accordingly. We do not find any reason for disagreement with the Commission and answer the point against the appellants accordingly.

15. With respect to Issue No. g), relating to T&D loss, it has been argued by the learned Counsel for the appellants that the Commission was not right in imposing the additional cost incurred due to excess T&D loss for the year 2005-06 & 2006-07 on first appellant when the second Appellant was operating as a distribution licensee. The argument cannot be accepted. If the distribution business is distinct and separate then the second appellant cannot take a stand that plantation and electricity distribution was carried on as one entity and profit from distribution

business and further billing of own consumption were never made issues. It appears that for the years 2005-06 and 2006-07, the distribution loss was 19.65% and 19.78% while the Commission approved 17.70% and 19.00%. The Commission found that from FY 2007-08, actual losses were lower than the approved losses which, however, was not the case in respect of the Financial Years 2005-06 and 2006-07. We do not find any counter argument, worth acceptable, that in the event of non-achievement of T&D loss target, the additional cost of energy equivalent to the excess T&D loss has to be deducted from the power purchase cost. That is to say, additional purchase which was found necessary due to excess T&D loss cannot be passed on to the consumers and the Commission found the excess energy in 2005-06 and 2006-07 at 9.00 and 3.50lakh units respectively. Commission, of course, made no major adjustment / disallowance even for the period prior to the take over except for the power purchase on excess T&D loss. The contention of the Appellant regarding power purchase cost based on revised BST has been disputed by the Commission. The Commission has taken into account the additional cost on account of revision of BST based on the calculation provided by the licensee itself. This is manifest from paragraph 11 of the Commission's order where in course of true up the Commission

provided a sum of Rs.667.88 lakh for meeting the cost on account of the revision of BST. The issue is answered against the appellants.

16. With respect to Issue No. h) relating to alleged disallowance of interest for the loan amount used for taking over the distribution business, it appears that the Commission found that for FY 2005-06, there was no interest and financial charges proposed or approved. The Commission observed after detailed analysis in its ARR an ERC order for 2008-09 on 21.1.2009 that the assumptions on interest rate and loan amount were not actual but hypothetical. Accordingly, interest on the proposed loan was disallowed. For FY 2009-10, the first appellant did not propose any interest on loan and during hearing the first Appellant claimed that they have availed themselves of a term loan from ICICI Bank but could not produce any documents to prove the loan transaction in the accounts and interest paid thereon. In the consolidated audited accounts, the first Appellant did not mention about the loan taken for take over of the distribution license. Accordingly, there was reason on the part of the Commission for being not convinced of the necessity of additional burden of interest charges.

Furthermore, consumers are not to be burdened for transfer of business. The issue is answered against the appellants.

17. On Issue No. i), relating to alleged disallowance of employees' expenses of the first Appellant without allegedly considering that the business of the first Appellant was a separate business it appears that the Commission approved Rs.43.44 and Rs.32.24lakh for FY 2005-06 and 2006-07 against which actual amounts were Rs.14.94lakh and Rs.24.72lakhs respectively. The Commission allowed the employees cost for the distribution business as per the details provided by the first appellant. The first Appellant had given the details of separate cost of employees for distribution of business and it was accepted by the Commission. The Commission observes *" The Commission accepts the reasoning and the separation of the employee operations proposed by the licensee for the purpose of truing up".* The Commission, of course, doubted whether the total contribution of the Manager was commensurate with the costs booked. The Commission, however, maintained that a separate exercise was being initiated to properly identify and separate the joint costs of the licensees but till then the Commission allowed the cost as

proposed by the licensee. The issue is answered against the Appellants.

18. With reference to the Issue No. j) & k), relating to alleged treatment of sale from the scraps as non-tariff income, the Commission rightly maintained that revenue booked under sale of scraps was on account of sale of existing copper cables which was replaced by the appellant and income received from the sale of assets has to be considered as revenue item. The licensee has not disputed the amount included as other income which is on account of the sale of scrap. It has submitted by the learned counsel for the Commission that the truing up was done on the basis of the audited accounts where the income from sale of scrap is shown as revenue The income from such source must be traced to the business. The question of inclusion of cost of replacement of conductors can be included as a part of the capital expenditure only when the expenditure is additionally incurred. No additional expenditure was shown with respect to replacement of conductors. The Commission found that the replacement of conductors was carried out from the income from sale of old copper conductors and balance amount was shown as part of other income. The issue is answered against the appellants.

19. With respect to the Issue No. l), concerning deducting duty and thermal charges, it has been submitted, rightly too, that thermal surcharge is a fuel surcharge imposed on the consumers and the licensee cannot account it as a cost. We do not find fault with the Commission's reasoning. The issue is answered against the appellants.

20. In the result, we do not find any illegality or infirmity in the order complained of in the appeal as a result whereof we dismiss the appeal but leave the parties to bear their own costs.

(V.J.Talwar) **(P.S. Datta)**

Technical Member **Judicial Member**

Reportable/Not-reportable

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