In the Appellate Tribunal for Electricity, New Delhi
(Appellate Jurisdiction)

Appeal No. 157 of 2015

Dated: 14th March, 2016

Present: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER
HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER

In the Matter of:

The Assam Electricity Grid Corporation Ltd.
(*Represented by its Managing Director*)
1st Floor, Bijulee Bhawan,
Paltan Bazar, Guwahati – 781 001 **... Appellant(s)/Petitioner**

Versus

The Assam Electricity Regulatory Commission
ASEB Campus, Dwarandhar,
G.S.Road, Six Mile,
Guwahati – 781 011 **... Respondent(s)**

Counsel for the Appellant(s) : Mr. Avijit Roy,
Mr. Barnali Das,
Ms. Deepika Ghatowar and
Mr. Pradeep Kumar

Counsel for the Respondent(s) : Mr. Buddy A. Ranganadhan,
Mr. D. V. Raghu Vamsy and
Mr. Raunak Jain

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUIDICIAL MEMBER

The present appeal, filed under section 111 of the Electricity Act, 2003, has been directed against the Impugned Order dated 09.04.2015 passed by the Assam Electricity Regulatory Commission (in short the '***State Commission***') in Review Petition No. 5 of 2015, filed by the appellant/petitioner under Section 94(1)(f) of the Electricity Act, 2003, read with Regulation 34(1) of the Assam Electricity Regulatory Commission (Conduct of Business) Regulations 2004, seeking review of tariff order dated 21.11.2014 on the true up for FY 2011-12, 2012-13, APR for FY 2013-14 and ARR and tariff for 2014-15, whereby the said Review Petition of the appellant has been partly allowed.

2) The State Commission, vide Impugned Order dated 09.04.2015, has rejected the Review Petition on the following three issues:

(i) Carrying cost of Rs.0.88 Crore on the amount of additional interest of Rs.2.69 Crores
(ii) Depreciation of assets created out of Government Grants and
(iii) Return on equity on assets created out of Government Grants

Thus, the Review Petition of the appellant/petitioner has been dismissed by the State Commission vide the impugned Review Order regarding these three claims and present appeal has been filed by the appellant.

3) We may mention here that the following issues were raised before the State Commission by the appellant/petitioner in the aforesaid Review Petition:

(i) Interest of Govt. of Assam Loan for the FY 2011-12
(ii) Depreciation on assets created out of promoter's contribution
(iii) Prior Period Charges
(iv) Employee Costs
(v) Non Tariff Incomes

Out of these five issues in the Review Petition, the above three claims have been disallowed by the Impugned Order: According to the appellant, the depreciation over the Government grant has been disallowed. Though the interest on Government loan was allowed to the appellant but its carrying cost has been disallowed. Thirdly, additional claim of return on equity on Government grant has also been disallowed.

4) We have heard Mr. Avijit Roy, learned counsel for the appellant and Mr. Buddy A. Ranganadhan for the respondent, Commission. We have gone through the written submissions filed by the rival parties and perused the material available on record including the impugned order.

5) The following issues arise for our consideration:

A) Whether the present appeal, at the instance of the appellant, is not maintainable against the Impugned Review Order dated 09.04.2015?

B) Whether the carrying cost of Rs.0.88 Crore on the amount of additional interest of Rs.2.69 Crores has been legally disallowed by the State Commission?

C) Whether the depreciation on assets created out of Government grants has been legally and correctly disallowed by the State Commission?

D) Whether the return on equity on assets created out of Government grants has been legally disallowed by the State Commission?

6) **Issue No.(A) – regarding maintainability of the instant appeal :**

The first objection of the respondent is that the instant appeal is not maintainable because the instant appeal has been filed only against the Impugned review Order without challenging the main tariff order dated 21.11.2014. The main tariff order should have been challenged by filing an appeal before this Appellate Tribunal by the appellant and then only this Appellate Tribunal could go into the legality of the main order dated 21.11.2014. Under Section 94(1)(f) of the Electricity Act, 2003, the Commission exercises its jurisdiction to review an order and the Commission does so as the powers of a Civil Court under the CPC. Under Order XXXXVII, Rule 7 of the CPC, an order rejecting the Review Petition is not appealable. The appellant has sought to appeal against the order which is expressly stated to be non-appealable. This Appellate Tribunal vide judgment dated 02.12.2013 in Appeal No.88 of 2013 in the Case of *NTPC Vs. CERC* held that no appeal is maintainable against the order passed by the Commission on the Review Petition. The said objection was taken by the respondent at the time of commencement of the arguments but even then the appellant chose to argue the appeal without utilizing the opportunity of preferring an appeal against the main order dated 21.11.2014.

6.1) **Per contra**, the learned counsel for the appellant submits as under:

That the CPC is a general law and Electricity Act 2003 is a special law, hence, the special law is applicable to the present matter. Section 111(1) of the Electricity Act, 2003 clearly lays down that "*any person aggrieved by the order made by the adjudicatory officer under this Act, (except under 127) or an order made by an appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal*". Therefore, the said provision clearly stipulates that the appeal is maintainable against any form of order which includes Review Order passed by an appropriate Commission. Further, special legislation will prevail over general legislation as held by a Constitution Bench of the Hon'ble Supreme Court in *P.S. Sathappan (dead) by LRS Vs. Andhra Bank Ltd. and Others* reported in (2004) 11 SCC 672 and in *UP Rashtriya Chini Mill Adhikari Parishad, Lucknow Vs. State of U.P. and Others,* reported in (1995) 4 SCC

738 hence, the instant appeal against the Review Order passed by the Commission is maintainable.

6.2) **Our consideration and conclusion on this issue:**

6.2.1) We have considered the issue in the light of the provisions of Civil Procedure Code and the Electricity Act, 2003 and the ruling cited above.

6.2.2) This Appellate Tribunal in its judgment dated 02.12.2013 in Appeal No.88 of 2013 in *NTPC Vs. CERC* while hearing the appeal, challenging the order dated 08.02.2012, passed by the Central Commission in the Review Petition filed by the appellant and having considered the arguments of the appellant in the reported case that when the Review Petition raises several distinct matters and some are partly rejected, the Doctrine of Merger in so far as the matters for which review is rejected, and further assuming that review was partly allowed, even then the Doctrine of Merger will be applicable only to the extent the review was allowed and will not be applicable to the matters for which the review was rejected, will not have any application holding the appeal as not maintainable, has observed as under:

> *"3.1 Summary of Our Findings*
>
> *If the Review Petition raises several distinct issues and the some of them are rejected, the Doctrine of Merger in so far as the issues which were rejected in the Review Order will not have any application. When this principle is applied to the present cse, then we are constrained to hold that the present Appeal as against the Review order in respect of these issues is not maintainable in view of the fact that these issues have already been decided in the main order itself. Thus, we uphold the objection regarding the Maintainability of the Appeal.*
>
> *3.2 In view of our findings above, the Appeal is dismissed as not maintainable."*

6.2.3) The Hon'ble Supreme Court in the case of *DSR Steel Pvt. Ltd. Vs. State of Rajasthan* reported in (2012) 6 SCC 762 has observed as under:

> *"25.1 One of the situations could be where the review application is allowed, the decree or order passed by the court or tribunal is vacated and the appeal/proceedings in which the same is made are reheard and a fresh decree or order passed in the same. It is manifest that in such a situation the subsequent decree alone is*

appealable not because it is an order in review but because it is a decree that is passed in a proceeding after the earlier decree passed in the very same proceedings has been vacated by the court hearing the review petition.

25.2 The Second situation that one can conceive of is where a court or tribunal makes an order in a review petition by which the review Petition is allowed and the decree/order under review is reversed or modified. Such an order shall then be a composite order whereby the court not only vacates the earlier decree or order but simultaneous with such vacation of the earlier decree or order, passes another decree or order or modifies the one made earlier. The decree so vacated reversed or modified is then the decree that is effective for the purpose of a further appeal, if any, maintainable under law.

25.3 The third situation with which we are concerned in the instant case is where the revision petition is filed before the Tribunal but the Tribunal refuses to interfere with the decree or order earlier made. It simply dismisses the review Petition. The decree in such a case suffers neither any reversal nor dismissed thereby affirming the decree or order. In such a contingency, there is no question of any merger and anyone aggrieved by the decree or order of the Tribunal or court shall have to challenge within the time stipulated by law, the original decree and not the order dismissing the Review Petition. Time taken by a party in diligently pursuing the remedy by way of review may in appropriate cases be excluded from consideration while condoning the delay in the filing of the Appeal, but such exclusion or condonation would not imply that there is a merger of the original decree and the order dismissing the review petition.

26. The decision of this Court in Manohar v Jaipalsing in our view, correctly, settles the legal position. The view taken in Sushil Kumar Sen v. State of Bihar and Kunhayammed V State of Kerala, wherein the former decision has been noted, shall also have to be understood in that lights only."

6.2.4) Thus in the DSR Steel matter the Hon'ble Supreme Court has considered three situations while dealing with the Review Petition and the appeal against the Review Petition. Thus the Hon'ble Supreme Court has dealt with different situations that may arise and relate to Review Petitions filed before a Court or Tribunal. One of the situations could be where the Review Petition is allowed, the decree or order, passed by a Court or Tribunal, is vacated and the appeal/proceedings in which the same is

made are re-heard and fresh decree or order passed in the same. In such a situation the subsequent decree alone is appealable not because it is an order in review but because it is a decree that is passed in a proceeding after the earlier decree passed in the very same proceedings has been vacated by the Court hearing the Review Petition. In a separate case, it has been clarified by the Hon'ble Supreme Court that original decree/order does not merge with Review Order where Review Petition/application is simply dismissed, which position is however different where Review Petition succeeds partly or wholly because in such a situation original decree or order no longer remains intact.

6.2.5) This Appellate Tribunal vide judgment dated 05.03.2014 in Appeal No.167 of 2013 captioned *Power Grid Corporation of India Ltd. Vs. Central Electricity Regulatory Commission & Ors.*, while dealing with the same issue namely, whether the instant appeal against the order passed on the Review Petition in case the Review Petition partly succeeds without challenging the original or main order, is maintainable and relying on the case law laid down in *DSR Steel (P) Ltd. Vs. State of Rajasthan & Ors.*, reported in (2012) 6 SCC 782 has held that the appeal filed against the Review Order, if Review Petition is partly allowed, is maintainable in the Appellate Tribunal even without filing any appeal against the main order. The relevant part of the judgment dated 05.03.2014, passed by this Appellate Tribunal, in Appeal No.167 of 2013 is reproduced hereunder:

"*(t) In the impugned Review Order dated 9.5.2013, the instant review petition has been partly allowed and, subsequently orders to this effect were directed to be issued by the Central Commission. The Review Petition has accordingly been disposed of. It is quite evident from the impugned review order that IDC and IEDC with regard to the Assets 1 & 2 were allowed for the reasons mentioned therein and the same with regard to the Assets 3 & 4 were disallowed for the mentioned reasons. The Appellant Petitioner claimed IDC and IEDC with respect to all the four Assets 1, 2, 3 & 4 which were disallowed in the main order. In the review order, IDC & IEDC for Assets 1 & 2 were allowed and Assets 3 & 4 were disallowed. On the basis of the review order, consequential order has been issued by the Central Commission which would further result in redetermination of tariff because tariff is determined on the basis of many components/Assets. Moreover, the transmission charges for combined Assets 1 and 3 have been determined in the main order for the period 1.9.2009 to 31.3.2014. The allowance of IDC and IEDC in respect of Asset 1*

in the review order will result in modification of transmission charges for combined Asset 1 & 3 determined in the main order.

(u) Thus, by the review order, the learned Central Commission has partly set aside the main order and accordingly allowed the review application after rehearing the parties during the review petition. The main order has consequentially been reversed/modified. Thus, the learned Central Commission has made an order in review petition by which the review petition has been allowed and the decree/order under review has been reversed or modified. Such an order then becomes a composite order whereby the Central Commission has not only vacated the earlier decree or order but simultaneous with such vacation of the earlier decree or order has passed another decree/order by modifying the one made earlier. Thus, the original decree or order of the Central Commission has been reversed or modified by the subsequent review order or decree and the review order or decree is effective for the purpose of further appeal.

After considering the controversy before us on the point of maintainability of the instant Appeal, and going through the different aspects of the matter and different rulings and legal position, we find ourselves in agreement with the pleas taken by the learned Counsel for the Appellant Petitioner. In our view, the instant appeal against the review order is fully competent and legally maintainable and this point namely; Point-1 is decided in favour of the Appellant Petitioner.

(v) The findings of this Tribunal in Appeal No. 88 of 2013 will not be applicable in the present case as in the present case the issue dealt with in the review petition was IDC and IEDC in respect of Asset 1 to 4, which was allowed partially by allowing IDC and IEDC in respect of Asset 1 & 2. Further, in the main order, the transmission charges for combined Asset 1 & 3 were determined. The review allowing IDC and IEDC in respect of Asset 1 will modify the transmission charges for combined Asset 1 & 3."

6.2.6) In view of the above discussion, we hold that the instant appeal, which has been filed against the Impugned Review order, passed on the Review petition, whereby the State Commission had disallowed three claims and allowed two claims out of the total five claims raised in the Review Petition, is fully competent and legally maintainable because after allowing Review Petition on two issues namely, employee costs and non-tariff incomes the State Commission would have to re-determine or re-cast the tariff thereby making changes or modifications in the original decree. The settled principle of law is that there cannot be more than one decree in one matter. There can only be

one decree in any matter. This issue is thus decided in favor of the appellant. Thus the instant appeal is maintainable, leaving us to decide the appeal on the other points raised in this appeal.

7) **Issue No.(b)** : **carrying cost on the amount of additional interest: On this issue the appellant has contended as under:**

That on the issue of interest on Government loans, the State Commission has agreed to provide additional interest amounting to Rs.2.69 Crores in the next tariff. However, the Commission has failed to appreciate the fact that the appellant is also entitled to get interest on carrying cost of Rs.2.69 Crores on term deposit for four years from FY 2011-12 to 2014-15. Therefore, while allowing Rs.2.69 Crores as interest for FY 2011-12 with the direction to claim the same in the next ARR, of 2015-16, the State Commission has not considered the interest for the interim period from 2011-12 to 2014-15.

7.1) **Per contra**, the following contentions have been made by the respondent, Commission:

7.1.2) That carrying cost on the differential interest expenses was not sought by the appellant in its Review Petition while the additional return on equity on promoters contribution was not sought by the appellant, either in its original petition or in the Review Petition. Hence, this is not open to the appellant to claim such a relief through an appeal filed against the Review Order.

7.1.3) That the State Commission's relevant extracts of the Impugned Review Order is given below:

> ***"Commission's Analysis and Decision***
>
> *In the Tariff Order dated November 21, 2014, the Commission had interpreted the statement in the audited accounts, viz., "4.2 GOA Grant amount of Rs.45,79,55,000/- wrongly included in GOA Loan during 2009-10 rectified during 2011-12", to mean that the amount of GoA grant had been reduced only from the closing balance of loan. Hence, the Commission had deducted this amount from the opening balance of loan also, and recalculated the interest accordingly. However, AEGCL has submitted additional documents to clarify the position as under:*
>
> …
>
> *That above computations …*
> *As regards the second issue …*

As regards the issue of interest …

Accordingly, the revised interest expenses on State Government loan for FY 2011-12, on account of the restatement of Rs.45.80 crore in the opening balance of loan and the revision in the applicable interest rate is Rs.21.84 Crore, as compared to the interest expense of Rs.19.15 Crore allowed in the Tariff Order dated November 21, 2014. The Commission allows AEGCL to claim the differential amount of Rs.2.69 Crore in the next Tariff Petition."

7.1.4) That it is seen from the Impugned Review Order that the appellant did not seek carrying cost on the amount of Rs.4.58 Crores sought in its Review Petition and sought only recovery of the base amount of Rs.4.58 Crores which was allowed by the State Commission as Rs.2.69 Crores, based on the study of the documents and clarifications submitted by the appellant along with the Review Petition.

7.1.5) That in the Original tariff order dated 21.11.1014 issued by the State Commission for the appellant, the Commission had added the cumulative revenue surplus of Rs.23.01 crores for FY 2011-12 and 2012-13 to the ARR of FY 2014-15 while doing so the State Commission had not considered any carrying cost on the amount of cumulative revenue surplus of Rs.23.01 crores. Hence, there is no question of considering carrying cost on the isolated item of interest, as sought by the appellant.

7.2) **Our consideration and conclusion on this issue:**

After citing the rival contentions of the parties and narrating the real controversy, we directly proceed towards the disposal of this issue.

7.2.1) The relevant part of the Impugned Order is as under:

"Commission's Analysis and Decision

In the Tariff Order dated November 21, 2014, the Commission had interpreted the statement in the audited accounts, viz., "4.2 GOA Grant amount of Rs.45,79,55,000/- wrongly included in GOA Loan during 2009-10 rectified during 2011-12", to mean that the amount of GoA grant had been reduced only from the closing balance of loan. Hence, the Commission had deducted this amount from the opening balance of loan also, and recalculated the interest accordingly. However, AEGCL has submitted additional documents to clarify the position as under:

…

That above computations …
As regards the second issue …
As regards the issue of interest …
Accordingly, the revised interest expenses on State Government loan for FY 2011-12, on account of the restatement of Rs.45.80 crore in the opening balance of loan and the revision in the applicable interest rate is Rs.21.84 Crore, as compared to the interest expense of Rs.19.15 Crore allowed in the Tariff Order dated November 21, 2014. The Commission allows AEGCL to claim the differential amount of Rs.2.69 Crore in the next Tariff Petition."

7.2.2) It is not a disputed fact that the carrying cost on the differential expenses was not sought by the appellant in its Review Petition. Even the additional return on equity on promoters' contribution was not sought by the appellant, either in the original petition or in the Review Petition. Hence, the State Commission did not have any opportunity to consider the said claim or relief of the appellant and there is no finding of the State Commission on this issue. Further, this is not a disputed fact that the appellant did not seek carrying cost on the amount of Rs.4.58 Crores, as sought in the Review Petition and only sought recovery of the base amount of Rs.4.58 crores, which was allowed by the State Commission as Rs.2.69 crores, based on the study of the documents and clarifications of the appellant submitted along with the Review Petition. We find that since the Commission had not considered any carrying cost on the amount of cumulative revenue surplus on Rs.23.01 crores while passing the original tariff order dated 21.11.2014, there is no question of considering the carrying cost on the isolated item of interest, as sought by the appellant. In view of the above discussion, this issue is decided against the appellant.

8) **Item No. (C): Depreciation on assets**, on this issue, the appellant has contended as under:

a) That the State Commission while approving the depreciation for 2011-12 and 2012-13 has unlawfully deducted depreciation on the assets built on the grants component as a whole but not on a specific capital basis. The State Commission has stated in its order that "*consumer contribution or capital subsidy/grant etc. shall be excluded from the asset value for the purpose of depreciation and thus the treatment in the order of not considering depreciation on assets funded through Government grants is clearly in accordance with the State Commission's Tariff Regulations*".

b) That the State Commission has erred in observing that the grants given by the Government of Assam to the appellant are in the form of promoters' contribution which is different from the consumers contribution grants received from the consumers and other agencies.

c) That Paragraph 5.2(1) of Accounting Standard 12 (***AS-12***), notified by MCA states that many Government grants are in the nature of promoters' contribution i.e. they are given reference to the total investment in an undertaking or by way of contribution towards its capital out lay and no repayment is ordinarily expected in case of such grants. Therefore, these grants should be credited directly to share holders' funds. The appellant creates these assets out of share holder's funds and therefore is eligible for claiming depreciation on these assets. In case of denial to treat the referred grants as promoters' contribution the same has to be treated as income which will accrue income tax, the burden of which is to be borne by the consumers of electricity of the State indirectly.

d) That as per transfer scheme issued by Government of Assam in terms of the Electricity Act, 2003, the closing balance on account of Government grants of Assam State Electricity Board (***ASEB***) on the date of transfer has been vested to Government of Assam and Government of Assam has divested the same to the successor companies of ASEB. Thus the said grants are not grants given by Government of Assam to the appellant against specific fixed assets but the grant against total assets of the appellant which shall have to be treated as Government grants in the nature of promoters' contribution.

8.1) **Per contra**, the respondent Commission has contended as under on this issue:

(a) That the treatment in the original tariff order for the appellant and the Impugned Order, of not considering depreciation on assets funded through Government grants, is clearly in accordance with the State Tariff Regulations 2006 and the State Commission has strictly followed its own Regulations while determining the ARR and the tariff for the appellant. The AS-12 is completely inapplicable to the present matter as it is clear from the State Commission's Regulations itself. Clause 4.7 of the State Commission's Tariff Regulations reads as under:

"4.7 In the preparation of Balance Sheet and profit & Loss Account, the Licensee or the generating company shall follow the accounting standards issued by the Institute of Chartered Accountants of India (ICAI) ***unless alternative standards are prescribed by the Commission through Regulations.***

Provided that depreciation shall be determined in accordance with regulation 14 of these Regulations and not the requirements of the Company's Act 1956*."*

(b) Hence, the question of dealing with the AS-12 on depreciation does not arise for tariff determination under the State Commission's Tariff Regulations.

(c) That the appellant has taken this contention contrary to their own earlier stand before the State Commission in previous tariff proceedings. In the Review Petition filed by the appellant, on the tariff order for FY 2013-14, the appellant had submitted that AS-12 is not applicable in the case. Hence, now the appellant is estopped from taking a contrary stand saying that AS-12 is applicable to this case.

(d) That the State Commission, in the main tariff order dated 21.11.2014, has analyzed the issue stating that for the issue of depreciation of assets created out of Government grants; Regulation 14 of the Assam Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff), Regulations 2006 provides as under :

"14. Depreciation:

For the purpose of tariff determination, depreciation shall be computed in the following manner;

(a) The asset value for the purpose of depreciation shall be the historical cost of the assets as approved by the Commission where;

The opening asset's value recorded in the Balance Sheet as per the Transfer Scheme Notification shall be deemed to have been approved, subject to such modifications as may be found necessary upon audit of the accounts, if such a Balance Sheet is not audited. Consumer contribution or capital subsidy/grant etc. shall be excluded from the asset value for the purpose of depreciation."

(e) That further the grants cannot be considered as deemed equity or promoters' contribution as suggested by the appellants, since, there is neither any provision in the Tariff Regulations for such treatment nor is such treatment correct in terms of AS.

(f) That on the issue of Government grants, the appellant had earlier sought treatment as either deemed equity or promoters' contribution and had submitted that AS-12 is not applicable. On the same issue, the appellant is now seeking relief under AS-12 and that too partly quoting incorrect and inapplicable paragraph. Further this issue has already achieved finality, as the State Commission had given the same ruling in several orders prior to the Impugned Order, hence, it is not open to the appellant to raise this issue at this point of time.

(g) That even on an interpretation of AS itself, the appellant has attempted to paint a wrong picture by incorrectly and selectively quoting from AS-12. Paragraph 5.2 should be read in totality and in the correct context. Paragraph 5 of the AS discusses the options for accounting of Government grants as either capital or income and Paragraph 5.2 reproduces the arguments of those in favor of capital approach. Paragraph 5.2 is not an accounting principle laid down under this AS.

(h) That in the case of the appellant, the Government grants have been released against specific assets and not towards the total fixed assets of the appellant and hence, the accounting principle laid down in Paragraph 8 or 14 will apply. In the Impugned Order the State Commission has rightly adopted the first approach of deducting amount of grant of the gross value of the asset which results in reduced depreciation charge. Thus there is no merit in the appellant's contention that under AS-12, the Government grants given to the appellant should be considered as promoters' contribution.

(i) That with respect to the clarification given by the Government of Assam regarding the treatment of Government grants as promoters' contribution, there is no significance to the letter of the Government of Assam, referred to by the appellant. This is apart from the fact that the letter of the Government is not, in law, binding on the State Commission and the Commission being, a statutory body, under the Electricity Act, 2003 and vested with statutory functions is not only entitled but tasked with the responsibility of rendering the finding on such an issue *de horse* any statement that may be made by the Government.

(j) That further the Government of Assam, in its letter, stated that "*grants and subsidies towards creation of capital assets …. should be treated as promoters contribution and that conversion of said grants and subsidies into equity is in process and will be intimated in due course*. Thus the Government grants have been given against specific capital assets, rather than against the total investment in the undertaking and hence paragraph 8 of the AS-12 will apply. The Government of Assam itself recognized that the grants have not been converted into equity as yet.

8.2) **Our consideration and conclusion on this issue:**

a) After citing the rival contentions of the parties, we now consider the legality of the findings recorded by the State Commission on this issue. We note that the State Commission while approving the depreciation for FY 2011-12 and 2012-13 deducted depreciation on the assets built on the components as a whole but not in a specific capital basis. The State Commission has stated in its order that consumer contribution or capital subsidy grants etc. shall be excluded from the asset value for the purpose of depreciation and thus the treatment in the order of not considering depreciation on assets funded through Government grants is clearly in accordance with the AERC Tariff Regulations.

b) There is a letter of Government of Assam dated 03.03.2009, addressed to the Member (Finance), ASEB which states as under:

> *"With reference to your letter dated 12/11/2008 regarding treatment of Government Grant released to ASEB and its successor Companies it is clarified as under:*
>
> *ASEB, a statutory body corporate constituted under the Electricity (Supply) Act, 1948 and restructured under the provision of Electricity Act, 2003 into five successor Companies (AEGCL, APGCL, LAEDCL, CAEDCL AND UAEDCL) and residual ASEB is fully owned by the Government of Assam. As such, grants & subsidies towards creation of capital assets paid by the Government of to ASEB and its successor Companies should be treated as promoter's contribution. Conversion of said grants and subsidies into Equity is on process and will be intimated in due course."*

c) This letter dated 03.03.2009 clearly depicts that ASEB is fully owned by Government of Assam and as such grants and subsidies towards creation of capital assets by Government of Assam to ASEB and its successor companies should be treated as promoters contribution. As per this letter, conversion of said grants and subsidies into equities is on process and will be intimated in due course. Thus no intimation from Government of Assam has yet been received, hence, thus the conversion of said Government grants and subsidies into equity is still on the process and not finalized. Had it been finalized, the letter to be issued by Government of Assam would have been produced by the appellant itself.

d) We have carefully gone through the Assam Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations 2006 notified no 28.04.2006, clause 4.7 of Regulation 4, dealing with *Preparation and submission of annual Accounts, Reports etc.* states as under:

> *"4.7 In the preparation of Balance Sheet and Profit & Loss Account, the Licensee or the generating company shall follow the accounting standards issued by the Institute of Chartered Accountants of India (ICAI) unless alternative standards are prescribed by the Commission through Regulations.*
>
> *Provided that depreciation shall be determined in accordance with regulation 14 of these Regulations and not the requirements of the Company's Act 1956."*

e) Thus this clause 4.7 of Regulation 4 of the State Tariff Regulations 2006 contains a proviso that provides that the depreciation shall be determined in accordance with Regulation 14 of the State Regulations and not the requirements of the Companies Act, 1956. On our query, the learned counsel for the appellant submitted that the appellant will challenge the legality or validity of Regulation 14 of the State Tariff Regulations 2006 before the competent Court, namely Writ Court, at a proper stage. Now after perusing the said clause 4.7 and Regulation 14 dealing with depreciation, we find that the depreciation has to be determined in accordance with the Regulation 14 of the State Tariff Regulations 2006 and the AS-12 under the Companies Act, 1956 is not to be considered. Thus the State Commission has rightly, legally and correctly decided this issue of depreciation. The State Commission has correctly observed in the Impugned order that the grants given by Government of Assam to the appellant are in the form of promoters' contribution and it is different from the consumers

contribution, grants received from consumers and other agencies. The findings recorded by the State Commission on this issue, in the Impugned Order seem to suffer from no legal defect or perversity. We find that in this case the Government grants have been released against specific assets and not towards the total fixed assets of the appellant and hence, the accounting principle laid down in paragraph 8 or 14 will apply. The State Commission, in the Impugned Order, has rightly deducted the amount of grant from the gross value of the asset which resulted in reduced depreciation charge. We do not find any merit in the contentions of the appellant that under AS-12, Government grants given to the appellant should be considered as promoters' contribution. Further the Government of Assam itself has recognized that the grants have not been converted to equity as yet. This issue is accordingly decided against the appellant.

9) **Issue No.(D) : Additional Return On Equity (ROE):** On this issue, the following are the contentions of the appellant:

(a) That the additional ROE is a consequential claim and based on the arguments that the referred Government grants should be treated as promoters' contribution and debt equity ratio structure prescribed in Regulation 80.1 of State Tariff Regulations 2006.

(b) That under Paragraph (b) depreciation of FY 2011-12 and 2012-13 in the Commission's analysis and decision it is delineated that when the utility finds replacement of odd fixed assets, either by its own equity or by loan or by both only then it will be eligible to claim returns on the new assets, subject to the prescribed debt equity norm. The appellant finds its assets out of the loan and promoters' contribution from the Government of Assam and therefore the appellant is eligible to claim return on fixed assets created out of loan and share holders' funds. As per audited accounts, as on 31.03.2014, a gross block of fixed assets stood at Rs.1261.63 Cores. Based on the debt equity ratio structure prescribed in Paragraph 80.1 of the State Tariff Regulations 2006, the equity should be Rs.378.49 Crores and the debt should be Rs.883.14 Crores. The State Commission has allowed Rs.13.99 Crores as ROE of Rs.99.93 Crores for FY 2014-15. In compliance with prescribed debt equity ratio, the appellant is eligible for ROE on share holders' fund of Rs.378.49 Crores. Therefore, the appellant is eligible to receive additional ROE.

(c) That the claim on ROE is maintainable in the instant appeal in view of the fact that the question of new plea does not arise when there is a clear procedure laid down in the form of statutory Regulations and State Commission is duty bound to follow the said procedure, more specifically, Paragraph 80.1 of the State Tariff Regulations 2006 due to the fact that accounts were audited as on 31.03.2014 and in compliance with prescribed debt equity norm the appellant is entitled to get ROE on share holders fund of Rs.378.49 Crores.

(d) That this Appellate Tribunal can exercise its power to appreciate above claim on ROE by the appellant at a belated stage.

(e) That Section 120(1) of the Electricity Act, 2003 provides that this Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure 1908 but shall be guided by the principles of natural justice and subject to other provisions of the Electricity Act. The Appellate Tribunal has power to regulate its own procedure. Therefore, the balance of equity is heavily in favor of the appellant in view of the fact that the accounts were audited till 31.03.2014 and this Appellate Tribunal may not hesitate to exercise its power to fill the gap left behind in the State Commission's proceedings. Further, in case this Appellate Tribunal does not exercise its power to allow ROE on assets created from Government grants, this Appellate Tribunal can direct the State Commission to decide the same in the interest of justice.

9.1) **Per contra**, the learned counsel for the State Commission has submitted as under:

9.1.1) That the appellant has prayed for additional ROE by considering equity in accordance with normative debt equity ratio on the asset cost, by considering the Government grants as promoters contribution.

9.1.2) That the appellant had not claimed such additional ROE in its original Tariff Petition. The appellant sought ROE of Rs.13.99 Crores which was allowed by the State Commission in the original Tariff Order hence, no appeal can survive in this regard.

9.1.3) That further the appellant did not seek any relief regarding ROE in its Review Petition. Thus the appellant had neither sought relief in its original Petition nor in the Review Petition. Now it is not open to the appellant to claim such a relief in an appeal filed against the Impugned Tariff Order. The appellant cannot seek relief that had not been

sought in its Review Petition on which the Commission's main Tariff Order had been issued. The claim of additional ROE made by the appellant is entirely based on this contention of the appellant that Government grant should be treated as promoters' contribution. This Appellate Tribunal in its judgment dated 17.12.2014 in Appeal No.142 of 2013 and Batch titled *M/s Mawana Sugars Vs. PSERC* paragraph 25 to 40 has held that if any assets have been created out of consumers' contribution then such quantum has to be excluded from the assets even while deciding ROE.

9.1.4) That since the Impugned Order is with respect to the final truing up for FY 2011-12 and 2012-13 and the ARR and Tariff for FY 2014-15, the audited account in question can only be the audited account for FY 2011-12 and 2012-13. For FY 2013-14, the State Commission had considered the provisional accounts and the same can be considered now also. Hence, audited accounts of subsequent years, if any, for FY 2014-15 cannot be considered at this stage because same was not considered by the State Commission in the Impugned Review Order.

9.1.5) That Regulation 80 of the State Tariff Regulations 2006 deals with debt equity ratio which provides as under:

> *"80.1 For the purpose of determination of tariff, debt-equity ratio in the case of a new generating station commencing commercial operations after the notification of these Regulations shall be 70:30.* ***Where equity employed is more than 30%, the amount of equity for the purpose of tariff shall be limited to 30% and the balance shall be treated as loan. Where actual equity employed is less than 30%, the actual equity employed shall be considered. In the case of Assam Electricity Grid Corporation Ltd. the debt equity ratio as per the Balance Sheet on the date of the Transfer notification will be the debt equity ratio for the first year of operation."***

9.1.6) That apart from the fact that equity share capital in the opening balance sheet appears to be incorrect, the equity capital is still only 10% of the gross fixed assets as on date. As the opening equity is 30% of the opening GFA, it shows that equity cannot be simply equated to 30% of GFA.

9.1.7) That the appellant is to prove that actual equity (excluding grants and consumer's contribution) invested in the assets after the opening balance sheet is 30% hence, the lower actual value has to be considered.

9.1.8) That the whole argument of the appellant is deviating from the main issue of whether the grant should be considered as grant or not. The correct method of accounting is to consider the debt equity ratio after reducing the amount of grants and consumer contribution as this reflects an amount that utility has to arrange either through own fund or through debts. The grants and consumer contribution do not have any costs i.e. they neither have to be returned nor have any interest or dividend to be paid on these amounts. Whereas, on equity capital, the utility is entitled to ROE and for debt, interest is allowed. Thus there is no merit in the contention of the appellant that 30% of the asset value should be considered as equity. If the appellant's contention is accepted then, if tomorrow 100% of the asset is funded by grant, the appellant will claim ROE on 30% of such amount and claim interest on normative loan on 70% of such amount. Even though, by virtue of grant neither does the amounts have to be returned nor have any interest or dividend to be paid on these amounts, which would be totally opposed to all norms of tariff determination.

9.1.9) That further in any event, as additional ROE was not claimed in the original Petition or in the Review Petition, the same cannot be claimed now.

9.2) **Our consideration and conclusion on this issue:**

9.2.1) After citing rival contentions of the parties, we directly proceed towards disposal of this issue relating to additional ROE. The appellant has prayed for additional ROE in accordance with normative debt equity ratio on the asset cost by considering the Government grants by promoters' contribution. Admittedly, the appellant had not claimed such additional grant equity in its original tariff petition. The appellant sought ROE of Rs.13.99 Crores before the State Commission in the original tariff petition and the same was allowed by the State Commission in the original tariff order. Further, the appellant did not seek any relief regarding ROE in its Review Petition. The position, as is evident from the record that the appellant had neither sought additional ROE in its original Petition nor in the Review Petition. We find that it is not now open to the appellant to claim such a relief in the instant appeal because the appellant seek the relief that had not been sought in its Review Petition on which the

State Commission's main tariff order had been issued. The claim of additional ROE made by the appellant is totally based on this contention of the appellant that the Government grant should be treated as promoters' contribution.

9.2.2) This Appellate Tribunal in judgment dated 17.12.2014 in Appeal No.142 of 2013 & Batch, titled *M/s Mawana Sugars Vs. PSERC,* particularly in Paragraphs 25 to 40 thereof held that if any assets have been created out of consumers' contribution then such quantum has to be excluded from the assets even while deciding ROE.

9.2.3) We further note that the Impugned Order is with respect to the final true up for the FY 2011-12, 2012-13 and the ARR and Tariff for FY 2014-15. The audited accounts in question can only be the audited accounts for the FY 2011-12 and 2012-13. For FY 2013-14, the State Commission had considered provisional accounts and same can be considered now also, hence, the audited accounts of subsequent years, if any, for the FY 2014-15 cannot be considered at this stage because the same was not considered by the State Commission in the Impugned Review Order. We find that Regulation 80 of State Tariff Regulations 2006 dealing with debt equity ratio clearly provides that where actual equity employed is less than 30%, the actual equity employed shall be considered. In the case of appellant, the debt equity ratio as per the balance sheet on the date of transfer notification will be the debt equity ratio for the first year of operation. The correct method of accounting is to consider the debt equity ratio after reducing the amount of grant and consumer contribution as this would reflect an amount that utility has to arrange either through own funds or through debts. We are of the view that the grants and contribution do not have any costs namely they neither have to be returned nor have any interest or dividend to be paid on these amounts.

9.2.4) We are not inclined to accept this contention of the appellant that additional ROE is the consequential claim and based on the arguments that the referred government grants should be treated as promoters' contribution and debt equity structure prescribed in Regulation 80.1 of State Tariff Regulations 2006.

9.2.5) Further we are not inclined to accede to this request of the appellant that this Appellate Tribunal should exercise its power to fill the gap left behind in the State Commission's proceedings. In view of the above, we do not find any merit in the contentions of the appellant. Consequently, this issue is decided against the appellant.

10) The instant appeal being without merits is liable to be dismissed.

O R D E R

The instant Appeal, being Appeal No. 157 of 2015, captioned as The Assam Electricity Grid Corporation Ltd. Vs. The Assam Electricity Regulatory Commission, is hereby dismissed and the Impugned Review Order dated 09.04.2015 passed by the Assam Electricity Regulatory Commission in Review Petition No. 5 of 2015, filed by the appellant/petitioner is hereby upheld.

No order as to costs.

Pronounced in the open court on this ***14th day of March, 2016***.

(T. Munikrishnaiah)
Technical Member

(Justice Surendra Kumar)
Judicial Member

✔
REPORTABLE / ~~NON-REPORTABLE~~