

**APPELLATE TRIBUNAL FOR ELECTRICITY
(APPELLATE JURISDICTION)**

Appeal No. 37 of 2010

Dated 10th August, 2010

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

Appeal No. 37 of 2010

In the matter of:

**Meghalaya State Electricity Board
Lumjingsghai, Short Round Road,
Shillong-793 001
Meghalaya**

... Appellant

Versus

**1. Meghalaya State Electricity Regulatory Commission
New Administrative Building, 1st Floor, Left Wing,
Lower Lachumiere,
Shillong-793 001
Meghalaya**

... Respondent-1

**2. Byrnihat Industries Association
13th Mile, Tamulikuchi,
Byrnihat-793 101
Ri Bhoi District, Meghalaya**

... Respondent-2

Counsel for Appellant

**Mr. Amit Kapoor &
Ms. Poonam Verma
Mr. Abhishek Munot**

Counsel for Respondent -1

**Mr. Mr. S.N.Mitra for Res.1
Ms Payal Chawla for R.1**

Counsel for Respondent-2

**Mr. M.G. Ramachandran,
Mr. Anand K.Ganesan and
Ms. Swapna Seshadri for
Byrnihat Industries Association
Ms Ranu Gupta and Mr. Gaurav**

JUDGMENT

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

1. Meghalaya State Electricity Board is the Appellant herein. Meghalaya State Electricity Regulatory Commission (State Commission) is the Respondent-1. Byrnihat Industries Association is the Respondent-2.

2. The Appellant has filed the present Appeal as against the order impugned dated 10.09.2009 passed by the State Commission, truing up the Appellant's account for the FY 2007-08 and FY 2008-09.

3. The relevant facts that are required for the disposal of this Appeal are as follows.

4. The Appellant Board is a distribution licensee. It filed the Petition before the State Commission for determination of the distribution tariff for the FY 2007-08. The State Commission passed the order on 17.12.2007 on the projected Annual Revenue Requirement (ARR).

5. Thereupon, Appellant filed the Petition for determination of distribution tariff for the FY 2008-09. Accordingly, the State Commission by the order dated 30.09.2008 passed the tariff order determining the distribution tariff for the said year.

6. As against this order dated 30.09.2008 passed by the State Commission, Byrnihat Industries Association (R-2) the consumer association filed an Appeal before this Tribunal in Appeal No. 132 of 2008. After hearing the parties, the Tribunal passed the final order in the said Appeal on 09.02.2009

remitting the matter to the State Commission by giving a direction to undertake the true up exercise in respect of FY 2007-08.

7. In pursuance of the said order, the State Commission directed the Appellant by the order dated 06.07.2009 to submit its report for the truing-up exercise in respect of FY 2007-08 to enable it to comply with the orders of the Tribunal. Accordingly, the Appellant submitted the report in respect of the truing-up exercise of account for FY 2007-08 and the relevant documents before the State Commission on 09.07.2009. On 13.07.2009, the State Commission intimated the Appellant as well as Byrnihat Industries Association (R-2) that the Remanded proceedings would be heard on 29.07.2009 by the State Commission.

8. After receipt of the said intimation, Byrnihat Industries Association (Respondent-2) filed the reply on 28.07.2009 before the State Commission requesting the State Commission to take up the true-up exercise in respect of both FY 2007-08 as well as

for FY 2008-09. However, the Appellant raised objection to this course stating that the State Commission cannot go into the true-up exercise in respect of FY 2008-09 and it should confine itself to true-up exercise for the FY 2007-08 alone as per the order of the Tribunal dated 09.02.2009. Despite this objection the State Commission directed the Appellant to submit the break up of the power purchase relating to the period for FY 2008-09 as well. Accordingly same was submitted. Ultimately, the State Commission passed the impugned order on 10.09.2009 and gave finding on the following 2 aspects:-

- (i) The trueing-up in the Appellant's account for the FY 2007-08 and FY 2008-09.
- (ii) The downward revision of electricity tariff for the FY 2008-09 was retrospectively given effect to w.e.f. 01.10.2008.

9. On being aggrieved, the Appellant has filed this Appeal.

10. The following are the grounds urged by the Learned Counsel for the Appellant.

(i) The order impugned is beyond the scope of Remand Order dated 09.02.2009. The Tribunal remitted the matter back to the State Commission, with a specific direction to undertake the truing-up exercise of the Appellant's accounts for the FY 2007-08 only but, contrary to this direction, the State Commission carried out the truing-up exercise not only for the FY 2007-08 but also for FY 2008-09.

(ii) It is settled law that it is mandatory for the State Commission to follow and adopt the financial statements, duly audited by the Comptroller & Accountant General. But on the other hand, the State Commission disallowed the various amounts of net prior period charges, such as employee's cost, depreciation, income-tax, administrative

expenditure, etc., after ignoring the certificate issued by the Comptroller & Accountant General and included the amount as revenue gain by 2% reduction of AT&C losses for the FY 2007-08 which is not in consonance with the financial statement duly audited by the Comptroller & Auditor General.

- (iii) The State Commission has wrongly given retrospective effect for adjustment of FY 2008-09 by revising the tariff downwards for the FY 2008-09.

11. In elaboration of the above grounds, the Appellant has made detailed submissions as given below:

- (A) The Tribunal by the order dated 9.2.2009, remitted the matter with a specific direction to undertake truing up exercise in respect of FY 2007-08 only. The said order did not direct the State Commission to simultaneously

undertake truing up exercise for the FY 2008-09. In violation of this order, the State Commission has done the truing up for the FY 2008-09.

(B) Actually, the Appellant abstained from filing any submissions relating to the truing up of the account for the FY 2008-09. As a matter of fact, the Appellant in his statement filed before the State Commission on 12.08.2009 specifically mentioned that the Electricity Board craves liberty not to reply to the respondent's contention since it refers to the allegations of the objectors relating to the FY 2008-09 since the issue before the State Commission is relating to truing up exercise for the FY 2007-08 only.

(C) Further, even in the impugned order the State Commission has recorded that the Remand proceedings were restricted to the extent of truing up of the accounts for the FY 2007-08. In the impugned order, State Commission itself recorded that the

Electricity Board, the Appellant, had not made any submissions with regard to the truing up of the accounts for the FY 2008-09, either in its reply dated 12.08.2009 or in its oral submissions during the hearings conducted on 29.07.2009 and 26.08.2009. Despite this factual position as admitted by the State Commission in the impugned order, it has wrongly gone ahead and trued up the Appellant's accounts not only for the FY 2007-08 but also for the FY 2008-09. There is neither a finding in the impugned order nor any interim order passed by the State Commission giving the reasonings as to why it undertook the truing up for the FY 2008-09 also.

- (D) When a matter is remanded by the Appellate Court to a lower court or the lower authority, with a limited direction, the scope of adjudication shall be limited to the directions as prescribed in the Remand Order. It is not open to such authority to do anything which is

beyond the scope of the Remand. This is well settled law laid down by this Tribunal, the High Courts and Supreme Court.

(E) The truing up exercise is a post-facto verification of actual expenses and revenues as against the projected expenses and revenue in tariff order. Therefore, the truing up exercise of the actual financial data for FY 2008-09, i.e. from 01.04.2008 to 31.03.2009 could be made only when the tariff for the next financial year is determined separately. Therefore, the impugned order, exercising the truing up both in respect of the FY 2007-08 and other year i.e. FY 2008-09 is not sustainable.

(F) The State Commission has failed to follow the accounts, duly audited by the CAG. It is mandatory for the State Commission to adopt and follow the figures which have been duly audited by the CAG. But in this case the State Commission while truing up of the

Appellant's financial accounts in respect of the FY 2007-08 has disallowed an amount of Rs. 8.54 crores on account of net prior period charges even though the same has been duly acknowledged and found legitimate in the accounts, duly audited by the CAG and wrongly included an amount of Rs. 17.26 crores as revenue gains by 2% reduction of AT&C loss which is not in consonance with the financial statement audited by the CAG. The total amount which has been acknowledged and audited by the CAG is Rs. 21.96 crores but the State Commission has allowed only Rs. 13.42 crores and disallowed the balance amounts. In doing so, the State Commission has wrongly classified the net prior period charges into 2 categories namely, controllable charges and uncontrollable charges. There is no basis for such a wrong calculation of prior period charges into 2 categories.

(G) Further, the amount of Rs. 17.26 crores has been wrongly included under the head “Revenue Gain for reduction of AT&C losses”, even though no such accounts were projected by the Appellant in the ARR petition filed in June 2007 and the CAG did not recognize the said amount in the audited accounts. It is true that in the decision of the Hon’ble Supreme Court in 2002 (8) SCC 715 (*West Bengal Regulatory Commission vs. CESC Ltd.*) it is held that audited accounts are not binding upon the Commission. However, in the very same judgment, the Hon’ble Supreme Court specially observed that the State Commission is bound to give due weightage to the audited accounts. Admittedly, this has not been done in this case. Further, the Tribunal in the judgment dated 04.05.2009 reported in 2009 ELR (APTEL) 538 (*Indian Tea Association vs. Assam State Commission*) has clarified about the binding nature of audited accounts in the absence of any reasonings

given by the State Commission for its deviance. Therefore, the impugned order is wrong in this respect.

- (H) The State Commission in the impugned order revised the tariff downward for the FY 2008-09 and directed the same to be given retrospective effect from 01.10.2008. It also directed that such retrospective adjustment be implemented against future energy charges of all affected consumers with a view to ensure that all excess amounts recovered by the Appellant are fully adjusted by 31.03.2010. The State Commission by the impugned order directed the Appellant to take effective steps to adjust the excess amount billed and collected during the tariff period between 01.10.2008 and 31.03.2010. Thus, it is clear that this is a specific direction that the Appellant has to give effect to the adjustment by 31.03.2010. The Appellant being a public body, will not retain any

amount which is unjustified and shall account for any surplus amount. The State Commission itself in its order dated 24.02.2010 in the Review Petition has observed that each time the financial accounts are trued up, the tariff may not be revised from a retrospective date. Since the Appellants audited accounts for the FY 2008-09 are now available, the State Commission may be directed to conduct the true up in respect of the FY 2008-09 to be done on the basis of the CAG's Report. Consequently any revenue surplus be adjusted while working out the ARR of the prospective year FY 2010-11.

- (I) In fact, the State Commission, while truing up for the FY 2007-08 has adopted the right approach of comparing the Appellant's expenditure as well as the revenue earned during the FY 2007-08. After considering the 2 heads, i.e. revenue and expenditure, the Learned State Commission in that order concluded

that it is not necessary to revise the tariff for the FY 2007-08 retrospectively. However, the State Commission while truing up in respect of the FY 2008-09 has wrongly considered the trued up expenditure as well as the ARR approved by the State Commission through the tariff order dated 30.09.2008. Therefore, this Tribunal may direct the State Commission to consider the audited data of Appellant's accounts for the FY 2008-09 and to true up the same in accordance with law.

12. In reply to the above submissions made by the Appellant, the learned counsel appearing for the Byrnihat Industries Association (R-2) has made the following submissions:

- (i) It is true that the truing up was to be done by the State Commission in pursuance of the order passed by the Tribunal by the order dated 09.02.2009 directing to exercise truing-up for the year 2007-08

only. However, the said order did not prohibit the State Commission to undertake truing up exercise in respect of FY 2008-09 also. Actually the proceedings were initiated by the State Commission in the month of July 2009 as per the Remand order dated 09.02.2009 passed in the Appeal filed by the R-2 herein challenging the tariff order in respect of FY 2008-09. During the said proceedings, the State Commission found that the provisional accounts with the actual data for the FY 2008-09 were very much available to enable the State Commission to re-determine the tariff. On that basis, the Appellant was directed by the State Commission to submit its report for truing up for both the years namely FY 2007-08 and FY 2008-09.

(ii) Even though the Appellant mentioned in his reply objecting to the request of the Respondent to true-up in respect of the FY 2008-09 also, the

Appellant mentioned in the said reply agreeing that it would provide the details for true-up exercise in respect of FY 2008-09 also, if so ordered. This reply was filed on 12.08.2009. In pursuance of the same, the State Commission on 21.08.2009 directed the Appellant to submit the report in respect of the FY 2008-09 as well. Accordingly, the Appellant submitted such report. As such, the Appellant did not raise any objection before the State Commission, while submitting the said report. In such circumstances, the State Commission has done the true up exercise in respect of both the years. There is nothing wrong in it.

- (iii) The Appeal proceedings before the Tribunal in Appeal No. 132 of 2008 filed by R-2 was against the tariff order in respect of the FY 2008-09. The order remitting the matter is for re-determination of the revenue requirement and tariff for the FY

2008-09. In the said order dated 09.02.2009, the Tribunal observed that it was noticed that the tariff for the FY 2008-09 has been finalized by the State Commission without subjecting the estimates claimed by the Electricity Board with prudent check and validation of data. It was in that background, the directions were given for trueing up for the FY 2007-08. The directions given by this Tribunal was to complete the true up exercise by 31.05.2009. The compilation of the accounts of FY 2008-09 was expected to take some more time beyond May 2009. Since the State Commission could not take up the matter before 31.05.2009, the State Commission had to consider the provisional accounts which were made available then for FY 2008-09. Therefore, the true up exercise was done by the State Commission for both the years. This is not wrong.

(iv) It is well settled that the truing up process is only comparing estimated figures at the beginning of the year with the actual figures at the end of the year. Since the actual data are available, the State Commission is required to undertake the truing up exercise. It is not necessary for the State Commission to wait for the audited accounts for which it may take a long time.

(v) The Appellant's contention that the State Commission ought not to have given retrospective adjustments in the tariff is misconceived. In the Appeal No. 132 of 2008 filed by the R-2, the challenge in the said appeal was against the tariff for the year 2008-09. The prayer in the Appeal was for re-determination of the tariff for the FY 2008-09. When the matter was remitted by the Tribunal to the State Commission with the direction to consider the grievance of the Appellant and to pass order in

accordance with law, the State Commission was required to consider the revenue requirement and determination of tariff for the FY 2008-09 also.

- (vi) According to the Appellant, the State Commission disallowed the prior period charges. The ground of challenge is that the State Commission is bound by the audited accounts of the Appellant. This contention is also misconceived. The audited account is only to verify whether the expenditure has been actually incurred or not. The auditor does not deal with the prudence of the expenditure. Whether the said expenditure is to be allowed or not is only after prudent check by the State Commission. The auditor will only verify and certify whether the expenditure of such accounts has been actually incurred or not. However, the State Commission is required to apply prudent check to verify whether the expenditure is to be allowed or not. In the present case, the prior

period charges are expenditure incurred by the Appellant during the year 2002-03. This was never claimed to be allowed in the past. In such circumstances, it is not open for the Appellant to claim such expenditure at the time of truing up especially when the said claim was not made at the time of tariff petition. So, claiming the same for the first time in the truing up process is wholly unjustified.

In addition to the above points, the learned counsel for Respondent 2 urged the other grounds also mentioned filed by it in IA No. 82/2010 seeking for the cross claim.

13. The Learned Counsel for the State Commission also argued in detail in justification of the impugned order.

14. The following questions have arisen for consideration in the light of rival contentions urged by the respective counsel for the parties as referred to above in the main Appeal.

- i) Whether in the proceedings initiated in terms of the order passed by this Tribunal dated 09.02.2009 in Appeal No. 132 of 2008 titled as *Byrinhat Industries Association vs. Meghalaya State Electricity Regulatory Commission and Another*, directing to take up the true up exercise in respect of the FY 2007-08, the Meghalaya State Commission should not have gone beyond the scope of the Remand to undertake truing up exercise of the Appellant's accounts for FY 2008-09 also?
- ii) Whether the State Commission was right in not following and adopting the financial statement, duly audited by the Comptroller & Auditor General in spite of the principle of truing up?
- iii) Whether the State Commission was right in disallowing the expenses relating to employees cost,

depreciation, income-tax, administrative expenditure and other expenses related to entire prior period charges as claimed by the Appellant in spite of AS-5 issued by the Council of the Institute of Chartered Accountants of India?

- iv) Whether the State Commission could pass the impugned order dated 10.09.2009 to give effect to the trued up tariff with retrospective effect from 01.10.2008?

15. We have heard the learned Counsel for the parties on these questions and have given our thoughtful consideration.

16. We will now discuss on each of the issues.

17. With reference to the first issue, it has been contended on behalf of the Appellant, that the State Commission has gone beyond the scope and remand order by having erroneously trued-up the financial accounts of the Appellant for FY 2008-09,

when the Remand Order dated 09.02.2009 passed by this Tribunal in Appeal No. 132/2008 directed the State Commission only with regard to truing-up of FY 2007-08. With regard to Remand order, the Hon'ble Supreme Court as well as various High Courts in various authorities cited by the learned counsel for Appellant have laid down the various principles to be followed by the lower court or lower authority while dealing with the issue of limited Remand. Those decisions are as follows:

1. *Mohan Lal vs. Anandibat (1971) 1 SCC 813*
2. *Paper Products Ltd. vs. CCE (2007) 7 SCC 352*
3. *Smt. Bidya Devi vs. Commissioner of Income Tax, Allahabad AIR 2004 Calcutta 63*
4. *K.P. Dwivedi vs. State of U.P. (2003) 12 SCC 572*
5. *Mr. Muneswar and Ors. vs. Smt. Jagat Mohini Des AIR (1952) Calcutta 368*
6. *Amrik Singh vs. Union of India (2001) 10 SCC 424*
7. *Union of India & Anr. Vs. Major Bhadur Singh (2006) 1 SCC 3670*
8. *Prakash Singh Badal & Anr. Vs. State of Punjab and Ors. (2007) SCC 1*

The principles laid down in those authorities are given below:-

- (i) *The Court below to which the matter is remanded by the Superior Court is bound to act within the scope of remand. It is not open to the Court below to do anything but to carry out the terms of the remand in letter and spirit.*
- (ii) *Ordinarily, the Superior Court can set aside the entire judgment of the Court below and remanded to the subordinate court to consider all the issues afresh. This is called ‘open Remand’. The subordinate court can decide on its own afresh on the available materials.*
- (iii) *The Superior Court can remand the matter on specific issues with a specific direction through a “Remand Order”. This is called*

‘Limited Remand Order’. In case of Limited Remand Order, the jurisdiction of the Court below is confined only to the extent for which it was remanded’.

18. Keeping these principles in mind, we can now refer to the specific directions in the Remand order issued by this Tribunal in Appeal No. 132 of 2008. The relevant paras of the directions are as follows:

“6.

7. In view of the above, we remit the matter to the Commission with the direction to undertake truing-up exercise of financial year 2007-08 with the financial data ending March, 2008 and examine the submissions and contentions of the Appellant in accordance with law. The Commission shall provide the opportunity to Appellant for being heard along with the Affected Parties before arriving at the determination in the truing-up exercise. Truing-up

exercise for financial year 2007-08 shall be undertaken by the Commission expeditiously so as to conclude it by end of March, 2009. On completion of the truing-up exercise the Commission shall act in accordance with law for giving effect to the same”.

19. The above direction would make it clear that the State Commission was asked to undertake truing-up exercise of FY 2007-08 alone with the financial data ending March, 2008 and to conclude it by the end of March, 2009. As such, this is ‘Limited Remand Order’. Admittedly, the State Commission carried out the exercise not only for FY 2007-08 but also for FY 2008-09. There is no dispute in the fact that when the Appellant filed its Report relating to the truing-up of the accounts for FY 2007-08, as directed by this Tribunal, it is R-2 who prayed the State Commission to take up truing-up both in respect of FY 2007-08 and FY 2008-09. The Appellant in his reply filed before the State Commission on 12.08.2009 objected

to the same, and requested the State Commission to confine itself to the truing-up exercise in respect of FY 2007-08 alone and that alone would be in conformity with the order of the Tribunal. As a matter of fact, the reply filed on 12.08.2009 before the State Commission would show that the Appellant (Electricity Board) specifically mentioned that the Appellant would not propose to reply to the truing-up exercise in respect of FY 2008-09 since the issue before the State Commission, as per the order of the Tribunal, is relating to the truing-up exercise for FY 2007-08 only. Even in the impugned order, the State Commission has referred to the said stand taken by the Appellant.

20. Despite this, the State Commission in the impugned order has trued-up the Appellant's accounts not only for FY 2007-08 but also for FY 2008-09. Admittedly, there is no reasoning given in the impugned order as to why the State Commission undertook truing-up exercise for FY 2008-09 as well. It is

settled law, as indicated above that when a matter is remanded or remitted by the superior court to the subordinate court or subordinate authority, with a limited direction, the scope of adjudication shall be limited to such direction alone and it is not open to such authority to do anything which is beyond the scope of the Remand.

21. However, the Learned Counsel appearing for the Respondent submitted that this is not a case of remand and this is only an order remitting the matter, directing for the true-up exercise for 2007-08 and the State Commission, being the authority to undertake the true-up exercise, it has resorted to the said exercise in respect of the next year also as there is no bar or restriction to do so either under the Act or under the order passed by the Tribunal. In the light of the said stand taken by the Learned Counsel for the Respondent-2, it would be appropriate to deal with this issue.

22. It is not disputed that the Remand Order remitting the matter to the State Commission was passed by this Tribunal on 09.02.2009 in the Appeal No. 132/08 filed by the Byrnihat Industries Association, Respondent-2 herein challenging the determination of the distribution tariff for the FY 2008-09. It cannot also be debated that the Tribunal, specifically mentioned in para 7 of the said order that the matter is remitted to the State Commission with the specific direction to undertake the truing up exercise in respect of the FY 2007-08 with the financial data ending March 2008. In other words, the said order did not direct or permit the State Commission to simultaneously undertake the truing-up exercise for the FY 2008-09.

23. In the proceedings in the Appeal No. 132/08 filed by the R-2, it was represented by the Board, the Appellant herein before the Tribunal that the financial data of the Board from 01.04.2007 to 31.03.2008 would be produced before the State Commission to true-up the financial for the FY 2007-08. Endorsing the said contention, the Tribunal had remitted the

matter back to the State Commission only for carrying out the truing-up of Appellant's financial for the FY 2007-08. Thus, the order of Remand is very clear. The order remitting the matter to the State Commission was only restricted to the truing-up for the FY 2007-08. In pursuance of the said order, the State Commission also directed the Appellant, namely the Board, to submit the report and the materials for exercising the truing-up in respect of FY 2007-08 in order to comply with the order passed by the Tribunal. Further, the State Commission itself has recorded in the impugned order that the Appellant had not made any submissions with regard to truing-up for the FY 2008-09 either in its reply dated 12.08.2009 or in the oral submissions made by the Appellant during hearings on 29.07.2009 and 26.08.2009. On the other hand, the Appellant raised his objection in its reply dated 12.08.2009 for truing up in respect of next year. When such being the case, there is no reason as to why the State Commission went ahead for truing up Appellant's financial not only for the FY 2007-08 but also for the FY 2008-09. In fact, there is no reason neither in the impugned

order nor in any interim order by the State Commission referring to the reply made by the Appellant for rejecting the objection of the Appellant for objecting truing-up in respect of the FY 2008-09 and for justifying as to why it undertook the truing-up exercise in respect of the FY 2008-09 as well.

24. It is a well settled principle of law as mentioned earlier that when a matter is remanded by the appellate forum to the lower court or the lower authority, with a limited direction, the said lower court or the lower authority shall restrict itself to the extent as prescribed in the order of “Limited Remand”. In other words, it is not open to the court below to do anything but to carry out the terms of the Remand remitting the matter in letter and spirit.

25. As a matter of fact, when the proceedings, in pursuance of the Remand order had started, the State Commission has specifically stated in the communication dated 06.07.2009 sent to the Appellant and in the order passed on 29.07.2009 that the

State Commission will take up the truing-up exercise in respect of the FY 2007-08 only. In other words, in the above communication/order there is no reference for the proposal about undertaking of the truing-up exercise in respect of the FY 2008-09. When the R-2 filed a petition requesting the State Commission to undertake the truing-up exercise in respect of the next year also, the specific objection was raised by the Board in its reply dated 12.08.2009 as indicated earlier and the following is the statement made by the Appellant in this regard.

“28. MeSEB craves liberty to not to reply to para 24 to 40 since it relates to the allegations of Objector relating to the FY 2008-09. It is reiterated that the issue before the Hon’ble Commission is relating to the truing-up exercise for FY 2007-08. The Objector has unnecessarily raised objections relating to FY 2008-09. If the Hon’ble Commission so desires, MeSEB shall provide the details as and when required.”

26. The above statement of the Appellant would indicate that the Appellant has taken a specific stand raising objection to the exercise of the truing-up in respect of FY 2008-09 as it is not in consonance with the order of Remand passed by the Tribunal. When such was the stand taken through the statement made by the Appellant before the State Commission objecting to the proposal to take up the truing-up exercise in respect of FY 2008-09, there is no justification for the State Commission to undertake the truing-up for the FY 2008-09 as well.

27. It is contended by the Learned Counsel for the R-2 that the Appellant itself has produced the documents/report before the State Commission to enable the State Commission to take up the truing-up exercise in respect of FY 2008-09. Mere submission of the records before the State Commission as directed by the State Commission, would not amount to withdrawal of its stand of objection taken before the State Commission that the State Commission should not take up the true-up exercise in respect of FY 2008-09.

28. According to the Appellant, even though such a specific stand was taken before the State Commission, the Appellant was constrained to submit the report for the next year in pursuance of the direction issued by the State Commission or otherwise the non-compliance of the said directions by the State Commission would result in adverse consequences against the Appellant.

29. In spite of the fact that the specific stand taken by the Appellant, objecting to the truing up exercise for the next year, there is no specific reasoning given by the State Commission in the impugned order dated 10.09.2009 either with regard to the rejection of the said objection raised by the Appellant or with regard to the circumstances, under which for undertaking truing-up of the Appellant's financial for the FY 2008-09 was taken up along with the truing-up exercise for the FY 2007-08.

30. It is contended by the Learned Counsel for the Respondent that the order passed by the Tribunal is not a Remand and it is

only an order remitting the matter for truing-up exercising the process and in the absence of any prohibition referred to in the said order by the Tribunal for exercising the truing-up process in respect of FY 2008-09, it cannot be said that the order passed by the State Commission is wrong. This contention, in our view, cannot be sustained for the following reasons.

31. Even though the distribution tariff order in respect of FY 2008-09 had been challenged by the R-2 in Appeal No. 132/2008, the Tribunal had not entered into the merits of the tariff order which was passed by the State Commission in respect of FY 2008-09 and on the other hand, it thought it fit to direct the State Commission to finish the truing up process in respect of the FY 2007-08 as, in their view, the true-up exercise must be completed in time in respect of FY 2007-08 before passing the tariff order relating to FY 2008-09. The Appellant also submitted before the Tribunal that the Audited Accounts were available for truing up for the year 2007-08. In that view only the Tribunal remitted the matter with direction through the

order of remand. Therefore, it cannot be contended that it was not a Remand order. In our view, the same is a limited Remand Order remitting the matter to the State Commission with a specific direction to State Commission to exercise and pass the order of truing-up process in respect of the year 2007-08. Under those circumstances, the State Commission ought to have complied with the directions of the Tribunal by deciding the issue relating to truing-up exercise in respect of FY 2007-08 only. It is proper for the State Commission to take up the true-up exercise for the FY 2008-09 separately since the materials to decide the issue in that case would be entirely different. Therefore, the order passed by the State Commission truing up in respect of FY 2008-09, clubbing with the truing-up exercise for FY 2007-08 is wrong and the same is liable to be set aside.

32. The second issue is relating to the State Commission not following and adopting the financial statement, duly audited by the Comptroller & Auditor General. On this issue, it has been argued by the Learned Counsel for the Appellant that the State

Commission should not have disallowed the revenue requirement and accounts without considering the audited accounts of the Electricity Board in the truing-up exercise. While elaborating this point, it is contended on behalf of the Appellant that the State Commission while truing-up the Appellant's financial accounts in respect of FY 2007-08 has disallowed an amount of Rs. 8.4 crores even though the same had been duly acknowledged and found legitimate in the accounts duly audited by the Comptroller & Auditor General (CAG) and wrongly included an amount of Rs. 17.26 crores as revenue gain by 2% reduction of AT&C losses which is audited by the Comptroller & Auditor General. It is also contended on behalf of the Appellant that even though the total amount which had been acknowledged and audited by the CAG is Rs. 21.96 crores, the State Commission has allowed only Rs. 13.42 crores. In doing so, it is argued that the State Commission has wrongly classified the net prior period charges into 2 categories namely "controllable charges" and "uncontrollable charges". This contention, in our view, is not

tenable. The audited account is only to verify as to whether the expenditure has been actually incurred or not. The auditor does not deal with the prudence of the expenditure. The question whether the said expenditure is to be allowed or not has to be considered only by the State Commission after prudence check. The auditor will only verify and certify whether the expenditure on such account had been actually incurred or not. On the other hand, the State Commission is bound to apply its mind to make a prudence check in order to verify whether the expenditure is to be allowed or not and the State Commission is not bound by the opinion of the auditors as laid down by the Hon'ble Supreme Court in AIR 2002 SC 358 = AIR 2002 (8) SCC 70.

33. The State Commission has disallowed certain expenditure in the ARR of the Appellant which are controllable. However, 6 uncontrollable expenditures have been allowed by the State Commission despite the failure on the part of the Appellant to claim the revenue requirement at the appropriate time. The claim which were rejected were only of controllable

expenditure. Since the Appellant have failed in its duty by not controlling the same, the State Commission has rightly disallowed the same as the burden cannot be passed on to the consumers. Segregating the prior period charges into controllable expenditure and uncontrollable expenditure is a well-recognized principle. This has been recognized in the National Tariff Policy. It is imperative for the State Commission to be guided by the National Electricity Policy and National Tariff Policy as mandated under section 61 of the Electricity Act, 2003. In this context, it would be proper to refer to Section 5.3 (h)(iii) of the National Tariff Policy. The same is as follows:

“Uncontrollable cost should be recovered speedily to ensure that future consumers are not burdened with past cost. Uncontrollable cost would include fuel cost, cost on account of inflation, tax and cesses, variation in power purchase unit costs including on account of hydro thermal mix in cases of adverse natural events”.

34. It is noticed that the prior period charges claimed by the Appellant are expenditure incurred by it during the FY 2002-03. This was never claimed in the past. Admittedly, the same was not claimed at the time of tariff proceedings also. In such circumstances, it is not open for the Appellant to claim such expenditure at the time of truing-up exercise for the year 2007-08. It is settled law that the stage of truing up as mentioned earlier is not to reopen the basis of redetermination of tariff and it is only comparing the estimated figures at the beginning of the year with the actual figures at the end of the year. It is not open to the Appellant to raise such an issue for the first time after many years. These principles have been laid down by the Hon'ble Supreme Court in 2009(6) SCC 235 in *UP Power Corporation Limited vs. NTPC* and this Tribunal in 2007 ELR APTEL 193 in *North Delhi Power Limited vs. DERC*. Therefore, the contention on this issue urged by the Learned Counsel for the Appellant is misconceived and consequently the

same is rejected. Consequently, the finding on this issue by the State Commission is correct and so the same is upheld.

35. The next issue is relating to the retrospective effect given to the revised tariff. According to the Appellant the State Commission ought not to have given retrospective adjustment in the tariff as this finding by the State Commission relating to the retrospective effect is neither tenable in law nor in fact. In this context, it is noteworthy to point out that the Appellant caters to a consumer base of more than 2 lakhs consumers. The Appellant is functioning on manual accounting system. In addition to the above, the Appellant is in the process of corporatization and unbundling. In view of the above, it is claimed by the Appellant that it is extremely difficult to give effect to all the directions relating to retrospective effect.

36. The perusal of the impugned order would reveal that the State Commission directed the Appellant to take effective steps to adjust the amount collected during the tariff period between

01.10.2008 and 31.03.2010. Thus, there is a specific direction to the effect that the Appellant has to give effect to the adjustment by 31.03.2010. The Appellant being a public body, will not retain any amount which is unjustified and shall account for any surplus amount.

37. In fact, while truing-up for FY 2007-08, the State Commission has adopted the right approach of comparing the Appellant's expenditure as well as the revenue earned during the FY 2007-08 after considering the two heads i.e. revenue and expenditure and concluded that it is not necessary to revise the tariff for FY 2007-08 retrospectively. Having held so, the State Commission, while truing-up in respect of 2008-09, has wrongly considered the trued-up expenditure as well as the ARR by giving retrospective effect. This is not a correct approach.

38. At this stage, one other factor has to be noticed. As against this impugned order dated 10.9.2009 in respect of the retrospective effect, the Appellant has filed this appeal. Actually

this Appeal has been filed as early as on 23.10.2009 and the same has been numbered as Appeal No. 37/10. At that stage R-2 filed a Review Petition No. RP-1/10 on 10.01.2010 seeking for suitable directions to the Appellant for implementation of the impugned order in respect of the FY 2008-09. After hearing the parties, this Petition for Review has been disposed of by the order dated 24.2.2010. In the said order, the State Commission while referring to the contention of the Appellant urged before the State Commission with regard to retrospective effect passed the following order:

“Noting the contention of the Appellant that giving retrospective effect to true up is not possible, direct that the ARR for the Accounting Year 2008-09 be finally trued up on the audited statement of accounts as duly audited by the CAG, as soon as it is received from the Appellant. Consequently, the revenue deficit or revenue surplus in the trued up ARR for the Financial Year 2008-09 would be adjusted while

working out and fixing the ARR of the perspective year i.e. Financial Year 2010-11.”

39. In this context, it is also worthwhile to note the other observations made by the State Commission in the Review Petition No. 1/10 dated 24.02.2010.

“11 (b). The Commission has noted the contention of the Respondent in para 9(i) of their affidavit in response dated 22.02.2010 that inter alia, the fixation of tariff depends upon the estimated ARR after truing up the Accounts of preceding years. Truing up exercise has to be necessarily taken up against each ARR approved by the Commission wherein any excess or shortfall of trued ARR, over the approved ARR is adjusted in the subsequent tariff order. However, for each time the accounts are trued up, the tariff may not be revised with retrospective effect. This is because the consumer base of distribution utilities in general is of the order of 10 to

50 lakh consumers and retrospective revision of bills for such a large number of consumers, every time the accounts are trued up is not possible. Retrospective revision of bills will also entail revision of all the monthly commercial data and correction of the Statement of Accounts 2008-09". The aforesaid contention has merit. Therefore, let the ARR of the accounting year 2008-09 be finally trued up on the basis of the Audited Statement of Accounts for that year, and the C&AG's Audited Report thereon, as soon as it is received from the Respondent. Consequently, Revenue deficit or Revenue surplus in the trued-up ARR for the accounting year 2008-09, will be adjusted while working out and fixing the ARR of the perspective year 2010-11."

40. The above observation would make it clear that the State Commission has taken a view that for each time the financial accounts are trued up, the tariff may not be revised with

retrospective effect. To carry out retrospective revision of vast base of consumer every time the financial accounts are trued up is not possible. The Revenue deficit or Revenue surplus in the trued up in the ARR ought to be adjusted in the prospective year 2010-11.

41. In this context, the Appellant has prayed that since the Appellant's audited accounts (duly audited by the Comptroller & Accountant General) for the FY 2008-09 are now available, the State Commission may be directed to true up the Appellant's accounts on the basis of C&AG's report and consequently any revenue surplus or deficit be adjusted while fixing the ARR of the prospective year, i.e. 2010-11. It is also brought to our notice that the audited accounts, duly audited by the C&AG of the Appellant for the FY 2008-09 have already been submitted on 28.04.2010 before the State Commission and, therefore, this Tribunal may direct the State Commission to consider the audited data of the Appellant's accounts for the FY 2008-09.

42. In the light of this prayer, it would be appropriate to refer to the judgment of this Tribunal in Appeal No. 100/07 (Karnataka Power Transmission Corporation Limited V/s Karnataka Electricity Regulatory Commission and Others. The relevant observation with reference to retrospective effect has been given in paragraph 28, which is reproduced below:-

“28. We have heard contentions of the rival parties. Basic issue that has to be decided is: whether or not the Commission was correct in carrying out the truing up of revenue requirements and revenues of KPTCL for the tariff period 2000-01 to 2005-06. Invariably, the projections at the beginning of the year and actual expenditure and revenue received differ due to one reason or the other. Therefore, truing up is necessary. Truing up can be taken up in two stages: Once when the provisional financial results for the year are compiled and subsequently after the audited accounts are available. The impact of truing up exercises must be reflected in the tariff calculations for

the following year. As an example; truing up for the year 2006-07 has to be completed during 2007-08 and the impact thereof has to be taken into account for tariff calculations for the year 2007-08 or/and 2008-09 depending upon the time when truing up is taken up. If any surplus revenue has been realized during the year 2006-07, it must be adjusted as available amount in the Annual Revenue Requirement for the year 2007-08 or/and 2008-09. It is not desirable to delay the truing up exercise for several years and then spring a surprise for the licensee and the consumers by giving effect to the truing up for the past several years. Having said that, truing up, per se, cannot be faulted, and, therefore, we do not want to interfere with the decision of the Commission in this regard to cleans up accounts, though belatedly, of the past. It is made clear that truing up stage is not an opportunity for the Commission to rethink de novo on the basic principles, premises and issues involved in the initial projections of revenue requirements of the licensee”.

43. It is laid down in the said judgment that the impact of truing-up exercises must be reflected in the tariff calculations for the following year and not to be given retrospective effect. If any surplus/deficit has been realised during the financial year, it must be adjusted in the ARR of the utility in subsequent years. The aforesaid principle of provisional truing-up leads to the conclusion that the State Commission cannot give any retrospective downward revision to the Appellant's tariff for the FY 2008-09 since any surplus/deficit ought to have been adjusted in the ARR of the Appellant in the subsequent year.

44. Therefore, in view of the above settled law and factual position, the State Commission is directed to take into consideration above aspects while the process of truing-up exercise is taken up in respect of the FY 2008-09.

45. Let us now come to the cross claim of the Association, R-2 made in IA No. 82 of 2010. In this application, the R-2 urged

that the State Commission did not give due adjustment and credit to the consumers of the State of Meghalaya for the surplus profit earned by the Appellant in the FY 2007-08. According to R-2, even the State Commission acknowledged the fact that the Appellant had earned surplus of Rs. 63.69 crores for the FY 2007-08 which was over and above the revenue requirement as determined by the State Commission and that even then the State Commission has failed to pass a consequential order for the surplus earned by the Appellant to be adjusted in the tariff of the consumers.

46. According to the Appellant, the Appellant has not earned a surplus of Rs. 63.69 crores during FY 2007-08 but in fact it has incurred a deficit of Rs. 26.95 crores and, therefore, the State Commission cannot allow any amount to be passed on to the consumers in order to give any due adjustment as claimed by the Respondent.

47. We have carefully considered this issue in the light of the submissions made on behalf of the Appellant and the State Commission. As per the calculations of the R-2, the revenue earned by the Appellant in the year 2007-08 is Rs. 383.34 crores. As per the calculations of the R-2 in the trued ARR as decided by the State Commission is Rs. 319.65 crores. Thus, the difference of the revenue earned and the ARR is Rs. 63.69 crores. According to R-2, the State Commission has come to a finding that there is excess revenue of Rs. 63.69 crores but has not given any adjustment in favour of the consumer for the above surplus amount. The admitted surplus of Rs. 63.69 crores as found by the State Commission ought to be passed on to the consumers with carrying cost.

48. According to the Appellant Board, the total revenue earned by the Board for the financial year 2007-08 from sale of power was Rs. 318.15 crores which has also been confirmed by the audited statement of accounts, but the Commission has wrongly added an amount of Rs. 65.19 crores qua subsidising and grants

and other income in concluding that the total revenue of the Appellant for FY 2007-08 was Rs. 383.34 crores since the same had already been deducted by the Commission while truing up the ARR of the Appellant for the FY 2007-08. As such the Appellant has not earned any surplus but has suffered a deficit of Rs. 26.95 crores (i.e. Rs. 345.10 Cr. as per audited account - 318.15).

49. We have examined the issue. In the order dated 10.9.2009 the Commission in para 21.1.7 has indicated revenue from sale of power during 2007-08 as 318.15 Cr. and further noted that the Board has revenue of Rs. 32.80 crores as subsidies and grants and Rs. 32.39 crores as other income. Adding subsidies and grants and other income of Rs. 65.19 crores, the Commission has held that the total income during the year 2007-08 was Rs. 383.34 crores. On the other hand, the Commission while working out the ARR has also deducted the income on account of subsidies and grants and other income totalling to Rs. 65.19 crores to arrive at a figure of net ARR of

Rs. 319.65 crores. Thus the other income and subsidies and grants totalling to Rs. 65.19 crores has been accounted for twice. When other income and subsidies and grants totalling to Rs. 65.19 crores has been deducted from the ARR, the same cannot be added to the income. Against the net ARR of Rs. 319.65 crores approved by the Commission in the true-up for 2007-08, the total income is Rs. 318.15 crores. Thus, there is actual deficit of Rs. 1.5 crores on the true up of FY 2007-08 taking into the true-up ARR approved by the Commission in the impugned order and there is no surplus as claimed by Respondent-2.

50. So, in the light of the above fact, the contention of the Respondent 2 that the Appellant has earned a surplus of Rs. 63.69 crores is not correct. On the other hand, the Appellant has a deficit and in fact, the State Commission has to adjust the deficit and to pass the consequent orders in future years. Therefore, there is no merit in the cross Appeal. Accordingly the claim made in the Cross Appeal is rejected

Summary of our findings:

51. **(i) The order passed by this Tribunal dated 09.02.2009 is the order of Remand with a limited direction to the State Commission to take the true up exercise only in regard to FY 2007-08. In our view this is a limited Remand order remitting the matter to state Commission with a specific direction to the State Commission to pass the order by truing up process in respect of FY 2007-08. Therefore, the State Commission ought to have complied with these directions by deciding the issue relating to truing up exercise in respect of FY 2007-08 alone. It is open to the State Commission to take up the truing up exercise in respect of FY 2008-09 separately on the basis of materials placed by the parties and decide the**

issue. Therefore, the order passed by the State Commission clubbing truing up the FY 2008-09 is wrong and is liable to be set aside.

(ii) The second issue relates to the State Commission not adopting the financial statement of audited accounts by the Comptroller and Auditor General of India. This contention is untenable. The audited accounts is followed specifically as to whether the expenditure has been actually incurred or not. The audited accounts do not deal with the prudence of the expenditure. The question whether expenditure is allowed or not has to be considered only by the State Commission while truing up. The Auditor will verify whether the expenditure has been actually incurred or not. On the other hand the State Commission is bound to apply its mind to make a prudence check whether the

expenditure is to be allowed or not. Therefore, the State Commission is not bound by the certificate of the Auditors.

(iii) The State Commission has correctly disallowed certain expenditure, ARR of the Appellant which may be rejected only on controllable expenditure. Since the Appellant has failed in its duty by not controlling the same and so the State Commission cannot pass the burden on to the consumers. Segregating the prior period charges into controllable expenditure and un-controllable expenditure is well recognised principle. Further, the prior period charges claimed by the Appellant are expenditure incurred by it during FY 2002-03. This was never claimed in the past. It is a settled law that the stage of truing up is not to reopen the basis of re-

determination of tariff and it is only comparing the estimated figures at the beginning of the year with the actual figure at the end of the FY. It is not open to the Appellant to raise such an issue for the first time after many years.

(iv) The State Commission ought not to have given retrospective adjustment in the tariff as this finding relating to the retrospective effect is neither tenable in law nor in fact. While going through the order passed by the Commission in the Review Petition No. 1 of 2010 dated 10.01.2010, the State Commission itself has taken the view that for each time the accounts are trued up, the tariff may not be revised with retrospective effect. The impact of trued up exercise must be in the tariff calculation for the following year and the same shall not be given retrospective effect.

The surplus/deficit in revenue in the trued up ARR has to be adjusted in the ARR during the subsequent years. Therefore, the State Commission is directed to consider the said issue on the basis of the Appellant account duly audited by the C&AG for the FY 2008-09 which is now available and adjust in the ARR of the Appellant in the subsequent year.

(v) The contention of the Respondent-2 that the Appellant has earned surplus money of Rs. 63.69 crores is not correct. On the other hand the Appellant has deficit of Rs. 26.95 crores during 2007-08 as per the audited accounts of the Appellant and about Rs. 1.5 crores as per the trued up ARR decided by the Commission in the impugned order. In fact the State Commission has to adjust this deficit and pass the consequent orders in future years. Accordingly the claim made by the

Respondent 2 in the cross para in IA No. 82 of 2010 is rejected.

52. In view of our above findings, the impugned order is set aside to the extent as indicated above. Consequently, we direct the State Commission to consider taking up the true-up process separately in respect of the FY 2008-09 taking into account the observations made by this Tribunal with reference to the aspects contained therein and pass appropriate orders.

53. The Appeal is partly allowed. No costs.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

REPORTABLE/NOT REPORTABLE

Dated: 10th August, 2010