

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
(APPELLATE JURISDICTION)**

**REVIEW PETITION NO.13 OF 2016
IN
APPEAL NOS.244 AND 246 OF 2015**

Dated: 17th November, 2016

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. T. Munikrishnaiah, Technical Member.**

In the matter of:-

THE TATA POWER COMPANY)
LIMITED (G),)
Bombay House, 24,)
Homi Mody Street, Fort,)
Mumbai – 400 001.) **.... Review Petitioner**

AND

MAHARASHTRA ELECTRICITY)
REGULATORY COMMISSION,)
World Trade Centre, Centre No.1,)
13th Floor, Cuffe Parade, Colaba,)
Mumbai – 400 005.) **.... Respondent**

Counsel for the Appellant(s) : Mr. Amit Kapur
Mr. Vishal Anand
Ms. Nistha Thakur

Counsel for the Respondent(s) : Mr. Buddy Ranganadhan
Mr. D.V. Raghu Vamsy

ORDER**PER HON'BLE T. MUNIKRISHNAIAH – TECHNICAL MEMBER**

1. In this review petition, the Review Petitioner is seeking review of the judgment dated 03/06/2016 passed by this Tribunal in Appeal Nos.224 and 246 of 2015.

2. By the impugned judgment, while disposing of two appeals, this Tribunal observed that both the appeals are confined to following three issues:

- “(a) Disallowance of carrying cost,*
- (b) Incorrect methodology while considering Delayed Payment Surcharge,*
- (c) Wrong disallowance of Income Tax”*

This Tribunal noted that in Appeal No.244 of 2015, following additional issue arises:

“(d) Incorrect treatment of Operating and Standby periods of Unit-6 of the appellant.”

3. After narrating the facts of both the appeals, this Tribunal framed the following issues:

- “(a) Whether the State Commission is justified in disallowing the carrying cost?”*
- “(b) Whether the incorrect methodology has been applied by the State Commission while considering the delayed payment surcharge?”*
- “(c) Whether the State Commission has wrongly disallowed the Income Tax?”*
- “(d) Whether the State Commission has given incorrect treatment of operating and standby period of Unit 6 of the appellant?”*

This Tribunal noted the rival contentions, considered them in depth and answered all the issues against the Appellant.

4. The present review petition seeks review of findings recorded by this Tribunal on all the above issues. We must quote first paragraph of the Review Petitioner’s submissions

which gives the correct idea about the scope of this review petition.

- “1. *The Review Petitioner, the Tata Power Co. Ltd. (“**Tata Power**”) has filed the present review of the judgment dated 03.06.2016 passed by this Hon’ble Tribunal in Appeal Nos.244 and 246 of 2015 (“**Impugned Order**”) on 4 issues:-*
- (a) Disallowance of **Carrying Cost** contrary to judgments of this Hon’ble Tribunal;*
 - (b) Incorrect methodology while considering **Delayed Payment Charges (“DPC”)**;*
 - (c) Wrongly disallowed **Income Tax** as under:-*
 - (i) On incentive and efficiency gains in contravention of Regulation 34.2 and 34.3 of MYT Regulations 2011;*
 - (ii) By calculating income tax on actual basis instead of calculating the same on accrual basis;*
 - (iii) By not considering entire income while calculating Profit before Tax (“**PBT**”);*
 - (iv) By calculating the benefit of Section 80IA of the Income Tax Act, 1961 for past periods; this issue has not even been dealt with in the Impugned Order;*
 - (d) Incorrect treatment of **operating and standby period of Unit 6** of the Generation business of Tata Power.”*

5. Thus, it appears to be the case of the Review Petitioner that the entire judgment suffers from errors apparent on the face of record. The entire judgment is sought to be reviewed. We must examine whether Review Petitioner's contention is right or whether this is a second appeal in disguise of a review petition.

6. On behalf of the Review Petitioner written submissions have been filed. Counter affidavit has been filed by the Maharashtra Electricity Regulatory Commission ("**the State Commission**") whose orders were under challenge in these appeals.

7. Before we consider the Review Petitioner's contention, it is necessary to see the scope of power of review. Several judgments have been cited on this aspect. They reiterate the same principles. Suffice it to quote the principles laid down by

the Supreme Court in **Kamlesh Verma v. Mayawati &**

Ors.¹ Following is the relevant extract:

“20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1. When the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words “any other sufficient reason” have been interpreted in Chhajju Ram v. Neki, AIR 1922 PC 112 and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulouse Athanasius & Ors. (1955) 1 SCR 520, to mean “a reason sufficient on grounds at least analogous to those specified in the rule”. The same principles have been reiterated in Union of India v. Sandur Manganese & Iron Ores Ltd. & Ors.

20.2. When the review will not be maintainable:

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

¹ (2013) 8 SCC 320

- (ii) Minor mistakes of inconsequential import.*
- (iii) Review proceedings cannot be equated with the original hearing of the case.*
- (iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.*
- (v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.*
- (vi) The mere possibility of two views on the subject cannot be a ground for review.*
- (vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.*
- (viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.*
- (ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negated.”*

In light of these principles, we shall refer to the Review Petitioner’s contentions.

8. It is contended that this Tribunal has disallowed the legitimate claim of 'Carrying Cost' of the Appellant. Counsel for the Review Petitioner has submitted that the State Commission has adopted an incorrect methodology for determining the Carrying Cost; has not considered the settled position of law; has failed to apply its mind to the catena of judgments of this Tribunal and erroneously disallowed the Carrying Cost. Reference is made to the Supreme Court's judgment in **Satinder Singh v. Umrao Singh**² and judgments of this Tribunal in **NDPL v. DERC**³, **BRPL v. DERC**⁴, **New Delhi Power Limited v. DERC**⁵, **Tata Power Co. Ltd. v. MERC**⁶ and **RInfra v. MERC**⁷.

9. So far as Interest on Delayed Payment Charges is concerned, it is contended *inter alia* that this case is covered by **NDPL** because regulation dealing with Working Capital in the case of Delhi on which **NDPL** was passed by this Tribunal

² AIR 1961 SC 908

³ 2007 ELR (APTEL) 193

⁴ 2009 ELR (APTEL) 880

⁵ 2010 ELR (APTEL) 891

⁶ 2011 ELR (APTEL) 336

⁷ MANU/ET/79/2009

are similar to Regulation 35.1 of the MYT Regulations, 2011 in Maharashtra. It cannot be distinguished on the basis of **judgment of this Tribunal dated 18/05/2015 passed in Appeal No.180 of 2013.** This Tribunal should have allowed Interest on Delayed Payment Charges to the Appellant in line with **NDPL.**

10. So far as Disallowance of Income Tax is concerned, it is submitted that Income Tax is wrongly disallowed as per the following:

- “(a) On incentive and efficiency gains in contravention of Regulation 34.2 & 34.3 of MYT Regulations 2011;*
- (b) By calculating income tax on actual basis instead of calculating the same on accrual basis;*
- (c) By not considering entire income while calculating Profit before Tax (“PBT”);*
- (d) By calculating the benefit of Section 80IA of the Income Tax Act, 1961 for past periods.”*

11. On treatment of Operating and Standby period of Unit 6, it is submitted that this Tribunal has failed to relax the norms as was done in the case of Unit 4.

12. It is clear from the nature of issues raised by the Review Petitioner at this stage that the Review Petitioner wants to reopen the entire matter and wants this Tribunal to reconsider each and every issue. This Tribunal has given detailed reasons for taking the view that it has taken after considering the Appellant's contentions. Reconsideration of the entire matter cannot be undertaken by us inasmuch as it is only material error or errors manifest on the face of the record or patent error which can be considered in a review petition. The Review Petitioner is trying to equate the review proceedings with the original hearing of the appeal. Concluded adjudication cannot be reopened in this manner. Even if it is assumed for the sake of argument that the judgment of this Tribunal is erroneous, as held by the Supreme Court in **Kamlesh Verma** a review is by no means an appeal in disguise whereby erroneous decision is reheard

and corrected. Review lies only for correcting patent error. We do not see any patent error or error apparent on the face of record in the order of which review is sought. Review petition is, therefore, dismissed.

13. Pronounced in the Open Court on this **17th day of November, 2016.**

T. Munikrishnaiah
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]

✓ **~~REPORTABLE/NON-REPORTABLE~~**