Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal no. 250 of 2012

Dated: 3rd July, 2013

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

In the matter of:

Neyveli Lignite Corporation Ltd. ….Appellant(s)
Neyveli House
135-E.V.R. Periyar Road
Kilpauk
Chennai – 600 010

Vs

1. **Kerala State Electricity Board ...Respondent(s)**
   9th Floor, Vidyut Bhavanam
   Pattom
   Thiruvananthapuram – 695 004

2. **Central Electricity Regulatory Commission**
   6th Floor, Core-3, SCOPE Complex
   Lodi Road, New Delhi – 110 003

Counsel for the Appellant (s): Mr. N.A.K. Sharma
Mr. R. Sasiprabhu
Mr. Venkata Chalapathy
Ms. Bindu K. Nair
Mr. Somiran Sharma

Mr. Ravi Shankar
Ms. Rakhi Mohanty

Counsel for the Respondents (s): **Mr. Jayashankar, Sr. Adv.**
Mr. M.T. George
Ms. Kavitha K.T.
Mr. G. Sreenivasan

JUDGMENT

PER HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by Neyveli Lignite Corporation Ltd. ("NLC") against the order of the Central Electricity Regulatory Commission ("Central Commission") dated 20.9.2012 rejecting the claim of the Appellant in respect of reimbursement of income tax for its TPS-I Expansion generating station by Kerala State Electricity Board ("Electricity Board").

2. The Kerala State Electricity Board is the Respondent no.1 and the Central Commission is the Respondent no.2.

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

3.1 Power generated by two generating stations of the Appellant, namely TPS-II and TPS-I Expansion are supplied to the Southern States including Kerala. The Electricity Board, the Respondent no.1 is thus the beneficiary of TPS-II and TPS-I Expansion. The two units of TPS-I Expansion of the Appellant had started commercial operation on 9.5.2003 and 5.9.2003 respectively.

3.2 Under the Tariff Regulations 2001 and Tariff Regulations 2004 of the Central Commission, the tax

on income from core activity of the generating company was to be computed as an expense and was recoverable by the generating company from the beneficiaries.

3.3 The tariff for the period 2001-04 and 2004-09 in respect of TPS-I Expansion was determined by the Central Commission by order dated 23.3.2007 with some delay which was due to the fact that the process of determination of the transfer price of lignite by the Central Commission took some time. Till then the power sold was being invoiced by the Appellant on the basis of provisional tariff.

3.4 In the tariff order dated 23.3.2007 it was stipulated that reimbursement of income tax by the beneficiaries will be at actuals. Even though, the Appellant regularly remitted the advance tax every quarter from FY 2003-

04 in respect of TPS-I Expansion as per IT Act, 1961 and also remitted/adjusted under/over payments at the end of the accounting years based on the certificate of the statutory auditors, the raising of claims on the Electricity Board for reimbursement of income tax was deferred till the issue of the tariff order dated 23.3.2007.

3.5 After the issue of the tariff order dated 23.3.2007, the Appellant made claims on the Electricity Board, the Respondent no.1 for the reimbursement of income tax for 2004-05, 2005-06 and 2006-07 for a total sum of about Rs. 46.52 crores in respect of TPS-I Expansion. However, payment was not made by the Respondent no.1.

3.6 On 2.1.2010, the Appellant filed a petition before the Central Commission for the direction for reimbursement. The Central Commission after hearing

the parties passed the impugned order dated 20.9.2012 rejecting the claim of the Appellant.

3.7 Aggrieved by the impugned order dated 20.9.2012 passed by the Central Commission, the Appellant has filed this Appeal.

4. The Appellant has made the following submissions:-

4.1 As per the procedure followed by the Appellant, on payment of Advance Tax every quarter, the Appellant furnished claim for reimbursement of income tax to the respective beneficiary for payment. After close of an accounting year and after the accounts have been audited by the statutory auditors, a final claim as credit/debit note with respect to reimbursement of income tax was furnished to each beneficiary supported by the certificate by the statutory auditors.

4.2 The tax liability of the Appellant is reckoned based on aggregate net taxable profits in respect of all the business activities, both core and non-core. However, in terms of the Tariff Regulations, reimbursement of tax by the beneficiaries was restricted to the income from core activity of the Appellant.

4.3 Claim for reimbursement based on advance tax paid every quarter, was required to be supported only by proof of payment by way of challan and a generating station-wise working in respect of each beneficiary. No certificate from statutory auditor would exist at that stage.

4.4 At the end of the year, after the accounts have been audited, final claim for income tax was made. Such final

claim alone was required to be supported by a certificate of statutory auditors.

4.5 Tariff Regulations require that the benefits of tax holiday, as applicable in accordance with provisions of Section 80 IA of the Income Tax Act, 1961 shall be passed on to the beneficiaries. Section 80 IA required that for the purpose of that section, the profit of the eligible business shall be computed, as if such business was the only source of income of the Assessee during the applicable years. Thus, even though the Appellant was required to aggregate all the taxable profits of all its core and non-core business activities for arriving at the rate of tax and tax liability, for the purpose of claiming the benefit under Section 80 IA in respect of TPS-I Expansion, the net profit was to be treated on stand alone basis.

4.6 TPS-I Expansion had accumulated depreciation (loss) of Rs. 657.12 crores as on the Commercial Operation Date ("COD"). For the purpose of determining the net business profit of the Appellant, this loss of Rs. 657.12 crores had to be set off against the gross profits from all other business activities of the Appellant. The final tax liability for 2003-04 of the Appellant had to be necessarily arrived at after setting off the losses of business units against the profits of other business units, so as to arrive at the net profit/loss. On the other hand for claiming tax benefits under Section 80-I(A), TPS-I Expansion had to be treated as a stand alone business activity of the Appellant and the loss of Rs. 657.12 crore was allowed to be set off only against the profit of TPS-I Expansion. The pre-COD accumulated loss of TPS-I Expansion had accordingly to be adjusted against the profits of TPS-I Expansion for 2003-04 and successive years upto 2007-08.

4.7 Thus, for the purpose of 80-IA, after setting of the accumulated loss of 657.12 crores against the profits of 2003-04 (Rs. 22.25 crores), 2004-05 (Rs. 152.6 crores), 2005-06 (Rs. 182.9 crores), 2006-07 (Rs.799.06 crores), the outstanding loss of 46.1 crores was set off against the taxable profit of Rs. 193.47 crores for 2007-08, leaving a taxable profit of Rs. 147.37 crores for that year. Accordingly, tax benefits under Section 80 I A was claimed in respect of TPS-I Expansion for 2007-08 to the extent of Rs. 147.37 crores.

4.8 Appellant remitted Advance tax every quarter in respect of TPS-I Expansion from 2003-04 onwards. The claim for reimbursement of income tax on the beneficiaries was raised only after the Central Commission determined the tariff for TPS-I Expansion for the period 2004-09 by its order dated 23.3.2007 by debit notes

dated 30.6.2007. The invoice raised on the Respondent no.1 with respect to TPS-I Expansion for the period 2003-04 to 2006-07 was amounting to Rs. 46.5288 crores. Certificate from statutory auditors was also submitted.

4.9 The statutory position has been misunderstood by the Central Commission to mean that TPS-I Expansion did not have any profit at all during 2003-04 to 2006-07 and hence it has been held that there is no question of any reimbursement of tax. The Central Commission also failed to appreciate that tax benefit under Section 80-I A in respect of TPS-I Expansion was not and could not have been availed by the Appellant in respect of any accounting year prior to 2007-08 because of the stipulation of Sub Section (5) of Section 80-I A.

4.10 The Central Commission also omitted to notice that the certificate of statutory auditors of the Appellant had been furnished to the Respondent no.1 in support of the demand for reimbursement of income tax in respect of TPS-I Expansion.

4.11 The Central Commission has also failed to appreciate that the tax benefit under Section 80-I A did not extend to the mines and accordingly the profit of TPS-I Expansion to the extent contributed by Mine I Expansion (linked mine), were liable to levy of income tax for FY 2007-08 and 2008-09 and hence liable to be recovered form the Respondent no.1.

4.12 The Central Commission has omitted to consider the issue as to whether the Appellant was obliged to avail tax benefit under Section 80-IA from the date of commissioning of TPS-I Expansion.

4.13 Thus, a sum of Rs. 62.0935 crores was payable to the Appellant by the Respondent along with interest @ 1.25% p.m.

5. The Electricity Board, Respondent no.1 has made the following reply submissions in support of the findings of the Central Commission.

5.1 The Appellant clearly stated that there were no taxable profits for TPS-I Expansion in the initial years due to adjustment of depreciation in respect of the said generating station during the years from 2003-04 to 2006-07 and taxable income arose only from 2007-08 onwards. Thus, notwithstanding the fact that the Appellant might have paid income tax during the relevant years on its total income as a Corporation, there was no profit derived from TPS-I Expansion for

the purpose of seeking reimbursement from the Respondent no.1.

5.2 The Appellant has chosen to set off the losses sustained in TPS-I expansion against the profits generated at other generating stations while computing its corporate tax liability under the Income Tax Act. While this is legally acceptable for the purpose of payment of tax under the IT Act, the right of the Appellant to get reimbursement of the income tax paid from the beneficiaries is governed by the Central Commission's Regulations. The Appellant has to calculate the proportionate income tax liability of each of the generating stations based on the generating station-wise profit before tax. This profit has to be calculated after taking into account the losses, if any, that are attributable to the particular generating station and it is only the profit remaining after the set off of

such losses that will determine the extent to which the corporate tax liability will be shared by that particular generating station.

5.3 The Appellant has sought to recover corporate tax from the generating stations in the same ratio as their book profits bear to the total book profits of the corporation. This is not a correct method since the corporation does not pay tax on its book profits and it has ignored the losses sustained by a particular generating station and apportioned the unabsorbed losses of that generating station, in a particular year, among other generating stations for set off against their profits.

6. We have heard Shri NAK Sharma, Learned Counsel for the Appellant and Shri Jayashankar, Learned Sr. Advocate representing the Respondent no.1. On the

basis of the rival contentions of the parties, the following questions would arise for our consideration.

i) Whether the Appellant has correctly apportioned its total tax liability during the period 2003-04 to 2006-07 to TPS-I expansion?

ii) Whether the Respondent no.1 is liable to reimburse the income tax apportioned to TPS-I Expansion by the Appellant out of total tax paid by the Appellant as a corporation, even though there was no taxable income in respect of TPS-I Expansion during the period 2003-04 to 2006-07 after setting of the losses of TPS-I Expansion?

7. Both the questions are interconnected and, therefore, being dealt with together.

8. Let us first examine the findings of the Central Commission in the impugned order. The relevant paragraphs are reproduced below:

"15. NLC has claimed recovery of income-tax dues of Rs.119 .0935 crore, details of which are contained in Annexure-II of the petition. As per these details, a total amount of Rs.171.7569 crore became payable by KSEB up to 31.3.2009 towards income-tax. After adjusting the amount receivable by KSEB, the net dues have been arrived at Rs.119.0935 crore. It is the case of NLC that there was no taxable income of TPS-I Expansion during these years after adjustment of unabsorbed depreciation for the year 2003-04. When there was no taxable income of TPS-I Expansion, there could be no justification for NLC to demand refund of income- tax dues. The demand of NLC being unjustified, KSEB was under no obligation to pay the amount demanded. Even if at some stage Advance Tax was paid by NLC for the years in question, it must have received credit from the Income-tax Department against the income-tax dues for other generating stations as NLC did not have the liability to pay income-tax for TPS-I Expansion for reason of taxable income not accruing during these years. Therefore, NLC cannot raise demand on KSEB for refund of income-tax for the years 2004-05 to 2006-07.

16. NLC has claimed that it availed of the benefit of tax holiday under Section 80 IA of the IT Act with effect from the year 2007-08 and passed on the benefit to KSEB as mandated by the regulations. In view of this claim of NLC, no income-tax liability accrues on KSEB for the years 2007-08 and 2008-09. Therefore, the question of recovery of income-tax dues for these two years also does not arise.

17. We conclude our findings by stating that income-tax liability in respect of TPS-I Expansion did not accrue for the years 2003-04, 2004-05, 2005-06 and 2006-07 for want of taxable income and for the years 2007-08 and 2008-09 because of availing the tax holiday benefit. In view of these findings, the question whether NLC was obligated to avail the benefit of Section 80 IA from the date of commissioning of TPS-I Expansion does not survive for our examination.

18. During the course of hearing it was submitted on behalf of NLC that even though the tax benefit has already been passed on by NLC to the beneficiaries, the assessing officer in his assessment order dated 28.12.2010 has disallowed its claim for tax benefit under Section 80 IA in respect of TPS-I Expansion for the financial year 2007-08 on the ground that the generating station was only an expansion of the then existing capacity and could not be considered as a separate undertaking as provided under Section 80 IA (4) (iv) of the IT Act. In case, NLC becomes liable to pay income-tax on account of unavailability of benefit under Section 80 IA, it shall be entitled to recover from KSEB the income-

tax along surcharge, interest etc paid to the Income-tax Department.

19. We have held that NLC is not entitled to recovery of income-tax dues in respect of TPS-I Expansion up to 31.3.2009. In view of this, there is justifiably no reason for KSEB to withhold income-tax dues for TPS-II. NLC has alleged that KSEB has been withholding income-tax dues in respect of TPS-II amounting to Rs. 57.00 crore included in the total amount of Rs.119.0935 crore. We direct that KSEB shall release such withheld income-tax dues amounting to Rs.57.00 crore pertaining to TPS-II along with interest at the rate of 9% per annum from June 2007 within 30 days upon NLC furnishing the claim, duly supported by the statutory auditors' certificate."

9. The findings of the Central Commission are summarized as under:-

i) There was no taxable income of TPS-I Expansion during the period 2004-05 to 2006-07 after adjustment of unabsorbed depreciation of TPS-I Expansion for the year 2003-04. When there was

no tax liability for the TPS-I Expansion during these years, there is no question of NLC raising demand on KSEB for the years 2004-05 to 2006-07.

ii) There is also no question of recovery of dues for the year 2007-08 and 2008-09 in respect of TPS-I Expansion in view of the Appellant availing the tax holiday under Section 80-IA from 2007-08.

iii) In case, the income Tax Department disallowed the claim of tax benefit under Section 80-IA in respect of TPS-I Expansion for the FY 2007-08 that it could not be considered as a separate undertaking and the Appellant is liable to pay income tax, it should be entitled to recover the same from the Respondent no.1.

iv) The Appellant has to release the payment of income tax for TPS-II with interest.

10. Let us now examine the Tariff Regulations, 2004.

*"7. **Tax on Income:** (1) Tax on the income streams of the generating company or the transmission licensee, as the case may be, from its core business, shall be computed as an expense and shall be recovered from the beneficiaries.*

(2) Any under-recoveries or over-recoveries of tax on income shall be adjusted every year on the basis of income-tax assessment under the Income-tax Act, 1961, as certified by the statutory auditors.

Provided that tax on any income stream other than the core business shall not constitute a pass through component in tariff and tax on such other income shall be payable by the generating company or transmission licensee, as the case may be.

Provided further that the generating station-wise profit before tax in the case of the generating company and the region-wise profit before tax in case of the transmission licensee as estimated for a year in advance shall constitute the basis for distribution of the corporate tax liability to all the generating stations and regions.

Provided further that the benefits of tax-holiday as applicable in accordance with the provisions of the Income-Tax Act, 1961 shall be passed on to the beneficiaries.

Provided further that in the absence of any other equitable basis the credit for carry forward losses and unabsorbed depreciation shall be given in the proportion as provided in the second proviso to this regulation.

Provided further that income-tax allocated to the thermal generating station shall be charged to the beneficiaries in the same proportion as annual fixed charges, the income-tax allocated to the hydro generating station shall be charged to the beneficiaries in the same proportion as annual capacity charges and in case of inter-state transmission, the sharing of income-tax shall be in the same proportion as annual transmission charges."

11. The Regulations 2004 provide that,

(i) tax on the income from the core activities of the generating company i.e. generation of electricity shall be recovered from the beneficiaries;

ii) Any under-recoveries or over-recoveries of tax on income shall be adjusted every year on the basis of

income tax assessment as certified by the statutory auditors;

iii) Provided that the generating station-wise profit before tax of a generating company as estimated for a year in advance shall be the basis for apportioning of corporate tax liability to all the generating stations;

iv) Provided that the benefits of tax holiday as per the IT Act shall be passed on to the beneficiaries;

v) Provided that the income tax allowed to a generating station shall be charged to the beneficiaries in proportion to their annual fixed charges.

12. Similar provisions for recovery of income tax exist in Tariff Regulations, 2001.

13. Thus, it is clear from the Regulations that the total income tax liability of the generating company will be distributed to the different generating stations on the basis of their respective profit before tax.

14. Admittedly there was no profit before tax in respect of TPS-I Expansion for the period 2003-04 to 2006-07 after adjustment of accumulated loss in TPS-I Expansion. Thus, TPS-I Expansion could not be apportioned any tax liability for this period for recovery from the beneficiaries of TPS-I Expansion out of income tax paid by the Appellant as a generating company.

15. We find that the Appellant has set off the profits of TPS-II with the accumulated depreciation (loss) of TPS-I

Expansion for tax purposes in order to reduce its over all corporate tax liability for the years in question and in the process showed book profit in TPS-I Expansion for the period 2004-05 to 2006-07 and accordingly included the same in its taxable income. As it was utilizing the accumulated loss of TPS-I Expansion to set off the profit on its other generating station, it could not avail the tax holiday benefit for the above period which was available to TPS-I Expansion under Section 80-IA of the Income Tax Act.

16. Let us now examine the Section 80-IA of the Income Tax Act. The relevant clauses are as under:

"80-IA.(1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or any enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall in accordance with and subject to the provisions of this section, be allowed, in computing the total income

of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.

(2) The deduction specified in sub-section (1) may, at the option of the asseessee be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility or starts providing telecommunication service of develops an industrial park [or develops a special economic zone referred to in clause (iii) of sub-section (4)] or generates power or commences transmission or distribution of power 95 [or undertakes substantial renovation and modernization of the existing transmission or distribution lines or lays and begins to operate a cross-country natural gas distribution network.

----

(5) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of sub-section (1) apply shall, for the purposes of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made."

17. Thus, the generating company can avail the tax benefit under Section 80-I A in respect of a generating station in consecutive 10 assessment years out of 15 years from the year in which it commences generation. However, for the purpose of availing tax benefit under Section 80-I A the generating company has to compute the profits of the eligible business as if such eligible business were the only source of income of the assessee during the relevant years.

18. According to the Appellant, it did not avail the tax benefit under Section 80-IA in the year 2004-05 to 2006-07 in view of huge accumulated depreciation (loss) available in the TPS-I Expansion in the FY 2003-04. Thus, in view of the accumulated loss in the TPS-I Expansion there was no tax liability for TPS-I Expansion during 2004-05 to 2006-07. The accumulated loss in TPS-I Expansion was 657.12

crores. For the purpose of Section 80-I A, these accumulated losses set off the profit of 2003-04 to the extent of 22.25 crores, 2004-05 by 152.6 crores, 2005-06 by Rs. 182.9 crores and 2006-07 by 499.06 crores. The outstanding loss of 46.1 crores was set off against the taxable profit of Rs. 193.47 crores for FY 2007-08 leaving a taxable profit of Rs. 147.37 crores for that year. Accordingly, the Appellant availed the benefit under Section 80-I A only from FY 2007-08.

19. Even if the Appellant has availed tax benefit under Section 80-I A in respect of TPS-I Expansion from FY 2007-08, there was no taxable income for TPS-I Expansion during 2004-05 to 2006-07. Thus, the tax paid by the Appellant during these years as generating company could not be distributed to TPS-I Expansion for recovery from the beneficiaries of TPS-I Expansion as per the Tariff Regulations.

20. The Appellant might have set off the profit of its other generating station during the period 2004-05 to 2006-07 for computing its tax liability under the Income Tax Act for payment of tax as a generating company, but the total tax has to be distributed amongst the various generating stations as per the Tariff Regulations i.e. as per the station-wise profit before tax. Since there was no profit in TPS-I Expansion in the years from 2003-04 to 2006-07 in view of the huge accumulated loss in FY 2003-04, there is no question of any income tax being apportioned to TPS-I Expansion during this period.

21. In view of above, we do not find any infirmity in the impugned order of the Central Commission and, therefore, confirm the same.

22. **Summary of our findings:**

"According to the Tariff Regulations, the generating station-wise profit before tax shall be the basis for distribution of corporate tax liability of the generating company to all the generating stations. Admittedly there was no profit before tax in respect of TPS-I Expansion for the period 2003-04 to 2006-07 after adjustment of huge accumulated loss in TPS-I Expansion. Thus, TPS-I Expansion could not be apportioned any tax liability for this period for recovery from the beneficiaries of TPS-I Expansion out of the income tax paid by the Appellant as a generating company. Thus, we do not find any infirmity in the order of the Central Commission."

23. In view of our findings, the Appeal is dismissed as devoid of any merit and the impugned order of the Central Commission is confirmed. No order as to costs.

24. Pronounced in the open court on this 3rd day of July, *2013*.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

√

REPORTABLE/~~NON-REPORTABLE~~

mk