Before the Appellate Tribunal for Electricity (Appellate Jurisdiction)

Appeal No. 134 of 2010

Dated: 19th November, 2010

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

In the matter of:

Tamil Nadu Electricity Board,
New No.144 (Old No.800), Anna Salai,
Chennai- 600 002. ... Appellant

Versus

1. **National Thermal Power Corporation,**
   NTPC Bhavan,
   Core 7, Scope Complex,
   7, Institutional Area, Lodi Road,
   New Delhi-110 011.

2. **Power Grid Corporation of India Ltd.**
   B-9, Qutab Institutional Area,
   Kativaria Sarai,
   New Delhi-110 016.

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

Counsel for Appellant(s)	**Mr. Pravin Parekh, Senior Advocate** **Mr. E.R. Kumar** **Mr. Kumar Shushank** **Mr. Debijyoti Bhattacharya &** **Mr. Kanan (Parekh & Co.)** **Mr. Vishal Parkeh**
Counsel for the Respondent(s):	**Ms. Swapna Seshadri** **Ms. Sneha Venkatramani &** **Ms. Ranjitha Ramachandran**

JUDGMENT

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

Tamil Nadu Electricity Board (hereinafter `Board') is the Appellant herein. National Thermal Power Corporation (hereinafter `NTPC') is the 1st Respondent. Power Grid Corporation of India Limited (hereinafter `Power Grid Corporation') is the 2nd Respondent herein.

2. The Appellant filed a petition before the Central Commission praying for declaration that Respondent Nos.1 and 2, namely, NTPC and Power Grid Corporation are not entitled to recover grossed-up tax

while claiming re-imbursement of Income tax from the Appellant and to issue a direction to the Respondent Nos.1 and 2 to refund the amount of grossed-up tax recovered from the Appellant for the period from 1.4.2001 to 31.3.2009 along with interest. The said petition was ultimately dismissed by the Central Commission by Order dated 27.4.2010. Aggrieved by that, the Appellant has filed this Appeal before this Tribunal.

3. Let us now refer to the relevant facts which are required for the disposal of this Appeal.

4. The Appellant, Tamil Nadu Electricity Board is involved in generation, transmission and distribution of electricity within the State of Tamil Nadu. The 1st Respondent NTPC is a Central Public Sector Undertaking engaged in the generation of electricity. Respondent No.2, Power Grid Corporation is a

Government Company which is referred to as Central Transmission Utility. As such, Respondent No.2 is deemed to be a Transmission Licensee.

5. The Appellant purchases electricity from various sources including Central Power Generating Stations and from other regions of the country. The 1st Respondent is the biggest power generator in India. It is a major supplier of power to the Appellant.

6. The Appellant entered into Bulk Power Supply Agreement on 22.3.1985 with NTPC (R-1) for supply of power from its Ramagundam Super Thermal Power Station. NTPC (R-1) subsequently set up other Power Stations at Talcher-2 (Orissa) and Kayamkulam (Kerala) from which also, electricity is being supplied to the Appellant and other constituents of the Southern Region. Under the said Agreement, NTPC

(R-1) was entitled to receive re-imbursement of Income tax from the beneficiaries including the Appellant. Under clause 2.12 of Regulation 2001, tax on income from core activity of the Generating Companies is to be computed as an expense. It shall be recoverable by the Generating Companies from the beneficiaries. Regulation 2004 also contain a similar provision.

7. In order to ascertain whether NTPC (R-1) and Power Grid Corporation (R-2) were claiming grossed-up tax, the Appellant in July, 2009 wrote a letter to both the Respondents asking for the relevant particulars with regard to the re-imbursement of the grossed-up income tax. There was no reply. Therefore, on 24.7.2009, the Appellant sent a notice to Respondents 1 and 2 requesting them to state as to whether the amount claimed by the NTPC as of Income Tax re-imbursement from the Appellant was in accordance

with Notification of the Central Commission and whether it included grossed-up tax.

8. On 20th August, 2009 and 7th September,2009, NTPC (R-1), sent a reply to the Appellant that it had paid Income Tax for its various stations and recovered the actual tax pertaining to generation activities from various beneficiaries including the Appellant. However, NTPC did not reply to the issue as to whether NTPC claimed the recovery of Income Tax by grossing up or not. There was no response. Therefore, the Appellant was constrained to approach the Central Commission and filed a petition No.253 of 2009 for seeking declaration and direction as mentioned above. The Central Commission after hearing the parties ultimately passed the impugned order dated 27.4.2010 dismissing the petition filed by the Appellant holding up that the Generating and Transmission Companies

are entitled to grossed up tax. This order is under challenge before this Tribunal.

9. The learned Counsel for the Appellant raised the following grounds for assailing the impugned order dated 27.4.2010:

> (A) The Central Commission passed the earlier orders dated 21.12.2000 and 26.3.2004 holding that Regulation 2001 and Regulation 2004 do not have any provisions for grossing up of Income Tax. The right to claim re-imbursement of Income Tax flows only from the Regulations made by the Central Commission. Unless the Regulations provide for the grossing up of tax, the same cannot be claimed by Respondents 1 and 2. As such, the Central Commission has erred in disregarding its earlier orders dated

21.12.2000 and 26.3.2004. The orders dated 21.12.2000 and 26.3.2004 have specifically dealt with the issue of grossing up of Income Tax and have then held against the grossing up of tax in case of Public Sector Undertakings. The Regulation deliberately did not use the word "grossing up" at any place. Nothing prevented the Central Commission from specifically providing for the grossing-up of tax in the Regulation if it intended to do so. Therefore, in the absence of the Regulation, Central Commission ought not to have held that Respondents 1 and 2 are entitled to grossed-up of Income Tax by totally discarding its earlier orders dated 21.12.2000 and 26.3.2004.

(B) The Central Commission has wrongly placed reliance on Section 195A of the Income Tax Act for holding in favour of grossing up of the Income Tax. Section 195A of the Income Tax Act does not apply to the present dispute. Section 195A presupposes existence of an agreement or arrangement between the parties. The relationship between the Appellant and the Respondents-1 and 2 in the instant case is being governed by the Regulation and not by any agreement or arrangement. Hence the first pre-requisite of Section 195A of the Income Tax Act is not fulfilled. The Income Tax Act provides for three different modes of collections of Income Tax Act, i.e.,

(i) Direct levy;
(ii) levy by deduction at source;

(iii) Collection at source.

(C) Section 195 deals with the collection and recovery of tax by deduction at source. Section 195A is not the charging Section. All that Section 195-A does is to provide for the modes of recovery of tax in case of an agreement or arrangement which is in the nature of net charge.

(D) The Division Bench of Uttaranchal High Court in the case of CIT Vs. ONGC reported in **254 ITR 340** while considering the scope of Section 195-A of Income Tax Act, held that Section 195-A of the Income Tax Act applies only to the deduction of tax at source to the payment and the said Section is not a charging Section. In view of the law laid down by the Uttaranchal High Court with

reference to the ambit of Section 195A of the Income Tax Act, the Central Commission cannot invoke Section 195A. Therefore, the order impugned is illegal.

10. In reply to the above submission made on behalf of the Appellant, the learned Counsel for the Respondents pointed out various reasonings given by the Central Commission in the impugned order to hold that Respondents 1 and 2 are entitled for re-imbursement of the grossing up of tax and made elaborate submissions in justification of the impugned order.

11. In the light of the above rival contentions, two questions have arisen in the present case which have been quoted as below:-

12. The questions involved in the present Appeal are:

I) Whether, while claiming from the beneficiaries re-imbursement of Income tax under Regulations 2001 and Regulation 2004, the Generating Companies/ Transmission Licensees are entitled to grossed-up tax?

II) Whether Section 195A of the of Income tax Act is applicable to the present case?

13. According to the Appellant, in the earlier orders passed by the Central Commission on the basis of Regulation 2001 and Regulation 2004, it was held that there was no provision for grossing up of Income Tax and on the contrary the Central Commission has wrongly held in the impugned order that Respondents 1 and 2 are entitled for the grossed-up tax. Further, it

is submitted that Section 195A of the Income Tax Act cannot be applied to give such finding and, therefore, the finding is wrong.

14. According to Respondents 1 and 2, the above issue has already been decided by the decision of this Tribunal in Appeal No.49 of 2010 dated 10.9.2010 in the matter of Tamil Nadu Electricity Board Vs. Neyveli Lignite Corporation giving appropriate interpretations of the said Regulations. It is also held in that decision that Section 195A can be invoked and, therefore, the points urged by the Appellant as against the impugned order are without any legal basis.

15. Let us now consider the questions framed in this case.

16. The Central Commission had rejected the contention of the Appellant that the Generating

Companies like NTPC Limited (R-1) and Power Grid Corporation (R-2) are not entitled to grossing-up of Income Tax under the provisions of CERC (Terms & Condition for Determination of Tariff), 2001 and CERC (Terms & Condition for Determination of Tariff), 2004. The very same contention has been urged before this Tribunal in this Appeal.

17. This issue is primarily on the basis of the interpretation of Regulation 2.12 of the Tariff Regulation, 2001 and Regulation 7 of the Tariff Regulation, 2004.

18. The tariff of Generating Stations consists of the following elements:

(i) Servicing Project Cost or Capital Cost incurred;

(ii) Operation and Maintenance Expense;

(iii) Interest on Working Capital;

(iv) Incentive and Disincentive;

(v) Re-imbursement of Taxes on Income;

(vi) Payment of Energy Charges.

19. It cannot be disputed that the cash outflow on account of Income Tax is one of the elements of tariff to be recovered by the NTPC from the purchasers of electricity including the Appellant. The provisions of the Tariff Regulations, 2001 and Tariff Regulations, 2004 make it clear that the Income Tax payable on the income from the core business of the Generating Companies/Transmission Licensees is to be treated as an expense and to be recovered through tariff payable by the beneficiaries. In other words, the quantum of tax liability upon the Generating Companies/Transmission Licensee should be recovered from the beneficiaries and Generating

Companies/Transmission Licensee cannot be put into any loss on account of actual amount of Income Tax payable on the income stream from its core business.

20. In the present case, the issue is whether the tax paid by the NTPC on actual basis should be allowed as one of the tariff elements. The tax paid by the NTPC admittedly is on the grossed-up amount. There is no dispute that the Income Tax Department recovers tax from NTPC on not only the amount of income of NTPC from core business but also the tax amount to be grossed on account of Income Tax by virtue of the said amount being treated as income in the hands of NTPC. In so far as the Income Tax Department is concerned, the actual tax paid by the NTPC is on the grossed-up amount.

21. The tax is recovered as a tariff element in terms of the provisions of the applicable Tariff Regulations. As pointed out by learned Counsel for the Respondents, the consistent practice adopted in Tariff determination process, first by the Government of India under Section 43A of the Electricity (Supply) Act, 1948 and thereafter, by the Central Commission is to allow such grossing up of tax. In fact, grossing up is the only eligible way of applying the tariff principles as recognized by the various Tariff Regulations notified by the Central Commission.

22. It is strenuously contended that Section 195A of the Income Tax Act would not apply to grossing-up of income in respect of the computation of the deemed profits. The Appellant also cited on authority rendered by Uttaranchal High Court to substantiate his plea

which has been reported in **264 ITR 340 –** *CIT Vs. ONGC.*

23. We have gone through the said judgment. In our view, in this decision, it has been held that Section 195 would not apply to grossing-up of income under Section 44-BB of the Income Tax Act, 1961. The above decision has been rendered in the context of Section 44-BB of the Income Tax Act and it has no application to the facts of the present case.

24. Section 44-BB of the Income Tax Act deals with the computation of the Profits and Gains from the business of oil exploration earned by Non-resident Companies. The entire mechanism of calculation of deemed profit as well as chargeability of 10% tax on the same is provided for in Section 44BB itself. Section 44BB is a complete code in itself which begins with a *non-obstant*e clause. Under those

circumstances, the Hon'ble High Court of Uttaranchal came to the conclusion that Section 195 would not apply to such a case of multiple grossing-up.

25. Further, it is noticed that in the above case, Uttaranchal High Court dealt with the dispute between the Revenue Department and the assessee on the liability to pay tax under Section 44BB by grossing up when the contractual payment to be made by ONGC to the NRC was net of taxes. In that case, the contention of the Revenue Department was rejected as there is no actual payment of tax by grossing up. No issue on the actual liability to pay tax by grossing up of NTPC would arise in the present case. Therefore, the reliance by the Appellant on the above decision is misplaced.

26. The Appellant has cited one more citation i.e. the judgment of this Tribunal in Appeal No.48 of 2010

wherein this Tribunal has held that the order passed by the Central Commission is not merely recommendatory but substantive order. In this judgment, this issue was not discussed. The said judgment was dealing with an entirely different issue, namely, as to whether methodology adopted by the Central Commission of the apportionment of Foreign Exchange rate variation between the loan and equity in the proportion of 50:50 which was implemented in the order dated 21.12.2000 could be disturbed due to a subsequent decision in another case. In the said matter, one of the Respondents had contended that the order of the Central Commission dated 21.12.2000 was not a substantive order but was merely a consultation paper.

27. In that context, this Tribunal concluded that the order dated 21.12.2000 inasmuch as the said order

gets converted into Tariff Regulation, 2001, which is not challenged, had become final on the issue of allocation of Foreign Exchange rate variation. Therefore, the said decision would not be of any use for the Appellant.

28. As pointed out by the Respondent-1, the issue in the present case has already been decided by the decision of this Tribunal in Appeal No.49 of 2010 in the matter of Tamil Nadu Electricity Board Vs. Neyveli Lignite & ors. The said judgment was rendered on 10.9.2010. The relevant portion of the judgment is as follows:

> *"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.

....

64(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."

29. The above decision would give a ratio on the basis of interpretation of Clause 2.12 of Regulation 2001 and Clause 7 of Regulation 2004. It further holds that if the re-imbursement is not on the grossed-up basis, it will amount to violation of those Regulations. In that context, it has been held that the concept of grossing-up is re-statement of the basic proportion 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 a purchaser has to be necessarily treated as further income in the hands of seller, thereby making it eligible to Income Tax again.

30. Such a finding has been given on the basis of the observation that both these Regulations as well as Section 195-A of the Income Tax Act could be invoked. As pointed out by learned Counsel for the Respondents, Section 195A of the Income Tax Act, 1961 only provides the manner in which the tax is to be recovered and the settled methodology for recovery of tax paid as an expenditure is to calculate the tax payable in a grossed-up manner so as to ensure that the actual tax paid is fully recovered through tariff.

31. The learned Counsel for the Appellant on the basis of the judgment of the Uttaranchal High Court, mentioned above, requests this Tribunal to reconsider

the decision taken by this Tribunal in Appeal No.49 of 2010.

32. We are not able to accept this request in view of the fact that as discussed above, the facts of the case dealt with by the Hon'ble Uttaranchal High Court with reference to Section 195A of the Income Tax Act has no application to the facts of the present case.

33. **SUMMARY OF OUR FINDINGS:**

1. **The concept of grossing-up is re-statement of the basic proportion 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 a purchaser has to be necessarily treated as further income in the hands of sellers, thereby making it eligible to Income Tax again. Therefore, while**

claiming from the beneficiaries re-imbursement of Income tax, the Generating Companies/ Transmission Licensees are entitled to gross-up tax under Regulations 2001 and Regulations 2004.

2. 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. A reading of section 195-A 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. Section 195-A of the Income Tax Act only provides the manner in which the tax is to be recovered

and the settled methodology for recovery of tax paid as an expenditure is to calculate the tax payable in a grossed-up manner, so as to ensure that the actual tax paid is fully recovered through tariff. Therefore, Section 195-A of the Income Tax Act could be invoked in the present case as laid down by this Tribunal in the Judgment in Appeal No. 49 of 2010 dated 10.9.2010 in the matter of Tamil Nadu Electricity Board Vs. Neyveli Lignite Corporation & Ors.. The decision cited by the Appellant rendered by the Hon'ble Uttaranchal Pradesh High Court is not applicable to the present facts of the case since the above decision has been rendered in the context of Section 44-BB of the Income Tax Act. As such, the decision

rendered by this Tribunal in Appeal No. 49 of 2010 dated 10.9.2010 requires no reconsideration.

34. In view of the discussion and findings, referred to in the above paragraphs, we do not find merit in this Appeal. The appeal is accordingly dismissed. There is no order as to costs.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Reportable/Non-Reportable

Dated 19th November, 2010.