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

APPEAL NO. 195 OF 2015

Dated: 10th August, 2016

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member

In the matter of:-

The Tata Power Company Limited
Jojobera Power Plant
Jamshedpur – 831016 …. Appellant

Versus

1. **Jharkhand State Electricity Regulatory Commission**
2nd Floor, Rajendra Jawan Bhawan
-Cum-Sainik Bazar
Main Road, Ranchi – 834 001 .... Respondent No.1

2. **Tata Steel Limited**
Jamshedpur – 831 001
Jharkhand .... Respondent No.2

Counsel for the Appellant: Mr. Amit Kapur
Mr. Vishal Anand
Ms. Pallavi Mohan
Mr. Sambit Panja
Mr. Janmali M.
Mr. Samir Malik

Counsel for the Respondent: Mr. Farrukh Rasheed for R-1

JUDGMENT

PER HON'BLE MR. I. J. KAPOOR, TECHNICAL MEMBER

1. The present Appeal is being filed under Section 111 of the Electricity Act, 2003 by M/s. The Tata Power Company Ltd. (hereinafter referred to as **"Appellant"**) challenging legality, validity and propriety of the Impugned Order dated 31.05.2015 passed by the Jharkhand State Electricity Regulatory Commission (hereinafter referred to as **"State Commission"**). The Impugned Order dated 31.05.2015 passed by the State Commission in the Petition of the Appellant for Annual Performance Review **("APR")** for FY 2013-14 including Truing up for FY 2011-12, FY 2012-13 and revised estimates for FY 2014-15 to FY 2015-16 for Unit No. 2 and Unit No. 3 of the Jojobera power plant operated by the Appellant.

2. The Appellant is a company incorporated under the Indian Companies Act, VII of 1913 and is engaged in generation, transmission and distribution of electricity. The generation from the Unit No.2 and Unit No.3 of the Appellant's Jojobera power plant having capacity of 120 MW each is being supplied by the Appellant to M/s. Tata Steel Limited (hereinafter referred to as **"Respondent No. 2"**), a Distribution Licensee in the State of Jharkhand.

3. The Jharkhand State Electricity Regulatory Commission is a statutory body functioning under Section 86 of Electricity Act, 2003. In the present case, this State Commission determines the tariff for supply of electricity from the Appellant's Unit No. 2 and 3 of the Jojobera power plant to the Respondent No.2.

4. Facts of the Appeal.

(a) Unit 2 of the Jojobera power plant attained Commercial Operation on 01.02.2001. Unit no. 3 of this station attained Commercial Operation on 01.02.2002.

(b) The Impugned Order dated 31.05.2015 related to Unit No. 2 and 3 of the Jojobera power plant passed by the State Commission, decided the following for the Appellant;

(i) Annual Performance Review for FY 2013-14.

(ii) Truing up for FY 2011-12 and FY 2012-13

(iii) Revised Estimates for FY 2014-15 and FY 2015-16.

(c) As per the Appellant, the State Commission vide Impugned Order dated 31.05.2015 has erroneously disallowed legitimate expenses of the Appellant as under:-

S.No.	Particulars of the Expenses disallowed (For FY 2012-13)	Impact on the Appellant (In Rs. Crores)
(a)	Actual Ash Disposal Expenses	3.46
(b)	Income Tax (Minimum Alternate Tax or "MAT") on Incentive due to over performance with respect to availability of the Units	4.78
(c)	Retention of 100% financial gains on account of savings int he consumption of Light Diesel Oil ("LDO"), a secondary fuel and corresponding Income Tax.	4.45
(d)	Increase in Capital Cost of the already approved Capex Scheme for the "Coal Shed for CHP"	1.61
	Total	14.30

Besides the above, the Appellant has also alleged the following Computational Errors in the Impugned Order dated 31.05.2015;

S.No.	Particulars of the Computational Error (For FY 2012-13)	Impact on the Appellant (In Rs. Crores)
(a)	Computation of landed price of Coal leading to approval of incorrect energy charges	1.05 Crores
(b)	Computation of Income Tax (MAT) on financial gain due to lower auxiliary consumption	5 lakhs
	Total	1.10 Crores

(d) The State Commission while approving the Ash Disposal Expenses has disallowed an amount of Rs. 3.46 Crores incurred by the Appellant on account of compliance with statutory mandate laid down vide its consent to operate dated 13.08.2012 by the

Jharkhand State Pollution Control Board and Ministry of Environment and Forest **("MOE&F")**, Government of India vide its notification dated 03.11.2009. As per the Appellant increase in Ash Disposal Expenses is uncontrollable in nature and is mandated by the law and the same should have been allowed by the State Commission and the same approach had been adopted in earlier MYT Order dated 31.05.2012, wherein the State Commission provisionally approved the Actual Ash Disposal Expenses of FY 2011-12. In this case also, the State Commission ought to have allowed the Actual Ash Disposal Expenses of the Appellant for FY 2012-13.

e) The Appellant further alleged that the State Commission has wrongly disallowed the recovery of Income Tax (MAT) on account of over performance with respect to availability of units achieved by the Appellant to the extent of Rs. 4.78 Crores which as per the Appellant is contrary to the earlier approach adopted in its Order dated 31.05.2012 issued by the State Commission and the prevailing Regulations on the Income Tax on incentive which clearly stipulates that the Income Tax on incentives for improved performance must be passed on to the procurer.

(f) Further, the financial gains earned by the Appellant on account of lower consumption of LDO ought not to be adjusted in tariff for the Control Period FY 2012-13 to FY 2015-16. The disallowance on this account as contested by the Appellant is to the tune of Rs.4.45 Crores which is contrary to Regulations of the State Commission.

(g) The Appellant is further aggrieved by the State Commission by not allowing an expenditure of Rs. 1.61 Crores additionally incurred for construction of Coal Shed originally approved by the State Commission in its MYT Order dated 31.05.2012 and the same resulted into increased expenditure to the extent of Rs. 1.61 Crores in capital cost of the already approved Capex for the Coal Shed for CHP and the same ought to be allowed due to the reasons which are beyond the control of the Appellant.

(h) Besides the above, the Appellant has also alleged that there are computational errors in the Impugned Order dated 31.05.2015 on account of landed price of coal as well as Income Tax on financial gain due to lower auxiliary consumption and the financial implication on account of both is stated to be Rs. 1.10 Crores.

Aggrieved by the above, the Appellant has filed the present Appeal.

6. We need to analyse issue-wise to ascertain **"whether the same has been decided rightly or not by the State Commission in its Impugned Order dated 31.05.2015"?**

7. We have heard at length the Learned Counsel Mr. Amit Kapur for the Appellant and learned Counsel Mr. Farrukh Rasheed for the State Commission.

Gist of the arguments/submissions of the rival parties are as under;

I. Issue relating to disallowance of Ash Disposal Expenses.

(A) The Appellant has made the following submissions on issue of the disallowance of Ash Disposal Expenses to the tune of Rs. 3.46 Crores for our consideration;

(i) As per the State Pollution Control Board's consent to operate dated 13.08.2012, the Appellant was prohibited from disposing ash in the nearby areas of the project and in order to dispose of the ash, the Appellant had to transport the same to the farther areas involving transportation for distance of around 20-25 kms away from the project by engaging bulk transport vehicles for transporting the Ash to distant low lying areas which resulted in increase in Ash Disposal Expenses.

(ii) The MOE&F, Government of India by its Notification dated 03.11.2009 mandated that low lying areas used to fill Ash must be covered with top soil after disposing Ash in the area. Thus, on account of the said directive, the Appellant had to procure top soil at the rate of Rs. 200 per tonne in FY 2012-13 for covering ash-filled low lying areas which also resulted into increased expenditure in ash disposal of ash from the plant.

(iii) For the FY 2011-12, the State Commission in its Order dated 28.04.2014 had allowed Ash Disposal Expenses at actuals (based on audited accounts). The State Commission ought to have allowed Ash Disposal Expenses as per the actual expenses incurred by the Appellant in light of the mandate laid down by the State Pollution Control Board Notification dated 13.08.2012 and the MOE&F's Notification dated 03.11.2009, which constitute change in law as per Regulation 7.41 (e) read with Regulation 2.1 (13) of the State Commission's (Terms and Conditions for Determination of Generation Tariff), Regulations, 2010. As per the Regulation 7.41 (e) read with Regulation 2.1 (13) of the State Commission, the cost incurred for disposal of ash in compliance of the statutory requirements should have been allowed by the State Commission. The Regulation 7.41 (e) read with Regulation 2.1(13) of the State

Commission's Generations Tariff Regulation, 2010 are reproduced as under:-

"7.41....
(e) Increase in O&M charges on account of war, insurgency or changes in laws, or like eventualities where the Commission is of the opinion that an increase in O&M charges is justified, may be considered by the Commission for a specified period."
"2.1(13) "Change in Law" means occurrence of any of the following events:

(i) The enactment, brining into effect, adoption, promulgation, amendment, modification or repeal of any law; or
(ii) Change in interpretation of any law by a competent court, Tribunal or Indian Governmental Instrumentality which is the final authority under law for such interpretation; or
(iii) Change by any competent statutory authority, in any consent, approval or licence available or obtained for the project."

(iv) The increase in Ash Disposal Expenses is directly linked to increase in power generation, ash content of the coal, fuel mixed, excavation and transportation cost besides, meeting the statutory obligations.

(v) In order to achieve hundred percentage Ash utilisation, the Appellant made certain arrangements for utilisation of Ash generated from Unit No. 2 and 3 of its plant and had to resort to necessary measures by transporting the Ash to distant low lying areas and arranging top soil which resulted into significant financial expenditure which was beyond their control of the Appellant and the same ought to have been allowed by the State Commission. The

impact of disallowance of Ash Disposal Expenses is Rs. 1.6 Crores for Unit 2 and Rs. 1.86 Crores for the Unit No. 3.

Hence the same should be allowed.

(B) The learned Counsel for the State Commission on the above issue relating to Ash Disposal Expenses for FY 2012-13 made the following submissions;

(i) The State Commission in its Impugned Order dated 31.05.2015 has relied upon Regulation 6.14 of its Generation Tariff Regulations, 2010 while deciding the said issue.

(ii) Regulation 6.14 (a) states; “any surplus and deficit on account of O&M expenses shall be to the account of the generating company and shall not be trued up in ARR.

(iii) The State Commission in its MYT Order dated 31.05.2012 approved Ash Disposal Expenses for the control period after considering the relevant Regulations and parameters including actual Ash Disposal Expenses in the base year and inflation. The State Commission in the said MYT Order had approved capital investment scheme towards better management of the fly ash and also directed the Appellant to expedite the implementation of such schemes to optimise its Ash Disposal Expenses.

(iv) There has not been amendment in the Regulations of the State Commission after the State Pollution Control Board's Notification dated 13.08.2012. Further, the Notification dated 13.08.2012 issued by the State Pollution Control Board is not an enactment. Therefore, it does not cover in the category of change of law as defined under Regulation 2(13).

(C) After having careful examination of the submissions made by the rival parties, our observations on this issue are as follows:-

(i) While deciding this issue the State Commission has relied on Regulation 6.14 of the Generation Tariff Regulations, 2010 issued by the State Commission for the existing thermal generating stations and the relevant extract of the same is reproduced below:-

"6.14 The true up across various controllable parameters shall be conducted as per principles stated below:-

(a) any surplus and deficit on account of O&M expenses shall be to the account of the generating company and shall not be trued up in ARR;"

As per the above Regulation 6.14 (a) that any surplus and deficit on account of O&M expenses shall be to the account of the generating company and shall not be trued up in ARR and as a result of the same they have disallowed partly the expenses actually incurred for the Ash disposal which forms part of O&M expenses.

(ii) Regulations 7.41 of the Generation Regulations, 2010 of the state Commission lays down the provision for determination of O&M expenses and the relevant extracts is reproduced below:-

"7.41 Existing Thermal Generating Stations:

(a) The O&M expenses for the Transition Period shall be approved by the Commission as per the JSERC (Terms and condition of Determination of Generation Tariff) Regulations, 2004.

(b) The Applicant shall submit details on O&M expenses as required by the Commission. The O&M expenses excluding terminal liabilities for the Base Year shall be determined based on latest accounting statements, estimates of the Generating Company for relevant years and other factors considered relevant.

(c) The O&M expenses excluding terminal liabilities permissible towards determination of tariff for each year of the Control Period shall be determined after a prudency check by the Commission based on submissions of the Generating Company, previous years' actual expenses and any other factor considered relevant.

(d) Terminal Liabilities will be approved as per actual submitted by the Generating Company or be established through actuarial studies.

(e) Increase in O&M charges on account of war, insurgency or changes in laws, or like eventualities where the Commission is of the opinion that an increase in O&M charges is justified, may be considered by the Commission for a specified period."

(iii) The State Commission while approving true up of FY 2012-13 allowed Rs. 2.49 Crores as Ash disposal expenses against the claim of Rs. 4.09 Crores submitted by the Appellant for Unit No. 2 and Rs. 2.58 Crores against the claim of Rs. 4.44 Crores submitted by the Appellant for Unit No. 3 resulting into

disallowing Ash Disposal Expenses to the tune of Rs. 3.46 Crores stated to have been incurred by the Appellant during the FY 2012-13.

(iv) In our considered opinion, the Ash disposal activity undertaken by the generator is in compliance with the statutory requirements prescribed by the State Pollution Control Board as well as by the Ministry of Environment and Forest, Government of India. In this present case, we have noted that the Jharkhand State Pollution Control Board **("JSPCB")** issued Consent to Operate dated 13.08.2012 for the project prohibiting the generators in the State from disposing Ash in the nearby areas of the project and as a result the Appellant was required to transport Ash to farther places. Relevant extract of the State Pollution Control Board's Consent to Operate dated 13.08.2012 is reproduced below:-

"16. That, he (they) shall utilize 100% fly ash and shall not dispose off fly ash in the nearby villages or any places outside the unit."

(v) In compliance to this condition imposed by the State Control Pollution Board, the Appellant has claimed transportation charges etc. to dispose off the fly ash in the areas located around 20-25 kms from the project.

(vi) Ministry of Environment and Forest, Government of India by its Notification dated 03.11.2009 mandated that low lying areas used to fill Ash must be covered with top soil after disposing Ash in the area. The Appellant in compliance to this directive of Ministry of Environment and Forest, Government of India had to procure top soil for covering Ash filled in the low lying areas and for the same, the Appellant made claim in the Ash disposal expenses.

(vii) As per Clause 2.1 (13) of the State Commission's Generation Tariff Regulations, 2010, change in law means occurrence of any of the following events;

.....*change by any competent statutory authority, in any consent, approval or licence available or obtained for the project.....*

As per Clause 7.41 (e) of State Commission's Generation Tariff Regulation, 2010 states as under;-

"e) Increase in O&M charges on account of war, insurgency or changes in laws, or like eventualities where the Commission is of the opinion that an increase in O&M charges is justified, may be considered by the Commission for a specified period."

(viii) In light of the Regulations 7.41 (e) read with 2.1 (13) of the State Commission's Generation Tariff Regulations, 2010, we do not have any doubt in our minds that the Appellant was required to comply with the both the Notifications i.e. Notification issued by the State Pollution Control Board as well as Notification issued by Ministry of Environment and Forest, Government of India since they are statutory in nature and mandated by the statutory authorities and compliance of the same is must for the Appellant which resulted in additional expenditure towards disposal of Ash generated by its plant and the same should have been allowed by the State Commission while approving true up of the Appellant for the FY 2012-13 subject to its prudent check for the expenses incurred as claimed by the Appellant.

In light of the above, we decide this issue in favour of the Appellant and remand the matter to the State Commission for the consideration of the same.

II. Issue relating to Income Tax (Minimum Alternate Tax or "MAT") on Incentive due to over performance with respect to availability of the Units.

(A) The Appellant has made the following submissions/arguments on this issue for our consideration;

As per the Appellant, the State Commission has wrongly disallowed MAT on incentive which the Appellant used to recover earlier by grossing up the incentive for higher availability of Units with applicable MAT rate and this action for the said disallowance is contrary to the State Commission earlier adopted approach and the fact that as per the relevant Regulations of the State Commission Generation Tariff Regulations, 2010 the entire tax liability of incentives for improved performance must be pass through and is to the benefit of the Appellant and the same shall not be adjusted in the tariff.

(B) The learned Counsel for the State Commission relied upon the reasoning given in the Impugned Order.

The impugned findings of the State Commission while disallowing MAT on incentive due to improved availability of the units, are reproduced below;

"Plant Availability
Petitioner's submission

6.3 The Petitioner submitted month wise actual plant availability of Unit 2 and Unit 3 and has calculated the average annual availability of Unit 2 at 94.10% and that of Unit 3 at 98.81% during FY 2012-13

Commission's analysis

6.4 The Commission in the MYT Order dated May 31 2012 for FY 2012-13 had projected the availability for Unit 2 and Unit 3 as equal to the Normative Annual Plant Availability Factor (NAPAF) of 85% as specified in the Generation Tariff Regulation, 2010. Since the actual Availability of Unit 2 and Unit 3 as submitted by the Petitioner was 94.10% and 98.81% respectively which is greater than NAPAF of 85%, the Commission after scrutinising the certifications of SLDC regarding availability approves the actual availability for the purpose of truing up for FY 2012-13.

Incentive

Petitioner's submission

6.83 The Petitioner based on the provisions of Generation Tariff Regulations, 2010 computed Incentive for Truing-up of FY 2012-13 which works out to Rs 11.62 Cr for Unit 2 and Rs 15.02 Cr for Unit 3. However vide the Interlocutory Application dated March 12, 2015 has revised the submissions to Rs 10.89 Cr for Unit 2 and 14.73 Cr for Unit 3. The detailed computation of pre-tax Incentive is shown in the following Tables:

Table 45 Incentive submitted by the Petitioner for FY 2012-13 for Unit 2 and Unit 3

Particulars	UoM	FY 2012-13	
		Unit 2	Unit 3
Actual Plant Availability	%	94.10%	98.81%
Normative Plant Availability	%	85.00%	85.00%
Annual Fixed Charges without Incentive	Rs Cr	81.39	72.52
Annual Fixed Charges with Incentive	Rs Cr	92.28	87.26
Computation of Incentive			
Incentive (Post-Tax)	Rs Cr	9.30	12.01
MAT Rate	%	20.01%	20.01%
Incentive (Pre-Tax) for FY 2012-13	Rs Cr	11.62	15.02
Revised Incentive computed vide the Interlocutory Application dated March 12, 2015	Rs Cr	10.89	14.73

Commission's analysis

6.84 As per regulation 8.12 of Generation Tariff Regulations, 2010,

"8.12 The capacity charge (inclusive of incentive) payable to a thermal generating station for a calendar month shall be calculated in accordance with the following formulae :

(a) Generating stations in commercial operation for less than ten (10) years on 1st April of the financial year:

= (AFC x (NDM / NDY) x (0.5 + 0.5 x PAFM / NAPAF) (in Rupees);

Provided that in case the plant availability factor achieved during a financial year (PAFY) is less than 70%, the total capacity charge for the year shall be restricted to: =AFC x (0.5 + 35 / NAPAF) x (PAFY / 70) (in Rupees)

(b) For generating stations in commercial operation for ten (10) years or more on 1st April of the year:

= (AFC x NDM / NDY) x (PAFM / NAPAF) (in Rupees)

Where, AFC - Annual fixed cost specified for the year, in Rupees;

NAPAF - Normative annual plant availability factor in percentage;
NDM - Number of days in the month;
NDY - Number of days in the year;
PAFM - Plant availability factor achieved during the month, in percent;
PAFY - Plant availability factor achieved during the year, in percent"

"6.85 Accordingly, the Commission has calculated the incentives after due verification of SLDC certified availability. The Commission hereby approved the incentives at Rs. 7.8 Cr for Unit 2 and 11.2 Cr for Unit 3."

(C) After having careful examination of the submissions made by the rival parties, our observations on this issue are as follows;

We are not inclined to accept the above Impugned findings on this issue since in terms of Regulation 6.13 of the Generation Tariff Regulations, 2010 issued by the State Commission, any financial gain on account of over performance with respect to plant availability factor is to the benefit of the Appellant and the same shall not be adjusted in the tariffs. Regulation 7.48 of the Generation Tariff Regulations, 2010 provides that any tax liability on incentives and savings on account of improved performance of any parameters shall be considered for passing on to the beneficiaries in the ratio of the sharing of the gains as prescribed under the Regulations.

In our considered opinion, the Impugned Order disallowing MAT on incentive on account of better performance is not in line with the above Regulations.

We decide this issue in favour of the Appellant and remand the matter to the State Commission for consideration of the same subject to its prudence check.

III. Issue relating to retention of 100% financial gains on account of savings in the consumption of Light Diesel Oil ("LDO"), a secondary fuel and corresponding Income Tax.

(A) The Appellant has made the following submissions/argument on this issue i.e. disallowance of an amount of Rs. 4.45 Crores to the Appellant;

(i) The Appellant has stated that the State Commission in its Impugned Order dated 31.05.2015 has wrongly allowed only 50% of the financial gains earned by the Appellant on account of lower consumption of LDO.

(ii) To decide this issue, we shall now examine the relevant Regulations in this regard. Regulation 6.12 and 6.13 of the Generation Tariff Regulations, 2010 of the State Commission are reproduced below;

"6.12 The Commission shall set targets for each year of the Control Period for the items or parameters that are deemed to be "controllable" and which includes:

(a) Gross Station Heat Rate;
(b) Normative Annual Plant Availability Factor;
(c) Auxiliary Energy Consumption;
(d) Secondary Fuel Oil Consumption;
(e) Operation and Maintenance Expenses;
(f) Financing Cost which includes cost of debt (interest), cost of equity (return); and
(g) Depreciation.

6.13 Any financial loss on account of underperformance on targets for parameters specified in clause 6.12 (a) to (e) of

these Regulations is not recoverable through tariffs. Similarly, any financial gain on account of over-performance with respect to these parameters is to the Generating Company's benefit and shall not be adjusted in tariffs."

The above Regulations clearly stipulate that any financial loss/gain on account of under/over performance with respect to the above parameters interalia including secondary fuel oil consumption is to the generating company's account and not to be adjusted in the tariff.

(B) The learned Counsel of the State Commission made the following submissions for our consideration;

(i) Regulation 8.4 of the JSERC Generation Tariff Regulations specifies the normative secondary fuel oil consumption for Unit-2 and Unit-3 of Jojobera Thermal Power Station of appellant.

(ii) The methodology of calculation of savings on account of secondary fuel oil consumption has been explicitly provided in the aforesaid Regulations. The same has been followed while approving the savings on account of secondary fuel oil in paragraph 6.87 and paragraph 6.88 of the Tariff Order dated 31.05.2015.

(C) On this issue of retention of 100% financial gains by the Appellant on account of savings due to lower consumption of LDO and the corresponding Income Tax/MAT, our observations are as follows;

(i) From the perusal of the Impugned findings of the State Commission, the State Commission while deciding this issue has relied upon its Regulation 7.52 of the Generation Tariff Regulations, 2010 for passing the said 50% financial gains on account of lower consumption of LDO to the beneficiary. Relevant extract of the Regulation 7.52 of the Generation Tariff Regulations, 2010 is reproduced hereunder;

"7.52 The savings on account of secondary fuel oil consumption in relation to norms specified in clause 8.4, 8.6 of these Regulations, shall be shared with Beneficiaries in the ratio of 50:50, in accordance with the following formula at the end of the year:

= (SFC x NAPAF x 24 x NDY x IC x 10 -AC_{sfoy}) x $LPSF_y$ x 0.5

Where,

AC_{sfoy} = Actual consumption of secondary fuel oil during the year in ml"

(ii) We have noted that there has been ambiguity in the Generation Tariff Regulations, 2010 issued by the State Commission to the extent that at one place it has been stipulated in its Regulation 6.13 that the financial gains on account of over performance are to be retained by the generator and in another stipulation it is mandated by the State Commission in its Regulation 7.52 to

pass on the gains on account of over performance in the ratio of 50:50 to the beneficiary.

(iii) The Regulation 6.13 of Generation Tariff Regulation, 2010 of the State Commission clearly stipulates 100% gains to be retained by the Generating Company under specific provisions of “Performance Targets” for each year of the control period for the controllable parameters.

(iii) We are in agreement with the Appellant’s arguments that the Regulation 6.13 of the Generation Tariff Regulations, 2010 of the State Commission is a specific provision dealing with the control period whereas Regulation 7.52 is a general provision and in our considered opinion, the specific provision overrides the generation provision and therefore, we decide this issue in favour of the Appellant since as per the specific Regulation 6.13 of the State Commission, the Appellant is entitled to the 100% financial gains on account of over performance in respect of lower consumption of LDO.

This issue is hereby remanded to the State Commission for passing on the benefit on account of lower consumption of LDO to the Appellant subject to its prudent check.

IV. Disallowance of increase in capital cost of the already approved Capex Scheme for the Coal Shed for Coal Handling Plant (CHP);

(A) The Appellant has made the following submissions/arguments on this issue for our consideration;

(i) The Appellant alleged that the State Commission has wrongfully disallowed actual cost incurred by the Appellant for constructing Coal Shed which was already approved as part of the Capex Scheme by the State Commission in its earlier Order dated 31.05.2012. However, there has been an increase in expenditure already approved by the State Commission in Capex scheme which is beyond the control of the Appellant as it happened due to revision in design for coal shed foundation and emergence of rocky surface beneath the ground.

(ii) The State Commission vide its Impugned Order dated 31.05.2015 has wrongfully disallowed an expenditure to the extent of Rs. 1.61 Crore for construction of Coal Shed which ought to have been considered by the State Commission for determination of Capex.

(B) The learned Counsel for the State Commission has made the following submissions/arguments in respect of this issue for our consideration;

(i) In Section 7 of the Tariff Order dated 31.05.2015, the State Commission has scrutinized the submissions of the Appellant with respect to variation in capital cost of approved schemes and proposed new schemes.

(ii) With respect to the approval of additional cost incurred for the coal shed as compared to the approval granted by the State Commission in its MYT Order dated 31.05.2012, it is submitted that appropriate due diligence should have been undertaken by Appellant before submitting its original proposal for additional capitalization. Variations due to inaccuracies in diligence and cost estimation by Appellant should not normally be passed on to beneficiaries.

(iii) Further Regulation 7.5 and Regulation 7.6 of the State Commission Generation Tariff Regulations, 2010 specify that additional capitalization shall only be admitted by the State Commission subject to prudence check.

(iv) Further, the learned Counsel for the State Commission relied upon the Impugned findings on this issue which are reproduced hereunder;

"7.16 In order to grant approval for above identified schemes, the Petitioner was directed to submit DPRs, reasons justifying

emergency of works, certification from Board of Directors for emergency of work and other relevant details. While, the Petitioner submitted DPRs for schemes with value above Rs. 1 Crore, the Commission on scrutiny of the DPRs observed that the details related to the savings in the operating norms due to improvement in availability, auxiliary consumption, heat rates, secondary fuel consumption, etc. which shall benefit the consumers have not been provided. Moreover, other details related to justifications for emergency works, certification from Board of Directors, etc. have not been furnished by the Petitioner.

7.17 In view of above, the Commission holds that passing on the cost of additional capitalisation without undertaking entire cost benefit analysis in terms of savings to be passed on to the consumers is not justified.

7.18 Thus, the Commission provisionally approves the additional capitalisation for schemes identified in Table 60 and Table 61, while the impact on fixed cost shall be passed on after detailed scrutiny at the time of true up considering the descriptions submitted by the Petitioner related to cost benefit analysis, savings in operating norms, certification

from Board of Directors, etc. and subject to prudence check by the Commission."

(C) After careful examination of all the factual details submitted before us by the rival parties, we find that the Appellant should have taken due care while submitting its proposal for Capex Scheme before the State Commission seeking additional capitalisation. The reasons submitted by the Appellant i.e the revision in design for coal shed and emergence of rocky surface beneath the ground are not at all appealing since it tentamounts to inaccuracies in due diligence and cost estimation carried out by the Appellant. We are not inclined to accept this claim of the Appellant and hereby reject the same.

V. Computational Errors on account of incorrect energy charges to the tune of Rs. 1.05 Crores and MAT on lower auxiliary consumption to the tune of Rs. 5 lacs.

(A) The Appellant has alleged that there are computational errors in the Impugned Order dated 31.05.2015 regarding Landed Price of Coal and Income Tax (MAT) on financial gain due to lower auxiliary consumption and the impact of the same as alleged by the Appellant in this Appeal is to the extent of Rs.1.10 crores consisting of Rs. 1.05 crores for Landed Price of Coal and Rs. 5 lakhs for MAT on financial gain.

Since for the first three issues mentioned above, we have remanded the matter to the State Commission for redetermination of true up for the FY 2012-13 of the Appellant, the State Commission is hereby directed to look into the computational errors as stated above by the Appellant and take corrective action in this regard, subject to its prudent check.

ORDER

In view of the above, the present Appeal is hereby partly allowed and the Impugned Order dated 31.05.2015 is set aside to the extent indicated above.

Pronounced in the Open Court on this **10th day of August, 2016.**

(I.J. Kapoor)
Technical Member

(Mrs. Justice Ranjana P. Desai)
Chairperson

√

REPORTABLE/NON-REPORTABLE

mk