
**In the Appellate Tribunal for Electricity at New Delhi
(Appellate Jurisdiction)**

Appeal No. 61 of 2015

Dated: 29th April, 2016

**Present: Hon'ble Justice Mr. Surendra Kumar, Judicial Member
Hon'ble Mr.T Munikrishnaiah, Technical Member**

IN THE MATTER OF:

NTPC Limited
NTPC Bhawan, SCOPE Complex
7, Institutional Area, Lodhi Road
New Delhi – 110 003

.....Appellant/Petitioner

VERSUS

1. Central Electricity Regulatory Commission
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi- 110001
2. Uttar Pradesh Power Corporation Ltd.
Shakti Bhawan, 14, Ashok Marg,
Lucknow-226001, Uttar Pradesh.
3. Jaipur Vidyut Vitaran Nigam Ltd.
Vidyut Bhawan, Janpath,
Jaipur 302005.
4. Ajmer Vidyut Vitaran Nigam Ltd.
Vidyut Bhawan, Panchsheel Nagar,
Makarwali Road, Ajmer-305 004
5. Jodhpur Vidyut Vitaran Nigam Ltd.
New Power House, Industrial Area,
Jodhpur-342003

6. Tata Power Delhi Distribution Ltd.
Grid Substation, Hudson Road,
Kingsway Camp, Delhi-110009
7. BSES Rajdhani Power Ltd.
BSES Bhawan, Nehru Place,
New Delhi-110019.
8. BSES Yamuna Power Ltd.
Shakti Kiran Building,
Karkardooma, Delhi-110092
9. Haryana Power Purchase Centre
Shakti Bhawan, Sector-VI,
Panchkula, Haryana-134109
10. Punjab State Power Corporation Ltd,
The Mall, Patiala-147001
11. Himachal Pradesh State Electricity Board Ltd.
Kumar Housing Complex Building-II,
Vidyut Bhawan, Shimla- 171004.
12. Power Development Department,
Govt. of Jammu & Kashmir,
Secretariat, Srinagar-190 009
13. Power Department (Chandigarh)
Union Territory of Chandigarh,
Addl. Office Building,
Sector-9 D, Chandigarh-160 009
14. Uttarakhand Power Corporation Ltd.
Urja Bhawan, Kanwali Road,
Dehradun-248001

.....Respondents

Counsel for the Appellant(s)	Mr. M.G. Ramachandran Ms. Poorva Saigal Ms. Anushree Bardhan Mr. Shubham Arya
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Ms. Ranjitha Ramachandran

Counsel for the Respondent(s) Mr. Pradeep Misra
Mrs. Swapna Seshadri for R-1
Mr. Suraj Singh for R-2
Mr. R.B. Sharma for R-7
Mr. Anand K. Ganesan for R-3 to R-5
Mr. Alok Shankar for R-6
Mr. Manoj Kr. Sharma

JUDGMENT

Per Hon'ble T. Munikrishnaiah, Technical Member

1. The present Appeal has been filed by the Appellant/Petitioner NTPC against the Order dated 15.05.2014 read with the order dated 01.10.2014 passed by the Central Electricity Regulatory Commission (hereinafter called the '**Central Commission**') in Petition No. 176/GT/2013 and Review Petition no. 21 of 2014 wherein the Central Commission has revised the tariff applicable for the Rihand Super Thermal Power Station, Stage-I (1000 MW) of NTPC Limited (hereinafter referred to as '**NTPC**' or the '**Appellant**' as the case may be) for the period from 01.04.2009 to 31.03.2014, after true up. In the said tariff revisions, the Central Commission has disallowed the capital expenditure of Rs. 13000 lakhs on Electro Static Precipitators and also not

allowed the de-capitalization of the assets which had become old and unserviceable in regard to an amount of (-) Rs. 703.36 lakhs and (-) Rs. 285.99 lakhs on account of replacement of Locos & Wagons, respectively.

2. The Appellant NTPC Limited is a Government of India Undertaking and is engaged in the business of generation and sale of electricity to various purchasers/beneficiaries in India. NTPC being a generating company owned and controlled by the Central Government is covered by clause (a) of sub-section (1) of Section 79 of the Electricity Act, 2003. The Respondent No. 1 is the Central Commission and is empowered to discharge various functions under the Electricity Act, 2003.
3. The Respondent Nos. 2-14 are Distribution Companies/beneficiaries of the various states and the electricity generated from the Rihand Super Thermal Power Station of NTPC is supplied to Respondent 2-14.

4. **FACTS OF THE CASE**

- 4.1 One of the generating stations of NTPC is the Rihand Super Thermal Power Station Stage-I, with the total capacity of

1000 MW, comprising two units of 500 MW each. The Commercial Operation Date (COD) of the different units of the generating station are as under:

Unit	COD
Unit I	01.01.1990
Unit II	01.01.1991

4.2 The Appellant NTPC filed Petition No. 176/GT/2013 (Impugned Petition) on 01.02.2013 for revision of the annual fixed charges for Rihand Station on the basis of actual capital expenditure incurred for the years 2009-10, 2010-11 and 2011-12 and the projected expenditure for the years 2012-13 and 2013-14, as per Regulation 6(1) of the CERC Tariff Regulations, 2009. In the said petition, NTPC did not claim the additional capitalization on account of the Electro Static Precipitators but stated that the actual capitalization of the said asset will stretch beyond 2013-14 owing to the timeline of the contract and the requirement of shutdown.

4.3 The Central Commission sought for information, details, clarifications etc. from NTPC. In response to the above, NTPC submitted the requisite details vide its Affidavits dated 8.05.2013, 31.07.2013 including on the aspects of

capitalization of the Electro Static Precipitators. The Central Commission by Order dated 15.05.2014 (Impugned) has revised the tariff for the Rihand Station. In the Impugned Order, the Central Commission has disallowed the expenditure of Rs. 13000 lakhs incurred regarding the Electro Static Precipitators (ESP) on the ground that the expenditure is covered under the Special Allowance, as and when it is capitalized. In the Impugned order, the Central Commission has also disallowed certain other claims of NTPC namely, the exclusion of the de-capitalization of the assets which had become old and unserviceable when the value of the corresponding replaced assets are not allowed to be capitalized. This is in regard to an amount of (-) Rs 703.36 lakhs and (-) Rs 285.99 lakhs on account of replacement items and Locos & Wagons, respectively.

4.4 On 9.07.2014, NTPC filed a Petition being Review Petition No. 21 of 2014 before the Central Commission seeking review of the order dated 15.5.2014 passed by the Central Commission.

- 4.5 On 10.07.2014, NTPC filed an Appeal being Appeal No. 182 of 2014 before this Tribunal challenging the Order dated 15.05.2014 passed by the Central Commission.
- 4.6 On 17.09.2014, this Tribunal dismissed the Appeal No. 182 of 2014 as the Review Petition was pending for adjudication before the Central Commission. Further, this Tribunal granted liberty to NTPC to file an Appeal, subject to outcome of the pending Review Petition.
- 4.7 On 1.10.2014, the Central Commission decided the Review Petition No. 21 of 2014, partly allowing the review petition and rejecting the review on other aspects.
- 4.8 Aggrieved by the decision of the Central Commission in disallowing the claim of the Appellant (which were not allowed in the Review Order) as contained in the order dated 15.5.2014 read with the order dated 1.10.2014, the Appellant filed this Appeal being Appeal No. 61 of 2015 and prayed for:-
- a) Allow the appeal and set aside the order dated 15.05.2014 passed by the Central Commission in Petition No. 176/GT/2013 to the extent challenged in the present appeal.
 - b) Pass such other Order(s) and this Tribunal may deem just and proper.

5. Heard the arguments of the Learned Counsel of the Appellant, Mr. M.G. Ramachandran, Mr. Pradeep Misra, Learned Counsel for Respondent No. 2 , Mr. R.B. Sharma, Learned Counsel for Respondent No. 7 and Mr. Anand K. Ganesan, Learned Counsel on behalf of Respondent No. 3 to 5. We have also gone through the written submissions of the Counsel of either parties and also gone through the material on record including the Impugned Order passed by the Central Commission, the following issues arise for our consideration:

Issue No. 1: Whether the Central Commission erred in disallowing additional capital expenditure of Rs. 13000 lakhs on Electro Static Precipitators (ESP) while undertaking True-up and the same is considered at the time of Tariff Order dated 07.06.2012 under Regulation 9(2)(ii) of Tariff Regulations, 2011?

Issue No. 2: Whether the Central Commission is right in disallowing the exclusion of the de-capitalization of Wagons and Locomotives of (-) Rs. 703.36 lakhs and (-) Rs. 285.99 lakhs on account of replacement items and Locos & Wagons, respectively.

6. **Issue No. 1: Whether the Central Commission erred in disallowing additional capital expenditure of Rs. 13000 lakhs on Electro Static Precipitators (ESP) while undertaking True-up and the same is considered at the time of Tariff Order dated 07.06.2012 under Regulation 9(2)(ii) of Tariff Regulations, 2011?**

7. The following are the submissions made by the Learned Counsel of the Appellant, NTPC Limited:

7.1 that the Central Commission erred in disallowing the capital expenditure of Rs. 13000 Lakhs claimed by NTPC on Electro Static Precipitators on the ground that the same would be covered by Special Allowance allowed for the Rihand Station for Renovation and Modernization. The capital expenditure on account of Electro Static Precipitators was claimed by NTPC under Regulation 9 (2) (ii), namely, under the head 'Change in Law' and the same was admissible by reason of the fact that such expenditure had become necessary on account of statutory requirements. Such expenditure is admissible independent of the expenses admissible under other provisions of the Tariff Regulation, 2009.

7.2 that the Central Commission has failed to appreciate that the expenditure on Electro Static Precipitator was required to reduce the emission level below 100 Mg/NM³ as per the directions of the Uttar Pradesh State Pollution Control Board vide letter dated 17.02.2011. The Central Commission had taken cognizance of the statutory requirement to

reduce the emission and had allowed for the capitalization of Rs 13000 Lakhs for the Electro Static Precipitators in its Order dated 7.06.2012 while determining the tariff of the station for the period 2009-14. Based on this order of 7.6.2012 i.e. only after obtaining the regulatory certainty of allowing the claim of Electro Static Precipitators in tariff from the Central Commission, NTPC went ahead and initiated the process of ESP modification. The Central Commission therefore cannot, at a later stage, reconsider issues already decided in the true up order as this would create uncertainty on the servicing of the capital expenditure made by the Appellant based on the prior approval and regulatory certainty by the Central Commission.

7.3 that the Central Commission has failed to appreciate that the expenditure on the Electro Static Precipitators was specifically claimed under the head 'Change in Law' as provided in Regulation 9(2)(ii) of the Tariff Regulations, 2009 and has to necessarily been considered as per Scope of Regulations 9(2)(ii). If the claim is clearly admissible under

the specific Regulation 9(2)(ii) of the Tariff Regulations, 2009, the same cannot be decided as being covered under generic provision of Regulation 10(4) of the Tariff Regulations, 2009 dealing with Special Allowance.

7.4 that the Central Commission has failed to appreciate that the expenditure on ESPs is to be considered under Regulation 9 (2) (ii) of the Tariff Regulation, 2009 which is independent of Regulation dealing with Special Allowance. The directions of law are to be obeyed independent of the capital expenditure to be considered under Special Allowance and irrespective of whether there is a life extension or not for the period for which such life extension is done and also such expenditure would have to be considered and allowed even after the Renovation and Modernization is completed if there is a requirement of law at any time. Therefore, Special Allowance & Add cap carried out under Regulation 9 (2) (ii) i.e. Change in law much coexist.

7.5 that the Central Commission has failed to appreciate that the Renovation & Modernization due during 2014-19 is in

respect of Stage-I of the generating station consisting of 2x500 MW units and the Electro Static precipitators are for generating station as a whole.

7.6 that the Central Commission has failed to appreciate that the capital expenditure on Electro Static Precipitators having been duly allowed in the main order dated 7.6.2012, the said decision cannot be modified in the True Up exercise after according in-principle approval earlier. The Central Commission did not take into consideration that in its earlier order dated 7.06.2012, it had recognized and allowed the capitalization of the Electro Static Precipitators as per Regulation 9(2)(ii) of the Tariff Regulations, 2009 to meet the required statutory norms of emission . In the Truing Up exercise, it is not open to the Central Commission to change the principle and disallow the expenditure on different reasoning. Reference in this regard may be made to the decision of this Tribunal in Karnataka Power Transmission Company Limited -v- Karnataka Electricity Regulatory Commission (Judgment dated 4.12.2007 in Appeal No.100 of 2007) and North Delhi Power

Limited v Delhi Electricity Regulatory Commission and Ors

2007 ELR (APTEL) 193.

8. **Per Contra, the following are the submissions made by the Learned Counsel of Respondent No. 2, Mr. Pradeep Misra:**

8.1 that the Appellant has contended that the Commission cannot change its methodology while truing up the expenditure. It has been contended that while approving the expenditure the CERC has held the same as per Regulation 9(2)(ii) of 2009 Regulations and has also noted that the units of generating stations will be completing their useful life very soon. However, while truing up it has been held that Appellant can meet this expenditure from special allowance.

The original order dated 07.06.2012 was only approval of the projected expenditure to be incurred in the year 2012-2013 and 2013-2014 and while considering the true up Petition, the CERC has held that since the work of R&M of ESPs was not completed in the tariff period, hence the CERC has rightly held that the same will be commissioned in 2015-2016 and this proposed projected expenditure can

be met from special allowance under Regulation 10 of 2009 Regulation, if the Appellant so opts. Thus there is no force in the contention raised by Appellant.

9. **The following are the submissions made by the Learned Counsel of Respondent No. 7, Mr. R.B. Sharma:**

- 9.1 that the Appellant has alleged that the Central Commission has re-considered and disallowed the amount of Rs. 1300 lakhs on the Electro Static Precipitators (ESP) claimed under Regulation 9(2)(ii) of the Tariff Regulations, 2009. The Appellant initially claimed the capital expenditure on ESP in Petition No. 261 of 2009 which was allowed by the Commission vide its Order dated 07.06.2012. Subsequently, the Appellant filed a Petition No. 176/GT/2013 for truing up the capital expenditure wherein no claim for additional capitalization for ESP was sought. It is, thus, evident that the Appellant could not incur any expenditure on ESP during the tariff period 2009-14. However, the Appellant stated that the package has been awarded to M/s Hitachi on 01.03.2013 and considering the timelines in the contract and shutdown, the actual capitalization may stretch beyond

2013 and will continue till 2015-16. The relevant Para of the impugned Order is quoted below:

“Environmental System under Change-in-Law Regulation 9(2)(ii) R&M of ESPs

15. The Commission in its order dated 7.6.2012/22.4.2013 had allowed the projected capital expenditure of `13000.00 lakhs for R&M of ESPs during 2013-14. The petitioner in this petition has not claimed the additional capital expenditure on this count during the period 2009-14. However, the petitioner vide its affidavit dated 8.3.2013 while submitting that the package was awarded to M/s Hitachi on 1.3.2013 after incorporating the environment norm for ESP emission has also stated that considering the timelines in the contract and the requirement of shutdowns, the actual capitalization would stretch beyond 2013-14 and would continue till the year 2015-16. The petitioner shall have the option to avail Special Allowance since then and in case the said option is exercised, the expenditure on R&M shall be met from the special allowance, by the petitioner.”

The impugned Order of the Commission would clearly show that no expenditure has been claimed by the Appellant during the tariff period 2009-14 and as such the provisions of the Tariff Regulations 2009 (applicable during tariff period 2009-14) are not applicable. It may also be noted that the Commission has further clarified that the Appellant will have the option of availing the Special Allowance

applicable under Regulation 16 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 on completion of the useful life. And if the option to avail the Special Allowance is exercised, the expenditure on R&M shall also be met from the Special Allowance.

10. **The following are the submissions made by the Learned Counsel of Respondent No. 3 to 5, Mr. Anand K. Ganesan:**

10.1 that the Appellant while filing the true-up Petition had not claimed the expenditure on ESP and stated in the Affidavit dated 08.05.2013 that the expenditure would actually be capitalized only till 2015-16. Therefore, if the amount itself has not been capitalized in 2009-14, there cannot be any question of charging a tariff on the same.

10.2 that the reasoning that the generating station will be in a position to claim special allowance after 25 years of its operation is an additional reason given by the Central Commission. However, the reason for rejecting the claim of the Appellant is that the expenditure has not been capitalized and this was the position of the Appellant itself. There is no dispute that the installation of ESP was for reasons of change

in law. However, if the expenditure has not been capitalized the same cannot form part of additional capital expenditure and cannot be allowed to be retained for the purpose of tariff computation.

10.3 that if the contention of the Appellant to the effect that an expenditure allowed in the main tariff order cannot be taken away in truing up is accepted, it would mean that the Appellant can project and be granted additional capitalization, though not capitalized the said amount but still continue to get the tariff on the same. This cannot be permitted and is not the purpose of Regulation 6 of the Tariff Regulations, 2009.

11. Our Consideration and Conclusion on this Issue

11.1 The Petitioner has claimed the expenditure of Rs. 130 cores in respect of CEA approved R&M Schemes under Regulations 9(2)(ii) of the 2009 Tariff regulations. The Petitioner submitted that the present stake emission level is in the range of 500 mg/Nm³ to 600 mg/Nm³ against the ESP design of 100 mg/nm³ and due to deterioration in coal quality, the performance of ESP has been adversely affected.

The Petitioner further submitted that as per notification dated 29.03.2010 of the Uttar Pradesh Pollution Control Board and submitted that the Board has directed to ring down the emission level to 100mg/Nm³ vide letter dated 17.02.2011.

11.2 It is true that in terms of the notification of Uttar Pradesh Pollution Control Board, emission level of 100 mg/Nm³ is to be achieved by 31.03.2011 by implementation of the scheme. In case of non-compliance of the said directives, the generating station of the Appellant would face problems by the Uttar Pradesh Pollution Control Board.

11.3 We have gone through the Central Commission's Order dated 07.06.2012 regarding approval of tariff of Rihand Super Thermal Power Station Stage-I (1000 MW) for the period from 01.04.2009 to 31.03.2014. The Central Commission taking into consideration of the importance of the scheme, considered the additional capital expenditure of Rs. 13000 lakhs towards ESP for capitalization during 2013-14 under Regulation 9 (2) (ii) subject to the Petitioner demonstrating the achievement of the emission level of 100

mg/Nm³ specified by the Uttar Pradesh Pollution Control Board but the Appellant/Petitioner failed to complete the work in the FY 2013-14.

11.4 We have also gone through the Impugned Order dated 15.05.2014 and noticed that the Appellant has not claimed the additional expenditure on ESP (as per table shown in Para-12 of the Impugned Order dated 15.05.2014) in the FY 2013-14. Further, the Petitioner vide its Affidavit dated 08.03.2013 submitted that the ESP package was awarded to M/s. Hitachi on 01.03.2013 and the erection will continue till the Year 2015-16.

11.5 The Central Commission in the Impugned Order dated 15.05.2014 disallowed the additional capital expenditure of Rs.130 crores towards ESPs during 2013-14. The relevant portion of the Central Commission's Order is as under:

“The Commission in its order dated 7.6.2012/22.4.2013 had allowed the projected capital expenditure of Rs 13000.00 lakh for R&M of ESPs during 2013-14. The petitioner in this petition has not claimed the additional capital expenditure on this count during the period 2009-14. However, the petitioner vide its affidavit dated 8.3.2013[8.5.2013] while submitting that the package was awarded to M/s Hitachi on 1.3.2013 after

incorporating the environment norm for ESP emission has also stated that considering the timelines in the contract and the requirement of shutdowns, the actual capitalization would stretch beyond 2013-14 and would continue till the year 2015-16. The petitioner shall have the option to avail Special Allowance since then and in case the said option is exercised, the expenditure on R&M shall be met from the special allowance, by the petitioner.”

11.6 The Appellant filed the Review Petition being R.P. No.21/RP/2014 in Petition No. 176/GT/2013, claimed the expenditure towards ESP and the Central Commission, disallowed the expenditure of 130 Crores which was allowed to be capitalization by order dated 07.06.2012 in Petition No. 261 of 2009. The relevant portion of the Order passed in the Central Commission’s Order dated 01.10.2014 (Review Order) is quoted below:

“The Petitioner vide its affidavit dated 08.05.2013 had submitted that the package was awarded to M/s Hitachi after incorporating the environment norm for ESP emission. The petitioner had further submitted that considering the timeline in the contract, the requirement of shutdowns, the actual capitalization would stretch beyond 2013-14 and would continue till 2015-116. Though capitalization of the expenditure for 2013-14 was allowed by order dated 07.06.2012 based on the submission made there under, the Commission, taking into account the submission of the petitioner in truing –up that the capitalization of this

expenditure would stretch beyond 2013-14 and would continue till the year 2015-16, disallowed the projected additional capital expenditure on R&M of ESPs during 2009-14 on the ground that the Units/generating station would be eligible to claim Special Allowance in lieu of R&M after expiry of 25 years of useful life, by the time the expenditure on ESPs are actually capitalized by the petitioner". Having disallowed the expenditure under this head based on the revised submissions of the petitioner as indicated above, the petitioner cannot contend that the expenditure should not be revised or rejected by the Commission. In our view, there exists no error apparent in the fact of the order on this count and hence, review is rejected".

11.7 The Commercial Operation Date (COD) of the Rihand Super Thermal Power Station, Stage-I is the useful life of 25 years of the first unit will expire in the year 2015 and the other unit will expire in the year 2016.

Thus, the Appellant can claim the expenditure on ESP under Regulation, 10 of the Central Commission's Tariff Regulation 2009, i.e. under Renovation and Modernization of the Thermal Plants.

11.8 In view of the above, we do not find any infirmity in the decision taken by the Central Commission in the Impugned Order dated 15.05.2014 and Review Order dated

01.10.2014. Thus, the issue is decided against the appellant.

12. **Issue No. 2: Whether the Central Commission is right in disallowing the exclusion of the de-capitalization of Wagons and Locomotives of (-) Rs. 703.36 lakhs and (-) Rs. 285.99 lakhs on account of replacement items and Locos & Wagons, respectively.**

13. **The following are the submissions made by the Learned Counsel of the Appellant, NTPC Ltd:**

13.1 that the Central Commission erred in disallowing the exclusion of the de-capitalization of the old items amounting to (-) Rs 703.36 Lakhs because the capitalization of the replacement items has not been allowed by Central Commission vide its order dated 07.06.2012 in petition no 261 of 2009. If the corresponding capitalization of the new assets are not allowed, the value of the old assets which have become unserviceable ought not to be de-capitalized. In this regard, it is relevant to mention that NTPC is required to incur capital expenditure on the replacement of the old and unserviceable assets and should not be penalized by both –(a) de-capitalizing the value of the old and unserviceable assets from the capital cost; and (b) not allowing capitalization of the value of the replaced assets.

13.2 that there was a de-capitalization of (-) Rs 285.99 Lakhs in 2010-11 and 2011-12 [(-) Rs 230.20 lakhs for Locos and (-) Rs 55.79 lakhs for Wagons]. The Central Commission erred in not allowing NTPC to treat an amount of (-) Rs. 285.99 lakhs under exclusion in respect of unserviceable locos and wagons which were de-capitalized in the books for the purposes of tariff determination when the new capitalization on the replacement thereof under this head is not being allowed. The Commission vide its order dated 07.06.2012 in petition no 261 of 2009 has not allowed expenditure of Rs 828.00 lakhs on Repowering of Locomotives during the period 2012-13 and 2013-14. Further, the Central Commission is not allowing the capital expenditure incurred on procurement of wagons on the grounds that there is no provision under Regulation 9 (2) of Tariff Regulations, 2009 to consider the expenditure for procurement of wagons against replacement of old wagons. Therefore, if the corresponding capitalization of the new assets is not allowed, the value of the old assets which have become unserviceable ought not to be de-capitalized.

13.3 that the Central Commission has failed to appreciate that NTPC was bound to and had incurred capital expenditure on the replacement of the old and unserviceable assets and should not be penalized by both –(a) de-capitalising the value of the old and unserviceable assets; and (b) not allowing capitalization of the value of the replaced assets. In other words, in case capitalization of the replaced value of the assets is not allowed, logically, the de-capitalization of the value of the old and unserviceable assets should be excluded for the purpose of tariff.

14. **Per Contra**, the following are the submissions made by the Learned Counsel of the Respondent No. 2, Mr. Pradeep Misra:

14.1 that the Appellant has contended that as the CERC has not allowed the capitalization of some of the assets, hence Appellant has prayed that the value of corresponding de-capitalized assets should be permitted to be part of capital cost for the purpose of tariff.

The capital cost has been defined in Regulation 7 of 2009 Regulation and it has been provided in proviso to Regulation 7(1) that the assets forming part of project but not in use

shall be taken out of capital cost. The said proviso reads as follows:

“Provided that the assets forming part of project, but not in use shall be taken out of the capital cost.”

14.2 that as per the above definition of the capital cost, the assets which are not in use and have already been de-capitalized, the value of the same cannot be allowed to be a part of capital cost for the purpose of tariff.

14.3 that the contention of the Appellant that unless and until value of an asset is allowed to be capitalized, the value of de-capitalized asset cannot be taken out of the capital cost, is without any force. This Tribunal in Appeal No. 86 of 2012 decided on 26.03.2014 on this issue held that the assets which are not rendering any useful service, its value has to be de-capitalized from capital cost.

15. **The following are the submissions made by the Learned Counsel of Respondent No. 7, Mr. R.B. Sharma:**

15.1 that the Appellant has contended that the Commission has not allowed exclusion of the de-capitalization of the assets which had become old and unserviceable when the value of the corresponding replaced assets is not allowed to be

capitalized. In other words the Appellant is contending that even the obsolete and unserviceable assets should be retained in the capital cost and these should not be de-capitalized. The grievance of the Appellant is in regard to the following;

- (i) De-capitalization amounting to Rs. 703.36 lakhs on account of replacement items; and
- (ii) De-capitalization amounting to Rs. 285.99 lakhs on account of Locos and wagons.

The Commission has de-capitalized the above assets and reduced from the Capital Cost. The Appellant has also not cited any regulation of the Tariff Regulations, 2009 in support of his contention. Further, the argument of the Appellant that NTPC should not be penalized by both -(a) De-capitalizing the value of the old and unserviceable asset; and (b) not allowing capitalization of replaced asset, is without any substance as no additional capitalization is permissible on the above two counts under Regulation 9(2) of the Tariff Regulations, 2009. And in lieu of this, the Appellant is allowed 'Compensation Allowance' under

Regulation 19(e) of the Tariff Regulations, 2009 which is quoted below;

“(e) In case of coal based or lignite fired thermal generating station a separate compensation allowance unit-wise shall be admissible to meet expenses on new assets of capital nature including in the nature of minor assets, in the following manner from the year following the year of completion of 10, 15, or 20 years of useful life:

Years of operation	Compensation Allowance (Rs lakh/MW/year)
0-10	Nil
11-15	0.15
16-20	0.35
21-25	0.65”

In the circumstances aforesaid, the Appeal is absolutely devoid of merits and liable to be dismissed with costs.

16. The following are the submissions made by the Learned Counsel of the Respondent No. 3 to 5, Mr. Anand K. Ganesan:

16.1 that the contention of the Appellant is that the Central Commission ought not to have excluded the de-capitalization of old assets of Rs. 703.36 lakhs and Rs. 285.99 lakhs, since the corresponding value of the replaced assets are not taken in the place of de-capitalized assets.

16.2 that there is no merit in the claims of the Appellant. If an asset has been de-capitalized and removed from the books, there is no question of asking the same to be excluded and created a state of fiction as if the asset is still in use and therefore, the tariff on the same should be paid. This goes against the very nature and purpose of tariff fixation. The fact that the capitalization of the replaced assets is not permitted is not an argument to exclude de-capitalization. The capitalization is allowed as per Regulation 7 & 9 of the Tariff Regulations, 2009 and if the replaced assets fall under these Regulations, the capitalization would have been allowed. But if the replaced assets are not eligible for capitalization at all, this cannot be used as an excuse for retaining de-capitalized assets in the books and continue to charge tariff on the same.

17. Our Consideration and Conclusion on this Issue

17.1 The Petitioner/Appellant contested that the Central Commission erred in disallowing the exclusion of the de-capitalization of old assets amounting to Rs. (-) 703.36 lakhs and also disallowed the exclusion of de-capitalization

of unserviceable Locos and Wagons amounting to Rs. 285.99 lakhs in 2010-11 and 2011-12, which were de-capitalized in the books for the purpose of tariff determination. Further, the Central Commission has not considered the capital expenditure incurred on new assets in place of old assets, procurement of wagons etc. Thus, the Appellant is penalized by both i.e. (a) de-capitalizing the value of the old and unserviceable assets from the capital cost; and (b) not allowing capitalization of the value of the replaced assets.

17.2 This Tribunal in its Judgment dated 08.05.2014 in Appeal No. 173 of 2013 disallowed the expenditure towards capitalization of Locos, Wagons and other assets to replace in place of the old and unserviceable assets. The Tribunal directed the Appellant/Petitioner in the earlier Judgments to meet the expenditure under compensation allowance under Regulation 19(e) of Tariff Regulations, 2009, which is quoted below:

“(e) In case of coal based or lignite fired thermal generating station a separate compensation allowance unit-wise shall be admissible to meet expenses on new assets of capital nature

including in the nature of minor assets, in the following manner from the year following the year of completion of 10, 15, or 20 years of useful life:

Years of operation	Compensation Allowance (Rs lakh/MW/year)
0-10	Nil
11-15	0.15
16-20	0.35
21-25	0.65”

Thus, the Appellant/Petitioner can meet the expenditure on procurement of new Locos and Wagons under 19(e) of the Tariff Regulations. Further, the Tariff Regulations, 2009 do not provide for including the cost of de-capitalized assets, which have become unserviceable and stopped rendering useful service. Further, the capital cost of the generating station is the cost which incurred in commissioning the plant and any additional capital expenditure made for efficient operation of the plant. Thus the Tariff of the generating station is determined on the cost plus basis.

17.3 This Tribunal in its Judgment dated 2nd January, 2013 in Appeal No. 99 of 2011 passed an order in the similar issue which is reproduced below.

“The issue regarding retention of the value of unserviceable assets which have been de-capitalized in the books of accounts, in the capital base for the purchase of tariff has

been decided by this Tribunal in Judgment dated 21.12.2012 in Appeal No.58 of 2011 in which the following was decided:

- (a) *According to Tariff Regulations, 2004, any expenditure on replacement of old assets can be considered after writing off the gross value of the original assets from the original Project cost. When the unserviceable assets/equipments have been written off and discarded, the cost of the same could not be allowed to form the part of the Capital Cost for determination of tariff.*
- (b) *The Central Commission has correctly disallowed the negative entry on account of de-capitalization of unserviceable assets/equipments Appeal No.99 of 2011 Page 12 of 13 claimed by NTPC in the capital base for determination of tariff.*

Thus, this Tribunal upheld the decision of the Central Commission regarding exclusion of the de-capitalized assets, Locos and Wagons, etc. while determining the Tariff of the Rihand Super Power Thermal Station, Stage-I.

17.4 The Central Commission in the Impugned Order disallowed de-capitalization of assets and not considered the value of the asset replacement in place of unserviceable assets, and the relevant part is quoted below:

“The submission of the petitioner has been examined, the Commission in its order dated 15.5.2014 while dealing with exclusions has clearly given the reasons for disallowing the exclusions of de-capitalization of old assets replaced by new assets (though not allowed in tariff) as they form part of the capital cost. In a cost plus tariff any assets, which is part of

the capital cost should be taken out from the capital bases as and when the asset is de-capitalized on the ground that the asset does not render any useful service to the generating station. Accordingly, we find merit in the submission of the petitioner that since capitalization of new assets has not been allowed the old assets which have become unserviceable and are not rendering useful service should not be taken out from the capital base of the generating stations. Accordingly, the review of order dated 15.05.2014 on this ground is rejected”.

17.5 Thus, after going through the submissions, Impugned Order and the relevant judgments passed by this Tribunal, we do not find any infirmity in the decision taken by the Central Commission in the Impugned Order. Thus, this issue is decided against the Appellant.

Since all the issues have been decided against the Appellant, the Appeal merits dismissal.

ORDER

The instant appeal being Appeal No. 61 of 2015 is hereby dismissed without any costs and the Impugned Order dated 15.05.2014 of the Central Commission in true up Petition being Petition No.21/RP/2014 is hereby upheld.

Pronounced in open Court on this **29th day of April,**
2016.

(T. Munikrishnaiah)
Technical Member

(Justice Surendra Kumar)
Judicial Member

√ REPORTABLE / ~~NON-REPORTABLE~~