COURT-II
IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 245 OF 2015 & IA NO.398 of 2015

Dated: 05th April, 2019

Present: Hon'ble Mr. Justice N. K. Patil, Judicial Member
Hon'ble Mr. S.D. Dubey, Technical Member

In the matter of:

The Tata Power Company Limited(D),
Bombay House,
24, Homi Modi Street, Fort,
Mumbai - 500 001
Maharashtra **…Appellant**

- Versus -

Maharashtra Electricity Regulatory Commission
World Trade Centre,
Centre No.1, 13th Floor,
Cuffe Parade,Colaba,
Mumbai – 400005
Maharashtra **…Respondent**

Counsel for the Appellant : Mr. Amit Kapur
Mr. Abhishek Munot
Mr. Malcolm Desai

Counsel for the Respondent(s) : Mr. Buddy A. Ranganadhan
Ms. Stuti Krishn for R-1

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The Appellant, The Tata Power Company Limited (Distribution), questioning the legality, validity and propriety of the Mid-Term Review (MTR) Order dated 26.06.2015 ("***Impugned Order***") passed by Maharashtra Electricity Regulatory Commission ("***State Commission***") in Case No.18 of 2015 has filed the present Appeals. The said MTR was carried out to:-

(a) Revise True up of FY 2011-12;

(b) True up of FY 2012-13 and FY 2013-14;

(c) Conduct Performance Review of expenses for FY 2014-15; and

(d) Revise Aggregate Revenue Requirement ("***ARR***") and Tariff for FY 2015-16

1.1 The Appellant is aggrieved by the Impugned Order because of undeserved cash-flow and business crisis caused primarily due to acts and omissions of Maharashtra Commission, being:

I. Wrongly calculated increase in sales for FY 2015-16, when admittedly the tariff fixed by Maharashtra Commission is such that there will be reduction in sales.

II. Wrongly determined tariff for HT Public Services, which is contrary to the principles set out in the Multi Year Tariff ("***MYT***") Order.

III. Incorrectly calculated Regulatory Asset Charge ("***RAC***") by considering wrong figures of Revenue gap allowed to be recovered in the MYT Order and wrongly allowed recovery of majority of

Regulatory Asset from the supply business rather than allowing recovery of the same from RAC.

IV. Wrongly disallowed Carrying Cost on the:

(a) Issues wherein Maharashtra Commission had in its earlier order allowed expenses on incorrect methodology which has been set aside by this Tribunal with a direction to Maharashtra Commission to re-determine carrying cost by following the correct methodology; and

(b) Revenue gap which has resulted due to reverse migration of consumers.

(c) Recovery of Regulatory Asset contrary to principles set out by this Tribunal in its Judgment dated 08.04.2015 in Appeal Nos. 160 of 2012, 3, 4, 57, 274, 164, 166, 121 and 211, 215of 2013.

V. Wrongly disallowed cost of procurement of Non Solar Renewable Energy Certificate ("***REC***").

VI. Wrongly refused to relax the norms and allow actual Operation and Maintenance ("***O & M***") expenses.

VII. Wrongly determined Cross Subsidy structure by:-

(a) ignoring the Tariff Policy and this Tribunal's Judgment dated 28.11.2014 passed in Appeal No.244 of 2013; and

(b) computing Cross Subsidy for individual categories by taking different component in the numerator and denominator.

VIII. Wrongly disallowed Interest on Fuel Adjustment Cost ("***FAC***") for FY 2012-2013 and FY 2013-2014, which is contrary to the principles set out in the MYT Order.

IX. Wrongly disallowed Property Tax in violation of Regulation 12 of the MYT Regulations, 2011.

X. Wrongly disallowed Income Tax:-

(a) on incentive and efficiency gains in contravention of Regulation 34.2 & 34.3 of MYT Regulations 2011; and

(b) by calculating income tax on actual basis instead of calculating the same on accrual basis.

XI. Wrongly calculated Cross Subsidy Surcharge ("***CSS***"), which is contrary to the formula prescribed under National Tariff Policy ("***NTP***") as upheld by this Hon'ble Tribunal in Appeal No. 331 of 2013 and contrary to principles set out in the MYT Order.

XII. Error in consideration and disallowance of payment of Rs.1.02/kWh as trading margin on procurement of Renewable Energy Certificates ("***RECs***").

1.2 However, some of the issues / grievances have been redressed in the MYT order dated 21.02.2006 and hence have not been pressed by the Appellant as detailed below:-

D.1 Inflated projected increase in sales for FY 2015-16.

D.2 Error in the computing Regulatory Asset Charge and its recovery of Regulatory Asset from Supply business.

D.3 Computed Cross Subsidy structure, contrary to the Tariff Policy.

D.4 Wrongly determined Cross Subsidy Surcharge ("***CSS***").

D.5 Wrongly determined tariff for HT Public Services category.

2. Brief facts of the case:-

2.1 The Appellant is a company incorporated in 1919 under the provisions of the Indian Companies Act, VII of 1913, and having its registered office at Bombay House, 24, Homi Mody Street, Fort, Mumbai 400 001. On 01.04.2000, the Tata Hydro-Electric Power Supply Company Limited and the Andhra Valley Power Supply Company Limited were merged into Tata Power Company Limited, to form one unified entity. Consequently, the licences of the aforementioned companies were also merged and the Appellant was granted a licence by the Government of Maharashtra for the supply of energy to the public in its Mumbai Licence Area, and to supply energy in bulk to Distribution Licensees.

2.2 The Respondent, i.e., Maharashtra Commission is a statutory authority which was established by the Government of Maharashtra on 05.08.1999 under the Electricity Regulatory Commission Act, 1998, and it became functional from 12.08.1999.

2.3 On 10.06.2003, the Act came into force. Pursuant to the enactment of the Act, the Appellant is required to submit its Aggregate Revenue Requirement ("***ARR***") and Tariff Petitions as per procedures outlined in Sections 61, 62 and 64, of the Act, and the governing regulations thereof.

2.4 On 12.02.2005, in exercise of powers under Section 3 of the Act, the Ministry of Power, Government of India notified the National Electricity Policy, and on 06.01.2006, notified the Tariff Policy.

2.5 In the year 2011, in exercise of its powers under sub-sections (zd), (ze) and (zf) of Section 181 (2) read with Sections 61, 62 and 86 of the Act and all powers enabling it in that behalf, Maharashtra Commission issued the Maharashtra Electricity Regulatory Commission (Multi Year Tariff) Regulations, 2011 ("***MYT Regulations, 2011***"), which are applicable for determination of tariff in all cases covered under the MYT Regulations 2011 from 01.04.2011 till 31.03.2016.

2.6 On 29.11.2011, the Appellant filed Case No.165 of 2011 before Maharashtra Commission submitting its MYT Business Plan Petition for the Second Control Period.

2.7 On 26.08.2012, Ld. Maharashtra Commission issued the Business Plan Order, wherein the Appellant was directed to file ARR for FY 2011-12 as per MYT Regulations 2005.

2.8 Being aggrieved by Order dated 26.08.2012, the Appellant filed Appeal No.183 of 2012 challenging the Order and directive issued by Maharashtra Commission in its Order dated 26.08.2012 for filing ARR of FY 2011-12 as per the Tariff Regulations, 2005, and not as per the MYT Regulations 2011.

2.9 On 04.12.2012, the Appellant filed Case No. 179 of 2011 before Maharashtra Commission ("***MYT Petition***") seeking determination of ARR for the MYT period from FY 2011-12 to FY 2015-16.

2.10 On 28.06.2013, Maharashtra Commission trued up expenses for FY 2011-12 and approved the ARR for FY 2012-13 to FY 2015-16 and retail tariffs and wheeling charges for the period FY 2013-14 to FY 2015-16 ("***MYT Order***"). Maharashtra Commission in the MYT

Order observed that it would undertake the mid-term review of the Appellant's performance during the third quarter of FY 2014-15.

2.11 On 28.11.2013, this Tribunal by its Judgment allowed Appeal No.183 of 2012 and directed Maharashtra Commission to true up FY 2011-12 as per the MYT Regulations 2011.

2.12 On 14.08.2014, upon application by the Appellant for grant of Distribution Licence in Mumbai, and the area covered under the Mira Bhayandar Municipal Corporation, Maharashtra Commission had granted a Distribution Licence to the Appellant for a period of 25 years from 16.08.2014.

2.13 Being aggrieved by the MYT Order, the Appellant filed Appeal No.244 of 2013 before this Tribunal. This Tribunal by its Judgment dated 28.11.2014 partly allowed the claims of the Appellant, and directed Ld. Maharashtra Commission to pass consequential orders in terms of the findings therein.

2.14 On 12.01.2015, pursuant to the directions of Maharashtra Commission in MYT Order and the directions issued by this Tribunal in Appeal No. 244 of 2013, the Appellant filed the Mid-Term Review Petition being Case No.18 of 2015 for revised Truing up for FY 2011-12, Truing up of FY 2012-13 and FY 2013-14, provisional True up of Aggregate Revenue Requirement for FY 2014-15, and revised Aggregate Revenue Requirement and Tariff for FY 2015-16 for the Distribution Business of the Appellant (***"MTR Petition"***).

2.15 On 04.02.2015, Maharashtra Commission scrutinised the Petition, and directed the Appellant to address the data gaps

raised at the first Technical Validation Session (“***TVS***”), in which authorised Institutional Consumer Representatives were invited.

2.16 On 23.02.2015, the Appellant filed its revised MTR Petition, pursuant to the direction and additional information sought by Maharashtra Commission during the TVS.

2.17 By its Order dated 24.02.2015, Ld. Maharashtra Commission admitted the revised MTR Petition.

2.18 On 26.02.2015, Public Notices of the filing of the MTR Petition were published by the Appellant for inviting suggestions and objections from the public and stakeholders in the following newspapers:

(i) Hindustan Times (English)

(ii) Indian Express (English)

(iii) Financial Express (English)

(iv) Loksatta (Marathi)

(v) Prahar (Marathi)

2.19 On 20.03.2015, public hearing on the MTR Petition in context of objections and suggestions was conducted by Maharashtra Commission.

2.20 On 26.06.2015, Maharashtra Commission passed the Impugned Order revising the tariff and truing up the expenses of the Appellant, against which the Appellant has preferred the present Appeal.

2.21 On 10.08.2015, the Appellant has filed a Review Petition against the Impugned Order on several issues which are:-

(a) Error in allowing the recovery of Regulatory Assets of Rs. 1,493.95 crore of Supply Business as a part of regular tariff, instead of allowing the same as a part of Regulatory Asset Charge.

(b) Error in determination of tariff for HT VI – Public Services category while determining the segregation of ABR in various components of tariff.

(c) Mathematical error of Rs. 0.62 crore in computation of Revenue Gap/(Surplus) of FY 2011-12.

(d) Error in not considering 6 months of carrying cost amounting to Rs. 5.70 crore on amount of Rs 78.18 Crores which was approved vide the review petition in Case No. 99 of 2013 of the Appellant.

3. Questions of law:-

The Appellant has raised the following questions of law for our consideration:-

A. Whether Maharashtra Commission has wrongly disallowed carrying cost to the Appellant on:-

(a) The issues wherein Maharashtra Commission had earlier allowed expenses based on it correct methodology which has been set aside by this Tribunal with a direction to re-determine expenses/revenue following correct methodology;

(b) Revenue gap which has resulted due to reverse migration of the consumers;

(c) Recovery of Regulatory Asset contrary to principles set out by this Tribunal in its Judgment dated 08.04.2015 in Appeal Nos.160 of 2012, 3, 4, 57, 274, 164, 166, 121 and 211, 215of 2013?

B. Whether Maharashtra Commission has wrongly disallowed Non-Solar Renewable Energy Certificate?

C. Whether Maharashtra Commission has wrongly refused to relax the norms and allow actual O&M expenses?

D. Whether Maharashtra Commission has wrongly disallowed interest on FAC for FY 2012-13 and FY 2013-14 contrary to the principles set out in the MYT Order?

E. Whether Maharashtra Commission has wrongly disallowed Property Tax in violation of Regulation 12 of the MYT Regulations, 2011?

F. Whether Maharashtra Commission has wrongly disallowed income tax on incentive and efficiency gains in contravention of Regulations 34.2 and 34.3 of the MYT Regulations, 2011?

G. Whether Maharashtra Commission has wrongly calculated Income Tax on actual basis instead of calculating the same on accrual basis?

H. Whether Maharashtra Commission has wrongly considered and disallowed payment of Rs.1.02/kWh as trading margin on procurement of RECs?

4. **Learned counsel, Mr. Amit Kapur, appearing for the Appellant has filed his written submissions for our consideration as follows:-**

A1. Wrong disallowance of Carrying Cost

4.1 Section 61 principles of the Electricity Act mandate the Appropriate Commission to ensure recovery of the costs/ expenses of a distribution licensee, while undertaking tariff determination. This includes recovery of past regulatory assets that have arisen due to under-recovery of costs/ expenses by the distribution licensee. The Revised Tariff Policy dated 28.01.2016, a binding statutory policy as held by the Hon'ble Supreme Court in *Energy Watchdog* v. *Central Electricity Regulatory Commission & Ors.* reported as (2017) 14 SCC 80, provides that regulatory assets ought to be recovered along with carrying cost in a time bound manner.

4.2 Timely and adequate provision of carrying cost is legitimate entitlement of distribution companies to finance the gap in legitimate cash flow, which has to be arranged by the distribution company from lenders/promoters/accruals. This position has been laid down by this Tribunal in a catena of Judgments including:-

(a) Judgment dated 15.02.2011 titled as *Tata Power Co. Ltd.* v. *Maharashtra Electricity Regulatory Commission*: 2011 ELR (APTEL) 336 at para 43

(b) Judgment dated 13.04.2018 titled as *Adani Power Limited* v. *CERC & Ors.*:2018 ELR (APTEL) 0556 at para 12(d)(vii).

4.3 MERC has wrongly denied Carrying Cost to the tune of **Rs. 114.31 Crores** (as on FY 2015-16).The details are set out below

4.4 MERC had erroneously missed out allowing a principal amount of **Rs. 78.18 Crores** (including Carrying Cost which was recoverable in FY 2012-13)in its MYT Order dated 28.06.2013.

(a) This mistake was rectified by MERC when it allowed the same in the Impugned Order (MTR Order dated 26.06.2015).

(b) On the said principal amount MERC has allowed carrying cost of Rs. 22.93 Crores (for FY 13-14 and 14-15) at the rate of 14.75%.

(c) MERC has failed to allow Carrying Cost of **Rs. 5.77 Crores**, which amount pertains to the six-month period during which the principal amount is to be recovered by the Appellant. Contrary to this Appellate Tribunal's Judgment dated 08.04.2015 in *Reliance Infrastructure Limited* v. *Maharashtra Electricity Regulatory Commission & Ors.* [2015 ELR (APTEL) 0999], holding that interest should be calculated for the period from the middle of the financial year in which the revenue gap had occurred upto the middle of the financial year in which the recovery has been proposed. For all other heads of claim carrying cost has been calculated by MERC upto the middle of the year of proposed recovery in line with this Tribunal's Judgment.

4.5 MERC has disallowed carrying cost to the Appellant on claims which were recomputed by MERC in accordance with the principles enunciated by this Tribunal in its Judgment dated 28.11.2013 in Appeal No. 106 of 2012, i.e.:-

(a) Income Tax (FY 08-09 to FY 10-11);

(b) Interest on refinancing of loan (FY 10-11);

(c) Power purchase cost of RE power (FY 10-11)

(d) De-capitalisation of asset (FY 08-09 to FY 10-11);

(e) Non-tariff income-treasury income (FY 09-10 to FY 10-11)].

4.6 On re-computation, MERC allowed the Appellant to recover a principal amount of Rs. 2.97 Crores. However, for computing carrying cost, MERC has only considered the principal amount of Rs. 1.33 Crores. Rs. 0.74 Crores have been allowed as carrying cost (on the principal amount of Rs. 1.33 Crore). MERC has not considered the remaining principal amount of Rs. 1.64 Crores for computation of carrying cost as it has held that this Hon'ble Tribunal has not set aside/ stayed MERC's order/ principles of computation applied by MERC and has merely enunciated certain new principles.

4.7 In disallowing, carrying cost of **Rs. 0.78 Crores** [on the principal amount of Rs. 1.64 Crores (being the difference between Rs. 2.97 Crores and Rs. 1.33 Crores)]. MERC has failed to appreciate that:-

(a) This Tribunal by its Judgment dated 28.11.2013 in Appeal No. 106 of 2012 had set aside the methodology applied by MERC for determining certain expenses/ revenue and laid down the correct principle for computation of the same. This Tribunal had directed MERC to re-determine certain costs/ revenue that were disallowed by MERC in its earlier Orders, by applying the correct methodology/ principle as laid down by this Tribunal Judgment dated 28.11.2013 in Appeal No. 106 of 2012. Had MERC applied the correct methodology at the time of passing the earlier Order, there would have been no reason for re-determination of the costs in terms of this Tribunal's Judgment dated 28.11.2013.

(b) This Tribunal by its Judgment dated 15.02.2011 in Appeal No. 173 of 2009 has held that Carrying Cost is permitted on legitimate expenditure if the same is, inter alia, disallowed by the State

Commission and is subsequently allowed by the superior authority (i.e. this Tribunal).

(c) When this Tribunal enunciated new principles/ methodologies for computation of costs/ revenue, this Hon'ble Tribunal in effect set aside the earlier principles/ methodologies laid down by MERC.

(d) Delay in allowing the correct expenses is not due to any fault of the Appellant, and accordingly the Appellant cannot be penalised for the same.

4.8 MERC has denied carrying cost to the Appellant on the recomputed amount as directed by this Tribunal in its Judgment dated 28.11.2013 in Appeal No. 183 of 2012. As per this Tribunal, MERC was directed to carry out true up for FY 2011-12 in accordance with MYT Regulations, 2011 and not the Tariff Regulations, 2005.On re-computation, MERC allowed the Appellant to recover an additional principal amount of Rs. 38.63 Crores in terms of this Tribunal's Judgment dated 28.11.2013. No carrying cost was allowed to the Appellant on the additional approved principal amount of Rs. 38.63 crores. The Appellant's claim for Carrying Cost in this regard is **Rs. 19.83 Crores**. The principles set out in Para 7(a) to (d) are squarely applicable in the present issue as well and hence, carrying cost of **Rs. 19.38 Crores** ought to have been allowed by MERC.

The Appellant's total claim as regards the above issues re Carrying Cost is <u>Rs. 26.41 Crores.</u>

4.9 In addition to the above, in the Impugned Order, MERC has erroneously computed Carrying Cost on the original spread of past recoveries approved by it in its MYT Order dated 28.06.2013,

whereas for the purpose of determination of ACoS for determination of tariff, in the very same MYT Order dated 28.06.2013, MERC had changed the spread of past recoveries for the Appellant. Once MERC had changed the spread of past recoveries for the purpose of ACoS for tariff determination, MERC ought to have allowed Carrying Cost on such revised spread of past recoveries, instead of the original spread of past recoveries approved by it. In this regard, the Appellant's claim for Carrying Cost is **Rs. 87.90 Crores.**

A2. Wrongly considered Property Tax paid by the Appellant while computing Efficiency Gain/ (Loss)

4.10 MERC has wrongly disallowed Property Tax at the stage of truing up as claimed by the Appellant, which is evident from the following:-

(a) In terms of Regulation 12.1(d) of the MYT Regulations 2011, change in taxes and duties are uncontrollable expenses

(b) Property Tax is levied by the Municipal Corporation of Greater Mumbai under the Mumbai Municipal Corporation Act, 1888. Such levy is beyond the control of the Appellant, and the Appellant is statutorily mandated to make payments against such levy of Property Tax.

(c) The Mumbai Municipal Corporation Act was amended in 2009. As per the amendment, the Municipal Corporation was authorised to levy property tax based on 'capital value' of the properties (earlier the property tax was based on the rateable value of properties as earlier prescribed) thereby increasing the quantum of tax payable by the Appellant.

(d) The aforementioned amendment to the Mumbai Municipal Corporation Act, resulting in a change in the methodology of levy of Property Tax, amounts to a Change in Law. In terms of Regulation 12.1(b) of the MYT Regulations 2011, Change in law is also an uncontrollable factor. Further Regulation 12.1 (b) of the MYT Regulations, 2011 also states that statutory taxes and duties also form part of uncontrollable expenses.

4.11 MERC has allowed Property Tax, being an uncontrollable factor, as a pass through. However, while doing so, MERC has considered it as a part of the O&M expenses while computing the Efficiency Gains & Losses. It is submitted that, it is a settled principle of law that uncontrollable factors are not to be considered while computing Efficiency Gain/ (Loss) of the distribution licensee.

4.12 In this regard, it is pertinent to note that in a similar context, while dealing with the introduction of Fringe Benefit Tax ("**FBT**") [a statutory levy] this Hon'ble Tribunal has by its Judgment dated 15.02.2011 in Appeal No. 173 of 2009 titled as *Tata Power Company Limited* v. *MERC*[Para 28 and 43(4)] held that:-

(a) FBT is a statutory expense and hence has to be construed as uncontrollable.

(b) The State Commission in its MYT order had approved the O&M expenses which did not envisage FBT. As FBT was levied subsequently, it is not proper to compare the approved O&M expenses with the actual O&M expenses.

(c) The correct approach is to compare the actual O&M expenses without FBT with the approved expenditure, compute the gains

and loss and then add the FBT paid by the Appellant to allow for the pass through for uncontrollable factors.

4.13 The above principle laid down by this Hon'ble Tribunal is squarely applicable to increase in Property Tax, since change in Property Tax is an uncontrollable expense in terms of Regulation 12 of the MYT Regulations, 2011 (change in taxes and duties).

4.14 On account of the amendment in the Mumbai Municipal Corporation Act, the amount paid for FY 2012-13 & FY 2013-14 as per 'capital value of property', as against the amount payable prior to the amendment (as per 'rateable value of the property') along with the total impact of disallowance of property tax as uncontrollable expenses while computing Gain/(Loss) for the Appellant. It is evident that the Appellant is entitled to receive **Rs. 0.99 Crores in FY 2012-13** and **Rs. 1.93 Crores in FY 2013-14** on account of the computation of Efficiency Gain/ (Loss) as prescribed by this Tribunal in its aforesaid Judgment dated 15.02.2011 [by keeping the uncontrollable expenses including property tax outside the purview of the computation of the efficiency gain/ (losses)].

B.1: Wrongly disallowed Income Tax

4.15 MERC while computing the income tax allowable in the ARR and tariff for the Appellant has acted contrary to:

(a) **Regulations 34.2 and 34.3 of the MYT Regulations 2011** by excluding Efficiency Gain and Incentive in the total income of the Appellant since FY 2011-12**.**

(b) **The Income Tax Act, 1961 and Accounting Standards I and II** to consider income based on the billed revenue instead of considering the income on accrual basis.

- *Disallowance of Income tax on efficiency Gain and Loss:*

4.16 MERC, while computing tax from FY 2011-12 onwards, has not considered Efficiency Gain and Incentive in the total income of the Appellant. MERC in fact while calculating tax at the stage of True-up has wrongly relied on the Proviso to Regulation 34.1 of the MYT Regulations 2011. MERC has failed to consider that the proviso to Regulation 34.1 is applicable at the time of determination of tariff and not at the stage of truing up.

4.17 At the stage of determination of Tariff, the Efficiency Gains and Incentives cannot be ascertained since only the income from billing is projected by MERC. Accordingly, at the stage of determination of Tariff, Proviso to Regulation 34.1 will be applicable. The actual income tax is to be determined at the stage of truing up in terms of Regulations 34.2 & 34.3 of MYT Regulations, 2011.

4.18 As per Regulation 34.2 and 34.3, if there is any variation between the Income Tax actually paid and approved on the income stream of the regulated business, then the Income tax has to be reimbursed to the distribution licensee. Such a variation in income tax paid arises on account of difference between the projected income tax to be paid by the Appellant vis-à-vis the actual income tax paid by the Appellant. MERC failed to appreciate the fact that projections are based on conservative estimates whereas at the time of true up, actual expenses are considered. Meaning thereby that, the actual Income Tax paid by the distribution licensee on its

income stream of its regulated business has to be reimbursed to the distribution licensee. Evidently, Efficiency Gain and Incentive are part of the income stream of the Appellant for its regulated business. MERC, by not considering the Efficiency Gain and Incentive under Income Tax, has allowed less tax in comparison with the actual tax which ought to have been paid by the utility based on the income entitlement for a particular year. Since the Efficiency Gain and Incentive are considered as legitimate revenue source and part of tariff computation, the Appellant is mandated by law to pay tax on such income. Accordingly, MERC ought to have allowed the tax on the Efficiency Gain and Incentive.

4.19 MERC failed to appreciate that a proviso is an exception to the general rule. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. MERC failed to understand that, as a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. In this regard, reference may be made to the Hon'ble Supreme Court's Judgment in *Haryana State Cooperative Land Development Bank Ltd.* v. *Haryana State Cooperative Land Development Banks Employees Union & Anr.* reported as (2004) 1 SCC 574. It is further submitted that, MERC has sought to rely upon the proviso to Regulation 34.1 of the MYT Regulations, 2011 and in doing so has sought to exclude the applicability of Regulation 34.2 and 34.3 of the MYT Regulations, 2011. MERC has failed to appreciate that a proviso does not travel beyond the provision to which it is a proviso. This has also been held by the

Hon'ble Supreme Court in a catena of cases including in *Haryana State Cooperative Land Development Bank Ltd. (supra)* case.

4.20 As regards MERC's objection that the Appellant has been claiming Income Tax by grossing up RoE and not on the basis of PBT (Profit Before Tax), it is submitted that the Appellant had submitted both the computations (grossing up RoE and PBT) to MERC. Hence, MERC's contention is incorrect and the same cannot be raised at the appellate stage, when no objections/ recordings of the same was made in the Impugned Order.

- *Disallowance of Income Tax on accrual basis:*

4.21 As per Section 145 of the Income Tax Act, 1961, Income chargeable under the head of "Profits and gains of business or profession" or "Income from other sources" shall be computed in accordance with the method of accounting regularly employed by the assessee. The Government has so far notified two Accounting Standards ("***AS***") to be followed by all the assessees following the accrual basis of accounting. Accounting Standard-I is regarding "Disclosure of accounting policies", and Accounting Standard-II is regarding "Disclosure of prior period and extraordinary items and changes in the accounting policies". These standards are more or less on the same pattern as AS-1 and AS-5 issued by the Institute of Chartered Accountants of India. Accordingly, the Appellant has been consistently following accrual basis of accounting and the resultant profit and the computed income tax is also on accrual basis. Accordingly, the Income Tax should be allowed to the Appellant on the Income of the Regulated Business accrued for

that year. Further, the assessee is also required to follow the accounting standard notified by the Central government.

4.22 MERC has wrongly considered Income based on Billed Revenue for each financial year, and not on accrual basis. When truing-up is done for any particular year, MERC approves the actual ARR for that year, which is the income for that Business. It is submitted that, for the relevant period under consideration i.e. FY 2007-08 to FY 2010-11, the truing up has already been done. Meaning thereby that the actual income has already been ascertained. Hence, once truing up for a particular year is completed, considering the billed revenue as Income amounts is an incorrect approach.

4.23 MERC has deviated from its own methodology by considering billed revenue as income, which, in fact, is not the approved income of the Regulated Business once Truing up has been done for the relevant financial year. The ARR approved by MERC becomes the approved income of the utility. It is submitted that such change in methodology at the stage of truing up is impermissible in law, as held by this Hon'ble Tribunal in a catena of Judgments. In this regard reference may be made to this Tribunal's:-

(a) Judgment dated 10.08.2010 in Appeal No. 37 of 2010 titled as *Meghalaya State Electricity Board* v. *Meghalaya SERC* reported as 2010 ELR (APTEL) 940 [Para 34];

(b) Judgment dated 31.08.2012 in Appeal No. 17, 18 and 19 of 2011 titled as *Tata Power Company* v. *MERC*; and

(c) Judgment dated 09.10.2009 in Appeal No. 15 of 2008 titled as *Bangalore Electricity Supply Company Ltd.* v. *Karnataka Electricity Regulatory Commission* reported as 2009 ELR (APTEL) 1012 [Para 4-7].

4.24 In the Distribution Business, on account of the fact that the regulatory assets are approved but allowed to be recovered in future years to avoid tariff shock to the consumers, the billed revenue tends to be lower than the actual ARR. Further, the regulatory assets are allowed to be recovered over a period of time. On account of this, the Distribution Business of the Appellant will always show a loss and accordingly the Income Tax computed will be zero, when in actual the Appellant would be paying Income Tax based on accrued Income. As the Regulatory Assets recovery is spread over a number of years, the Appellant will continue to be in loss for these years and the Income Tax will always be zero, which is not a correct representation of the factual situation.

4.25 MERC's argument that the Appellant has not been able to submit responses to the queries raised by MERC is untenable. The Impugned Order itself records that the details sought by MERC were duly provided by the Appellant. Once the information was submitted, the authenticity of the same was never questioned by MERC. Accordingly, it is not open for MERC to suggest that the Appellant has not been able to submit responses to the queries raised by MERC for reconciling the amounts considered as Revenue for income tax.

4.26 In any case, MERC cannot seek to justify and/ or give reasons to the Impugned Order in the present Appeal. The Impugned Order

has to stand on its own legs. The Hon'ble Supreme Court in *Mohinder Singh Gill* v. *Chief Election Commissioner, New Delhi & Ors.* reported as (1978) 1 SCC 405,has held that when a statutory functionary makes an order based on certain grounds/ reasoning, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the form of affidavits or otherwise. Therefore, MERC, a statutory functionary cannot seek to adduce reasonings to the Impugned Order, by way of its submissions in the present Appeal, when they do not form a part of the Impugned Order.

B.2: Wrongly disallowed Interest on Fuel Adjustment Cost ("FAC") for FY 2012-2013 and FY 2013-2014

4.27 MERC has wrongly disallowed interest on FAC to the Appellant which is evident from the following:-

(a) The interest due to delayed or over recovery of FAC is allowed under FAC charge and it becomes part of revenue recovered by a distribution utility;

(b) If interest on FAC is not included under the cost of power purchase, the same is passed on to the consumers through Gap/Surplus when actual truing up takes place. In FY 2012-13, the Appellant was charging FAC as per the Maharashtra Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2005 ("***Tariff Regulations 2005***").

(c) MERC had allowed interest on FAC in the MYT Order. Therefore, at the stage of MTR it is not open for MERC to change the principles set out in the MYT Order which is evident from:-

(i) Regulation 11 of the MYT Regulations 2011.

(ii) This Tribunal's Judgment dated 10.08.2010 in Appeal No. 37 of 2010 titled as *Meghalaya SEB* v. *Meghalaya SERC* reported as [2010 ELR (APTEL) 940,Para 34].

4.28 Under the Tariff Regulations, 2005, the Appellant had been claiming interest on FAC in terms of Regulation 82. It is submitted that any variation in the fuel cost is passed through to the distribution licensee by the Generating Company. In terms of the Tariff Regulations, the distribution licensee is permitted to claim the impact of such variation in fuel cost under the head of FAC. It is submitted that as per the above formula, it is evident that there is a regulatory time gap of two months before FAC is charged by the distribution licensee on its consumers. It is submitted that the formula for FAC allows for carrying cost on FAC computed because as per the formula itself there is an inherent delay in charging the FAC to the consumers (by two months) from the date of expenditure incurred. It is towards this delay that the interest is computed and becomes part of the FAC which is allowed to be charged to consumers. The FAC charge so computed and collected from consumers becomes part of Revenue and if the carrying cost is not considered in the total expenses the gap reduces to that extent.

4.29 Further, MERC's finding that "*The Commission has already allowed the normative IoWC, which is TPC-D's legitimate claim, and hence has not considered interest on FAC...."* is incorrect as the Interest on Working Capital ("**IoWC**") considers "*Two months*

equivalent of the expected revenue from sale of electricity at the prevailing tariffs" not for working capital which is delayed to be billed as per the formula of Regulations 82. The carrying cost/ interest component provided in the FAC formula is entirely different from the IoWC allowed by MERC. This is because the IoWC allowed by MERC relates to the period when the charges have been raised by the distribution licensee on the consumers and the amounts are yet to be recovered, whereas the Interest on FAC pertains to the two month time gap before the FAC is charged to the consumers. If the intent of IoWC was to take care of the interest component in the FAC formula, there the Regulation would not have specified interest as a part of the FAC formula. The Interest component in the FAC formula and the IoWC operate for two separate time period.

4.30 Since recovery of such variable charges is collected after a lag of 2 months, the Appellant has been claiming interest on recovery of FAC. As permitted by regulations, MERC has been allowing such a claim of the Appellant in terms of Regulation 82 of the Tariff Regulations 2005. Under the MYT Regulations 2011, the corresponding provision is Regulation 13, which provides for the mechanism for pass through of gains or losses on account of uncontrollable factors, such as variation in fuel charges. Accordingly, the Appellant is seeking that the same principle be followed under the MYT Regulations 2011, which was being followed under the previous Regulations.

4.31 MERC is considering the interest component of the FAC formula while deriving the revenue earned by the Appellant, but not

considering this interest component while computing the Appellant's expenditure. As a result, the interest collected by the Appellant through FAC billing (as entitled to be retained by it) is passed back to the consumers through Gap/ (Surplus) computation (i.e. Revenue collected – Approved Expenditure) at the time of Truing Up. This is completely contrary to the intent of the Regulations.

4.32 MERC, in the MYT Order dated 28.06.2013, had in fact allowed the interest on FAC for the years from FY 2009-10 to FY 2011-12. Therefore, MERC ought not to deviate from the principle/methodology at the stage of Truing up.

C.1: Wrongly disallowed the excess Non-Solar Renewable Energy Certificate ("REC") purchased beyond the RPO requirement

4.33 MERC disallowed the excess Non-Solar REC purchased by the Appellant, beyond the Renewable Purchase Obligation ("***RPO***") requirement for the FY 2013 and 2014, failing to consider that the quantum for RPO is derived from the requirement of the utility at the State periphery premised on the following:

(a) Energy billed by distribution utility at Distribution Level;

(b) Energy measured at T<>D level i.e. meter reading of ABT meters installed at T<>D interface;

(c) Changeover of consumer and meter reading finalized by distribution utility;

(d) Transmission loss computed by SLDC by considering energy injected into State Grid and energy drawl by all distribution utility;

(e) Wind energy contracted by Open Access consumers of the Appellant; and

(f) Wind energy contracted by the Appellant.

4.34 MERC failed to consider that:-

(a) The exact energy requirement for RPO gets ascertained after expiry of two to four months (and in certain cases beyond four months) in a financial year. This is because, the reconciliation of changeover consumer and meter reading takes upto four to six months. Further, the reconciliation of the wind energy procured by the Appellant also takes upto four to six months, since the distribution licensees in whose area of supply the wind generators are situated, take time in issuing the credit notes.

(b) 4 out of the 5 variable components are uncontrollable and difficult to predict since they depend upon several factors beyond the control of the Appellant, viz., -

 (i) Sale of power to changeover consumers,

 (ii) State Transmission loss, and

 (iii) Wind energy tied up by Open Access consumers.

 (iv) Wind energy tied up by the Appellant

4.35 For FY 2013-14, there is a large amount of deviation in comparison with the approved figures, which is because large number of changeover consumers have reverse migrated from the Appellant to R-Infra. Such movement has been caused due to substantial tariff deferential between the two utilities. In such cases it is very difficult to estimate what would be the RPO requirement

of the Appellant when the consumers are reverse migrating. If the requirement is calculated based on the changeover consumers as approved in the MYT Order dated 28.06.2013, there would be a surplus of 40 MUs.

4.36 A detailed computation for REC requirement is undertaken based on the data available at the relevant time. It is submitted that, there is a time lag with respect to availability of final data of various crucial data points considered in procurement of RECs.

4.37 In the present case, the Appellant is unable to calculate its RPO obligation because of migration and reverse migration of consumers and all aforementioned uncontrollable factors. The Appellant is made to suffer on both ends since on one hand if the Appellant is unable to achieve its RPO requirement, then there is a penalty imposed on the Appellant, whereas on the other hand if the Appellant procures RE over and above its RPO requirement then the same is disallowed by MERC.

4.38 In any case, it is pertinent to note that energy procured/ REC's purchased towards compliance of RPO by the Appellant in FY 2012-13 and in FY 2013-14 was in a minor deviation from its actual RPO requirement i.e. in FY 2012-13, the deviation was 0.1% vis-à-vis the deviation of 0.12% from the approved sales to the actual sales, and in FY 2013-14, the deviation was 1.47% vis-à-vis the deviation of 6.3% from the approved sales to the actual sales. The Appellant has prudently procured its non-Solar REC's, especially given a situation that the Appellant is not aware of its actual RPO requirement, even at the end of the financial year.

4.39 Further, Regulation 5.1 of the RPO Regulations, 2010 clearly provides that the RPO targets for obligated entities, is the ***minimum percentage*** that they are required to meet. Meaning thereby that, the Obligated Entities (including the distribution licensee) are obligated to meet the minimum RPO requirement, failing which penalties are leviable and not the other way around especially when such purchases are on account of reasons beyond the Appellant's control. Such minor deviations ought not be disallowed to the detriment of the Appellant. This is also contrary to the promotion of RE in terms of the Electricity Act.

4.40 As it is not possible for a distribution licensee to exactly estimate the REC requirement before the end of the financial year, certain deviation from the minimum RPO ought to be permitted and the Distribution Licensee ought not to be penalised for procuring marginally more or lesser RECs.

4.41 It is pertinent to note that in the subsequent RPO Regulations 2016, MERC has accepted that distribution licensees face difficulty in estimating the actual RPO requirement. Hence, in the said RPO Regulations, 2016, MERC has categorically provided that any variation in the fulfilment of RPO targets by the Obligated Entity within a band of +/- 5% of the applicable RPO target (in terms of Energy Units or MWh) for the respective years shall be allowed. In the Statement of Objects and Reasons to the RPO Regulations 2016, MERC notes that it has provided deviations from the RPO targets to take into account variations that may arise on account of, *inter alia*, factors such as change in sales trajectory and

consumption mix, impact of Open Access etc which are beyond the control of the Obligated Entity.

4.42 The impact of the Impugned Order by disallowance of Non-Solar REC is Rs. 1.50 Crores for FY 2012-13 and FY 2013-14 (Rs 0.12 Crores in FY 2012-13 and Rs. 1.38 Crores in FY 2013-14).

C.2: Wrongly disallowed payment towards exchange/trading fees on procurement of Renewable Energy Certificates ("RECs")

4.43 MERC has wrongly disallowed Rs. 0.02/kWh paid by the Appellant towards exchange/trading fees for FY 2012-13 and FY 2013-14.

4.44 In the data gap response submitted by the Appellant, the amount of Rs. 0.02/kWh was shown to have been paid higher than the Floor Price of Rs. 1.50/kWh for non-solar RECs on account of exchange/trading fees. Further, it was submitted that service tax had been paid on procurement of non-solar RECs.

4.45 MERC while approving total cost of RECs purchased for FY 2012-13 & FY 2013-14 had disallowed Rs. 0.02/kWh and service taxes paid towards REC purchase, wrongly presuming that entire amount is paid to trader.

4.46 The Appellant had purchased REC's from two exchanges i.e. from:-

(a) Indian Energy Exchange; and
(b) Power Exchange of India Limited

during the year FY 2012-13 & FY 2013-14. For any power purchase / REC, Exchanges charge, Exchange Fees and Service

tax on such purchase, regardless of whether the transaction is undertaken through a trader or directly with the Exchange, is payable. Accordingly, MERC ought not to have disallowed the amount of Rs. 0.02/kWh and service taxes as claimed by the Appellant.

4.47 MERC has erroneously considered trading margin paid by the Appellant as Rs. 0.02/ kWH, when the actual trading margin paid by the Appellant comes up to approximately Rs. 2 Lacs. By considering trading margin as Rs. 0.02/ kWh, MERC has in effect disallowed a greater amount as compared to the Rs. 2 Lacs actually paid by the Appellant towards trading margin.

C.3: Wrongly refused to relax the norms and allow actual Operation and Maintenance (“O&M”) expenses

4.48 In support of its findings, MERC has submitted that:-

(a) The whole purpose of specifying norms in the MERC MYT Regulations 2011 was to link the O&M expenses to clearly measurable output parameters. Having done so, allowing O&M expenses on actual basis would defeat the whole purpose of specifying norms.

(b) The Appellant is in effect contending that in case actual expenses are lower than the norms, the norms should be considered, and in cases where the norms actuals are higher than norms, then actuals should be considered. Such pick and choose approach cannot be allowed.

(c) Further, where no norms are prescribed, the Appellant is in effect challenging the MYT Regulations through this Appeal.

(d) With regard to relaxation of norms, it is submitted that such power is discretionary in nature and the Appellant cannot demand such relaxation.

4.49 MERC has erroneously allowed O & M expenses on the normative basis for the Appellant instead of actual basis. MERC ought to have relaxed the norms to approve actual expenses under **Regulation 100 on the MYT Regulations, 2011.**

4.50 O&M expenses include the expenditure on manpower, repairs, spares, consumables, insurance and overheads. These expenses primarily consist of three categories viz.,:-

(a) Employee Expenditure,

(b) Administration & General Expenditure (A&G) and

(c) Repair & Maintenance Expenditure (R&M).

Of the aforesaid expenses, while R&M expenditure depends on the asset base of the Distribution Utility, the Employee Expenditure and the A&G expenditure depends on the number of units served as well as the number of consumers served. Further, certain expenditures also have a direct co-relation with the number of consumers served, such as number of meter readers required, number of bills issued, etc.

4.51 Since the Appellant's consumer base was very small, while deciding the O&M expenditure norms in the MYT Regulations, 2011 for the Appellant, only one parameter of Rs. / kWh was used as compared to a combination of Rs. / kWh and Rs. Lakhs / '000 Consumers, which is used for all other distribution licensees in Maharashtra.

4.52 As per Regulations 78 and 92 of the MYT Regulations, 2011, normative O&M expenses for any distribution utility is derived based on three factors.

(a) For the Wire Business, the following are taken in account:-

(i) Energy Wheeled (Paise/kWh)

(ii) Consumers in Wires Business (Rs Lakh/'000 Consumer)

(iii) The percentage of the opening GFA

(b) For the Supply Business, the following factors are taken into account:

(i) For sales in Supply Business (Paise/kWh)

(ii) For Consumers in Supply Business (Rs. Lakh/'000 Consumer)

(iii) R&M expenses (Percentage of Opening GFA)

4.53 The consumer base of the Appellant which was 23,639 in the year FY 2008-09 has increased to 5,99,344 in FY 2014-15, which is a very significant increase. Such addition of consumers was primarily in categories of low consumption. Hence, the result of this addition of low end consumers is that quantum in terms of MUs did not increase much, but the number of consumers has increased substantially. This has resulted in an increase in O&M expense related to servicing the consumers like meter reading, billing, attending to complaints etc. for the Appellant. However, since there were no norms specified based on consumer base unlike other Distribution Utilities, the Appellant has been deprived of these incremental costs. The comparative table for Actual cost and normative cost allowed is set out, annexed herewith this Note.

4.54 The Appellant, in its MTR Petition, had pointed out to MERC that the O&M expenses had increased also due to several exceptional activities undertaken by the Appellant. In fact, MERC in R-Infra's MYT Order dated 22.08.2013 in Case No. 09 of 2011 has recognised that such increased expenditure was in fact unavoidable. Therefore, MERC ought to have relaxed the norms and approved the actual expenses under Regulation 100 on the MYT Regulations, 2011 as allowed in case of R-Infra. It is submitted that MERC, being the sector regulator, cannot discriminate between two distribution licensees. MERC cannot seek to mete out differential treatment to distribution licensees, especially when they are operating as parallel distribution licensees.

4.55 The impact of the absence of allowance of actual O&M expenses (after considering the pass through of 1/3rd of the uncontrollable expenses to the consumers) and the loss suffered by the Appellant in FY 2012-13 and FY 2013-14 comes up to **Rs. 11.49 Crores.**

5. Learned counsel, Mr. Buddy A. Ranganadhan, appearing for the Respondent has filed his written submissions for our consideration as follows :-

The submissions on each of the issues raised are as under:-

ISSUE No. A.1 Carrying Cost:-

5.1 The Appellant has contended that, in the impugned Order, the Respondent Commission has wrongly denied Carrying Cost on the heads wherein:

(i) Principles adopted by the Respondent Commission have been set aside and the Tribunal has directed the Respondent Commission to determine the expenses or Revenue by correct methodology or principle;

(ii) Carrying Cost on the Revenue Gap that has resulted due to reverse migration of subsidising consumers back to RInfra-D;

(iii) Recovery of Regulatory Asset contrary to principles set out by the Tribunal in Appeal No. 160 of 2012 and batch of Appeals.

5.2 It is submitted that the aforesaid issues are entirely covered against the Appellant in the Judgment of this Hon'ble Tribunal dated 3-6-2016 in **Appeal No. 244 and 246 of 2015 paras 9** titled Tata Power Company Ltd Vs MERC). A Review Petition filed by the Appellant in respect of the aforesaid Judgment was also dismissed by this Tribunal vide Judgment dated 17-11-2016 in RP No. 13 of 2016. Without prejudice to the same, it is submitted, inter alia, as under:-

(a) In regard to the contention that carrying cost ought to have been allowed even when a new methodology was specified by this Tribunal it is submitted that:-:

(i) The Commission has allowed Carrying cost on certain heads of expenses that have been allowed subsequently, and has not considered Carrying Cost on certain heads wherein the correct principle or methodology has been laid down by the Tribunal subsequently. The Respondent Commission has explained this rationale in the impugned Order.

(ii) It is respectfully submitted that such treatment of the heads of expenses on which Carrying Cost is allowable, exactly in accordance with the Judgment of the Tribunal. Even the Appellant has relied only on the Judgment in Appeal No. 173 of 2009.

(iii) Neither in the Appeal nor in its submissions has the Appellant urged, much less established, that such reasons are wrong. In fact the thrust of the Appellant's argument is that in the light of the tests laid down in Appeal No. 173 of 2009, carrying cost ought to have been granted even though the reasons given by the Commission for not allowing carrying cost have not been challenged. It is not the Appellants case that the reasons given in the Order are wrong. The Appellant has not even attempted to discharge its burden of proof to show, even prima facie, that the reasons as mentioned in the above table of the Impugned Order are wrong. Hence there has been no occasion for the Respondents to seek to justify such reasons.

(iv) The reasons enumerated in the impugned Order will clearly show that the claim for carrying cost does not fall into the tests laid down in the Judgment in Appeal No. 173 of 2009.

(v) It is therefore submitted that in the light of the tests laid down by this Tribunal in Appeal No. 173 of 2009 (which even the Appellant itself is relying on) carrying cost ought not to be allowed to the Appellant for the reasons mentioned in the Impugned Order.

(b) As regards the issue of non-consideration of Carrying Cost on the amount of Revenue Gap, it is submitted that:-

(i) The Respondent Commission has clearly outlined its rationale for such treatment in the impugned Order.

(ii) The Appellant has not countered the above justification given by the Respondent Commission in the impugned Order, and hence the Appeal on this issue should be dismissed.

(iii) Further, the impact of the non-consideration of Carrying Cost on the Revenue gap, as contended by the Appellant in the Appeal, is based on the Appellant's revised presentation of all numbers, which is not admitted by the Respondent Commission, as stated earlier.

(c) As regards the Appellant's contention that the Respondent Commission has not allowed Carrying Cost in the year of origin and year of recovery, it is submitted that:-

(i) in the impugned Order, the Carrying Cost has been allowed for the year of origin and year of recovery.

(ii) The Respondent Commission respectfully submits that the same issue was agitated by the Appellant in the Review Petition filed by the Appellant against the impugned Order, and the Respondent Commission has already clarified in this regard in the Review Order dated 5 November, 2015 .

(iii) Further, from the Appeal, it appears that the Appellant is challenging the computation of Carrying Cost considered in the MYT Order. The Respondent Commission respectfully submits that the MYT Order is not the subject matter of this Appeal, and has achieved finality, and it is not open for the

Appellant to appeal against any computation in that Order. Thus, this issue does not survive.

Hence, there is no merit in the Appellant's contentions in this regard, and the same deserves to be rejected.

ISSUE No. A.2 - Disallowance of Property Tax:-

5.3 The Appellant has contended that, in the impugned Order, the Respondent Commission has wrongly disallowed Property Tax at the time of truing up even though, under Regulation 12 of the MERC MYT Regulations, 2011, change in taxes and duties are uncontrollable expenses.

5.4 In its Mid-term Review Petition, the Appellant had considered the Property Tax as an uncontrollable expenditure. The submissions of the Appellant in its Petition are reproduced below:

> *"Further, Tata Power-D wishes to submit that the property tax which is levied by Municipal Corporation of Greater Mumbai "MCGM" and governed by the 'Mumbai Municipal Corporation Act 1888 (MMC Act) is an uncontrollable expenditure."*

5.5 The Respondent Commission, in the impugned Order, took the view that under Regulation 12.2(g) of the MERC MYT Regulations, 2011, the variation in O&M expenses was a 'controllable' factor, and hence, did not accept TPC-D's submission that part of the O&M Expenses, including Property Tax, should be considered as uncontrollable and deducted before sharing the Gains/losses. The entire O&M Expenses were considered as controllable in

accordance with the MERC MYT Regulations, 2011, and sharing of gains and losses was carried out.

5.6 The normative O&M expenses are derived based on the methodology specified in the MERC MYT Regulations, 2011. Therefore, the normative O&M expenses have an in-built escalation of 5.72%. Increase in any type of taxation is also included as part of the composite escalation rate. Therefore, there is no merit in allowing the variation in property tax separately.

5.7 It is further submitted that a **three Judge Bench of this Hon'ble Tribunal has In Judgment dated 23-3-2011 in Appeal No. 139 of 2009 titled Maharashtra State Electricity Transmission Co Ltd Vs MERC in paras 8.2 to 8.5** have also held and accepted that ". A&G and R&M expenses are controllable factors

5.8 For all the aforesaid reasons, there is no merit in the appellants contentions on this issue.

<u>ISSUE No. B.1 – Disallowance of Income Tax on (i) Efficiency Gain and Incentives and (ii) on billed revenue rather than accrued revenue:-</u>

5.9 The Appellant has contended that, in the impugned Order, the Respondent Commission has incorrectly computed Income Tax as it has not allowed Income tax on efficiency gains and incentive, in terms of Regulation 34.2 and 34.3 of the MERC MYT Regulations, 2011;

(i) instead of calculating Income Tax on accrual basis, has wrongly computed the same on revenue billed basis, contrary to the Income Tax Act, 1961.

5.10 The aforesaid issues are entirely covered against the Appellant in the Judgment of this Tribunal dated 3-6-2016 in **Appeal No. 244 and 246 of 2015 page 65** titled Tata Power Company Ltd Vs MERC. A Review Petition filed by the Appellant in respect of the aforesaid Judgment was also dismissed by this Tribunal vide Judgment dated 17-11-2016 in RP No. 13 of 2016.

5.11 The Appellant has contended that the Respondent Commission has wrongly relied on the proviso to Regulation 34.1 of the MERC MYT Regulations, 2011, to deny Income Tax on the amount of efficiency gain and incentive. The Appellant has further contended that the proviso to Regulation 34.1 of the MERC MYT Regulations, 2011 is applicable only at the time of tariff determination and not at the stage of truing up. The Appellant has also contended that as per Regulation 34.2 and 34.3 of the MERC MYT Regulations, 2011, the Income Tax has to be allowed based on the income stream of the regulated business, including efficiency gains and incentive. Further, since efficiency gain and incentive are part of tariff computation the Income Tax on the same has to be allowed to be recovered through the ARR. It is submitted that such interpretation of the MERC MYT Regulations, 2011 is totally erroneous and cannot be permitted.

5.12 There is no merit in the Appellant's contention, as the amounts of efficiency gain and incentive are crystallised at the time of truing up only, and hence there is no question of such amounts even being considered for pass through at the time of ARR and tariff determination.

5.13 Secondly, the Appellant has contended that, since efficiency gain and incentive are part of tariff computation the Income Tax on the same has to be allowed to be recovered through the ARR. This is factually incorrect. Regulation 14.1 of the MERC MYT Regulations, 2011 specifies as under:

> *"14.1 The approved aggregate gain to the Generating Company or Transmission Licensee or Distribution Licensee on account of controllable factors shall be dealt with in the following manner:*
>
> *(a) One-third of the amount of such gain shall be passed on as a rebate in tariff over such period as may be stipulated in the Order of the Commission under Regulation 11.6;*
>
> *(b) The balance amount, which will amount to two-third of such gain, may be utilised at the discretion of the Generating Company or Transmission Licensee or Distribution Licensee"*

5.14 The issue of allowing Income Tax raised by the Appellant is on the Licensee's share of the efficiency gain [under Regulation 14.1 (b)], which is not considered in the tariff and is to be utilised at the discretion of the Licensee. Thus, as these amounts are not considered in the ARR and tariff, Income tax on these amounts retained by the Licensee cannot be passed on to the consumers, and the Licensee has to bear the Income Tax on the same.

5.15 Interestingly, the Appellant's tariff Petition does not appear to contain any such claim as is being sought to be made before this Tribunal.

5.16 Moreover, this Tribunal, in its Judgment in **<u>Appeal No. 104-105-106 of 2012 (para 55)</u>** dt 28-11-2013 titled TPC Vs MERC has held that:

"any notional or actual income even within regulated business that is not permissible to be considered as regulatory taxable income cannot be allowed as it would amount to allowance of more than warranted regulatory tax liability/profits."

5.17 If therefore, the Regulations do not permit the Income Tax on efficiency gains and incentives to be passed through in tariff, there can be no question of the Appellant contending (as it is) that such Regulation applies only to a tariff determination stage and not a true up stage. If a certain item cannot be allowed in tariff, it certainly cannot be allowed in true-up.

5.18 In fact the Appellant, even in its tabular Notes of Arguments in para 1(e)(i) on page 7 in Appeal No. 244 and 246 of 2015 admits that the Commission cannot deviate from its own methodology at the stage of truing up. In the same breath the Appellant seeks to contend that the Tariff Regulations prohibit tax on incentives at the stage of tariff determination and such prohibition cannot extend to truing up. It is submitted that the Appellant ought not to be permitted to "blow hot and cold".

5.19 The law as laid down by this Tribunal is that the Commission cannot change the principles of tariff determination at the true up stage. This self-same argument has been contended by this very Appellant itself inter alia, relying upon the Judgments of this Tribunal in Appeal No. 37 of 2010 dated 10th August 2010, titled Meghalaya State Electricity Board Vs MSERC in the following terms:-

"It is settled law that the stage of truing up as mentioned earlier is not to reopen the basis of redetermination of tariff and it is only comparing the estimated figures at the beginning of the year with the actual figures at the end of the year…."

5.20 It is further submitted that this Tribunal has upheld such similar dispensation for Income Tax on incentives in the case of **PSTCL Vs PERC – Appeal No. 262 of 2014 dated 14-1-2016 para 12-14 reported in 2016 ELR 383.**

5.21 In regard to the second contention that the Commission instead of calculating Income Tax on accrual basis, has wrongly computed the same on revenue billed basis, contrary to the Income Tax Act, 1961, it is submitted that:-

(i) The Appellant has also contended that the Income Tax should be allowed to the Appellant on the income of the regulated business accrued for that year, rather than the billed Revenue as considered by the Respondent Commission in the impugned Order. The Appellant has further contended that, when truing up is done for any year, the Respondent Commission approves the actual ARR for that year, which is the income for that Business. The Appellant has further contended that the Respondent Commission has deviated from the methodology at the time of truing up, which is not permitted.

(ii) It is relevant to make that for the years from FY 2007-08 to FY 2010-11, though the Appellant had submitted in the Mid-term Review Petition that it was claiming Income Tax in accordance with the Hon'ble Tribunal's Judgment, in fact, the Appellant had claimed Income Tax by grossing up the RoE, though the Hon'ble Tribunal had ruled that Income Tax would be computed on Profit before Tax (PBT) basis at the time of truing up. This aspect and the Respondent Commission's

rationale in this matter has been clearly explained in the para 3.1.1 of the impugned Order .

5.22 Further, in the additional data gaps dated March 24, 2015 sent to the Appellant, the Respondent Commission asked the Appellant to submit the following information vide query number 12:

"12) TPC-D should submit the income tax computation for the period from FY 2007-08 to FY 2011-12 on Profit before Tax (PBT) basis.

a. TPC-D should also provide the Reconciliation Statement for those years for considering the Revenue and expenses to regulated business (Generation, Transmission and Distribution) and other business for all the years from FY 2007-08 to FY 2011-12.

b. TPC-D should reconcile the amount considered as Revenue for truing up purposes vis-a-vis the amount considered as Revenue for income-tax purposes for each year from FY 2007-08 to FY 2011-12."

5.23 It may be noted that, though the Appellant submitted the Reply to Query No. 12 (a) for FY 2009-10 and FY 2010-11, the Appellant did not submit the reply to Query No. 12 (b) for any of the years under consideration. In other words, the Appellant is not in a position to reconcile the amount considered as Revenue for truing up purposes vis-a-vis the amount considered as Revenue for Income-Tax purposes for each year from FY 2007-08 to FY 2011-12. In the absence of such reconciliation, the Respondent Commission could not have considered the Revenue as claimed by the Appellant for Income Tax purposes.

5.24 Further, the Appellant's contention that, when truing up is done for any year, the Respondent Commission approves the actual ARR

for that year, which is the income for that Business, is totally incorrect, as the ARR is not equal to income. If that were the case, then Revenue side true up would not require to be carried out at all. Moreover, the income booked by the Appellant for Income Tax purposes is the expense incurred by it in that year, which is not equal to the ARR approved by the Respondent Commission for that year. Therefore, the Appellant's contention that the same trued up ARR should be considered as the income has no merit. Further, there is no basis for the Appellant's contention that the Respondent Commission has deviated from its principles in this regard in the impugned Order. The Respondent Commission has rightly considered the regulatory PBT as the difference between the income considered for truing up purposes and the expenses allowed at the time of truing up.

5.25 As regards the Appellant's contention that the approach adopted by the Respondent Commission will result in zero Income Tax being allowed on account of the presence of Regulatory Assets, the same is negated by the impugned Order itself wherein the Respondent Commission has allowed Income Tax of over Rs. 50 crore for the period from FY 2008-09 to FY 2013-14. Further, in an ongoing business like the Appellant's, regulatory PBT for any year will include the Regulatory Asset that is allowed to be recovered in any year, and hence the amount of Income Tax will get computed correctly.

Hence, there is no merit in the Appellant's contentions in this regard, and the same deserves to be rejected.

ISSUE No. B.2 - Determination of Interest on Fuel Adjustment Charge (FAC):-

5.26 The Appellant has contended that, in the impugned Order, the Respondent Commission has wrongly disallowed interest on FAC.

5.27 In the impugned Order, the Commission has clearly stated the rationale for disallowing the interest on FAC, as reproduced below:

> **"4.15 INTEREST ON WORKING CAPITAL ON FAC**
>
> *TPC-D submitted that, in FY 2012-13, it was charging FAC as per the Tariff Regulations, 2005 and subsequent amendments. Since FAC reflects the change in the variable charges and is collected after a lag of two months, it is entitled to recover interest ("I" in Regulation 82.6). The IoWC of FAC works out to Rs. 19.70 Crore.*
>
> ***Commission's Analysis***
>
> *The FAC formula already provides for interest due to delayed recovery of FAC. The Commission has already allowed the normative IoWC, which is TPC-D's legitimate claim. Hence, it has disallowed interest of Rs. 19.70 Crore on FAC recovery claimed by TPC-D."*

5.28 As stated in the impugned Order, the interest on working capital already factors in the actual fuel and power purchase cost and the cost of the total working capital requirement hence, there is no requirement to allow the interest on the FAC separately. The interest on FAC is in-built in the FAC Formula, and is hence considered in the Revenue earned from FAC. On the cost side, the interest on working capital factors in this cost, hence there is no requirement for allowing further interest on FAC as an expense in the ARR. The Claim of the Appellant would clearly lead to double

counting of the Interest on the FAC. Further, the same treatment has been adopted for other Distribution Licensees also.

5.29 It is submitted that a similar issue is also pending before this Tribunal in appeal by the other Discom of Mumbai, RInfra in Appeal No. 237 of 2015 and batch.

5.30 Hence, there is no merit in the Appellant's contentions in this regard, and the same deserves to be rejected.

ISSUE No. C.1 - Disallowance of Excess Non Solar REC purchased beyond the Renewable Purchase Obligation:-

5.31 The Appellant has contended that, in the impugned Order, the Respondent Commission has wrongly disallowed the Non-Solar Renewable Energy Certificate (REC) purchased beyond the Renewable Purchase Obligation (RPO) Requirement for FY 2012-13 and FY 2013-14.

5.32 In fact, the issue in respect of purchase of Solar Energy in excess of the RPO target has been disallowed by this Tribunal in Judgment dated **8-4-2015 in Appeal No. 160 of 2012 and batch para 97**. If purchase of solar energy in excess of the RPO target has been disallowed, it is submitted that the purchase of REC's in excess of the RPO target stands on a much weaker footing and ought to be rejected.

5.33 Without prejudice to the above, it is submitted that the above contentions of the Appellant do not have any merit, for the following reasons:

(a) While submitting its Truing Up Requirement for FY 2012-13 and FY 2013-14, the Appellant was well aware that the purchase of Non-Solar RECs had exceeded the RPO for the respective years. However, in its Mid-term review Petition, the Appellant did not ask for any specific relief in this regard, such as being sought in the present Appeal, viz., deviations being allowed upto +2% of RPO, or allowed to carry forward the surplus to the next year, etc.

(b) In fact virtually none of the contentions raised by the Appellant in the Notes of arguments appear to find place in the MTR petition before the Commission. It is respectfully submitted that the Appellant, not having sought such relief in the Petition before the Respondent Commission, cannot be allowed to seek such relief in an Appeal filed against the impugned Order. Therefore, the Respondent Commission has rightly disallowed the cost of excess RECs purchased.

(c) The rationale given in the Impugned Order is fully justified since the consumers ought not to be burdened with a cost that the licencee need not have incurred.

5.38 Hence, there is no merit in the Appellant's contentions in this regard, and the same deserves to be rejected.

ISSUE No. C.2 - Disallowance of amount paid towards exchange/trading fees:-

5.39 The Appellant has contended that, in the impugned Order, the Respondent Commission has wrongly considered the amount of Rs. 1.02/kWh as trading margin and disallowed Rs. 1.02 crore for FY 2012-13 and FY 2013-14.

5.40 The above contentions of the Appellant do not have any merit, for the following reasons:

(i) Firstly, the amount disallowed is “Rs. 0.02/kWh” and not “Rs. 1.02/kWh” as contended by the Appellant in the Appeal and in the Notes of Arguments.

(ii) Secondly, the Respondent Commission has not considered the amount of Rs. 0.02/kWh as trading margin on RECs, but has considered this amount as 'exchange/trading fees' based on the Appellant's reply to the Respondent Commission's query in this regard. In the data gaps dated 24.03.2015, and repeated in the data gaps dated 16.04.2015, the Respondent Commission enquired regarding the amount of Rs. 0.02/kWh over and above the floor price of RECs. The specific query and the Appellant's reply in this regard are reproduced below for reference:

> *"3. In the additional data gaps dated March 24, 2015, the Commission had asked TPC-D to submit the justification for procurement of solar and non-solar RECs in FY 2012-13 and FY 2013-14 at rates higher than floor price of RECs.*
> *a. In its reply, TPC-D has submitted no justification regarding purchase of <u>non-solar RECs</u>. TPC-D should submit justification for procurement of non-solar RECs also at rates higher than floor price in FY 2012-13.*
>
> ***Response***
> *...*
> *It is also submitted that the amount of Rs. 0.02/kWh higher that the Floor Price of Rs. 1.50/kWh is on account of exchange/trading fees and service tax thereon."*

(iii) The rationale adopted by the Respondent Commission has been clearly enunciated in the impugned Order as under:

> *"However, the Commission is of the view that TPC-D should have procured RECs directly from the Exchange not from traders, as the Exchange platform provides double-sided undisclosed bidding. In such a case, there is no additional benefit from procurement of RECs through traders. In this transaction, TPC-D has unnecessarily increased the burden on the consumers to the extent of trading fees and Service Tax. Hence, the Commission has disallowed the additional Rs. 0.02 per kWh incurred on account of exchange/trading fees and Service Tax thereon."*

(iv) Thus, it can be seen that the details of the charges paid to Exchange and Traders in FY 2012-13 and FY 2013-14 for procurement of RECs, submitted in the present Appeal, were not submitted to the Respondent Commission in the tariff petition or in the reply submitted by the Appellant to the specific query raised by the Respondent Commission in this regard.

(v) The findings and rationale contained in the impugned Order for this disallowance has not been challenged by the Appellant, much less answered.

5.41 Hence, there is no merit in the Appellant's contentions in this regard, and the same ought to be rejected.

<u>ISSUE No. C.3 - Disallowance of O & M</u>:-

5.42 The Appellant has contended that in the impugned Order, the Respondent Commission has erroneously allowed O&M expenses on normative basis instead of on actual basis, and that the

Respondent Commission ought to have relaxed the norms and approved the actual expenses under Regulation 100 of the MERC MYT Regulations, 2011.

5.43 The above contentions of the Appellant do not have any merit, for the following reasons:

(a) As regards the Appellant's contention that the actual O&M expenses rather than the normative O&M expenses should have been allowed, the Respondent Commission has clearly held on this issue in the impugned Order, as reproduced below:

"4.4.2 Total O&M Expenses for FY 2012-13

...

Commission's Analysis

TPC-D has requested the Commission to consider the actual O&M Expenses rather than the normative expenses as specified in the MYT Regulations. ***The Commission is of the view that, once the norms have been specified, these have to be considered, or else the whole purpose of linking the O&M Expenses to identified output parameters would be defeated****. Hence, the Commission has considered the normative O&M Expenses for FY 2012-13. Further, the Commission has undertaken sharing on account of Efficiency Losses/Gains between actual O&M Expenses and the normative expenses, considering the O&M Expenses as controllable, in accordance with the MYT Regulations..."(****emphasis added****)*

(b) As stated in the impugned Order, the whole purpose of specifying norms in the MERC MYT Regulations, 2011 was to link the O&M expenses to clearly measurable output parameters. Having done so, if the O&M expenses are to be allowed on actual basis, by ignoring the norms and without sufficient justification for deviation citing exceptional

circumstances, then the whole purpose of specifying norms will be defeated.

(c) The Appellant had challenged the Respondent Commission's Orders regarding determination of ARR for FY 2011-12 and onwards under the MERC MYT Regulations, 2011 [**Hon'ble Tribunal Judgments (i) dated 28-11-2013 In appeal 158, 182 and 183 of 2012 (ii) dated 28.11.2013 in Appeal No. 104, 105 and 106 of 2012 para 13 and (iii) dated 27-10-2014 in Appeal No. 212 of 2013 para 10-13**], where the main justification given by the Appellant was that, even though the actual expenses had been allowed for FY 2011-12, the norms specified in the MERC MYT Regulations, 2011 should be applied from FY 2011-12 onwards, and non-application of the same from FY 2011-12 onwards had resulted in financial losses to the Appellant. This challenge was allowed by this Tribunal. Thus, it appears that the Appellant is in effect contending that, in case the actual expenses are lower than the norms, then the norms should be considered, and in cases where the actual expenses are higher than the norms, then the actual expenses should be considered. In other words, the Appellant desires that only the efficiency gains should be considered, whereas the efficiency losses should not be considered. The Respondent Commission respectfully submits that such 'pick and choose' approach cannot be allowed.

5.44 The Appellant has further contended that, since there were no norms specified based on consumer base for the Appellant, unlike

the norms for other Distribution Licensees, the Appellant has been deprived of these incremental costs. It is submitted that:-

(i) This amounts to challenging the MERC MYT Regulations, 2011 through this Appeal, which is not before the Tribunal.

(ii) The Appellant had successfully argued for implementation of these very Regulations from FY 2011-12 onwards, being well aware of the contours and limits of these Regulations.

5.45 As regards the Appellant's contention that the Respondent Commission ought to have relaxed the norms and approved the actual expenses in the impugned Order, it is submitted that:-

(a) The exercise of the power of relaxation has to be premised on a right to claim relaxation and the Appellant cannot demand that such relaxation should be done in the absence of any such right.

(b) Further, if such discretionary power can be readily invoked by the Appellant, merely because the actual expenses are more than the norms, then the entire purpose of normative tariff determination would be meaningless. It is clear that such is not the intention of the Regulations, and the Appellant cannot seek such relief.

(c) The reliance by the Appellant on the Order in respect of RInfra is misconceived. The Order relied on by the Appellant in this regard is the "MYT" Order of the Commission dt 22-8-2013. Whilst the present appeal is against the "MTR" Order of the Appellant dt 26-6-2015. The Appellant can certainly

not rely upon the MYT Order of another licencee in a challenge to the MTR Order for the Appellant.

5.46 Hence, there is no merit in the Appellant's contentions in this regard, and the same ought to be rejected.

6. We have heard learned Counsel appearing for the Appellant and the learned Counsel appearing for the Respondent at considerable length of time and gone through their written submissions carefully and after thorough critical evaluation of the relevant material available on records, the issues that arise for our consideration are as follows:-

Issue No.1: Disallowance of carrying cost

Issue No.2: Wrong consideration of property tax

Issue No.3: Disallowance of Income tax

Issue No.4: Disallowance of interest on fuel adjustment cost

Issue No.5: Disallowance of purchase of excess non- solar REC beyond the RPO

Issue No.6: Disallowance of payment towards exchange / trading fees

Issue No.7: Refusal to relax the norms for allowing actual O&M expenses

Our Consideration & Analysis:-

Issue No.1:-

7. Learned counsel for the Appellant submitted that recovery of past regulatory assets that have arisen due to under-recovery of costs/ expenses by the distribution licensee and timely / adequate provision of carrying cost is legitimate entitlement of distribution companies to finance the gap in legitimate cash flow. He further

submitted that the State Commission has wrongly denied Carrying Cost to the tune of **Rs. 114.31 Crores** (as on FY 2015-16). Learned counsel vehemently submitted that as per Section 61 of the Act and the Revised Tariff Policy dated 28.01.2016, the Appropriate Commission has to ensure recovery of the costs of a distribution licensee, while undertaking tariff determination and in a catena of judgements of the apex court as well as this Tribunal, it has been held that the regulatory assets ought to be recovered along with carrying cost in a time bound manner. In this regard, he placed reliance on this Tribunal's judgment dated 15.02.2011 in case of *Tata Power Co. Ltd.* v. *Maharashtra Electricity Regulatory Commission* and judgment dated 13.04.2018 titled as *Adani Power Limited* v. *CERC & Ors.*. Learned counsel quick to point out that some mistakes were rectified by the State Commission in MTR order dated 26.06.2015. However, it failed to allow Carrying Cost pertaining to six-month period during which the principal amount is to be recovered by the Appellant. While relying on the judgement of this Tribunal dated 08.04.2015 in *Reliance Infrastructure Limited* v. *Maharashtra Electricity Regulatory Commission & Ors.,* learned counsel pointed out that the interest should be calculated for the period from the middle of the financial year in which the recovery has been proposed.

7.1 Learned counsel contended that MERC has disallowed carrying cost to the Appellant on the claims which were re-computed by it in accordance with the principles enunciated by this Tribunal in its Judgment dated 28.11.2013 in Appeal No. 106 of 2012. By the said judgement and order, this Tribunal had set aside the methodology applied by MERC for determining certain expenses /

revenue and laid down the correct principles for computation of the same. However, the State Commission had denied carrying cost to the Appellant on the recomputed amount, as directed by this Tribunal. Learned counsel further contended that in addition to the above, MERC has erroneously computed carrying cost on the original spread of past recoveries approved by it in its MYT Order dated 28.06.2013. Learned counsel summed up the claim for the carrying cost and contended that the State Commission ought to have allowed Carrying Cost on such revised spread of past recoveries, instead of the original spread of past recoveries approved by it.

7.2 ***Per contra, l***earned counsel for the Respondent Commission contended that the Appellant has made out the case for Carrying Cost mainly on the premise :

i. Principles adopted by the Respondent Commission have been set aside and the Tribunal has directed the Respondent Commission to determine the expenses or Revenue by correct methodology;

ii. Carrying Cost on the Revenue Gap that has resulted due to reverse migration of subsidising consumers back to RInfra-D;

iii. Recovery of Regulatory Asset contrary to principles set out by the Tribunal in Appeal No. 160 of 2012 and batch.

He was quick to point out that the aforesaid issues raised by the Appellant are entirely covered against the Appellant in the Judgment of this Tribunal dated 3-6-2016 in Appeal No. 244 and 246 of 2015 (para 9) in case of Tata Power Company Ltd Vs MERC. Further to that, a Review Petition filed by the Appellant in

respect of the aforesaid Judgment was also dismissed by this Tribunal vide Judgment dated 17-11-2016 in RP No. 13 of 2016. Learned counsel further submitted that the State Commission in the impugned order has explained the rationale for allowing Carrying Cost on certain heads wherein the correct principle or methodology has been laid down by this Tribunal subsequently. Learned counsel vehemently submitted that such treatment of the heads of expenses on which Carrying Cost is allowable is exactly in accordance with the Judgment of this Tribunal in Appeal No. 173 of 2009 on which the Appellant has also relied upon. He further submitted that the Appellant has not countered the justification given by the Respondent Commission in the impugned Order, and the Appellant's contention on the impact of non-consideration of carrying cost on the revenue gap has primarily arisen out of the revised presentation of all members by the Appellant which is not admitted by the State Commission. Regarding Appellant's contention that the Respondent Commission has not allowed Carrying Cost in the year of origin and year of recovery, learned counsel clarified that the State Commission has allowed the same strictly as per statement of the Appellant which was subsequently clarified in Review Order dated 5 .11. 2015 .

7.3 Learned counsel contended that the Appellant is trying to challenge the computation of Carrying Cost considered in the MYT Order which is not the subject matter of this Appeal and has achieved finality. Thus, it is not open for the Appellant to appeal against any computation in that Order. Accordingly, this issue does not survive for consideration and deserves to be rejected.

Our Findings:-

7.4 We have carefully considered the rival contentions of the learned counsel for the Appellant as well as learned counsel for the Respondent Commission and also took note of various judgements of this Tribunal, relied upon by learned counsel. While learned counsel for the Appellant contends that the carrying cost which is a legitimate entitlement of the distribution company to finance gap in cash flow, have been disallowed by the State Commission on one or the other account. It is the submission of the learned counsel for the Appellant that the corrective methodology specified by this Tribunal in its judgment dated 15.02.2011 and 13.04.2018 has not been appropriately applied by the State Commission resulting into financial loss to the Appellant on account of disallowance of the requisite carrying cost. On the other hand, learned counsel for the Commission submitted that the aforesaid issues are entirely covered against the Appellant in the Judgement of this Tribunal dated 3.6.2016 in A.No.244 & 246 of 2015 in the case of Tata Power Company Ltd. vs. MERC against which the Review Petition was also dismissed by this Tribunal vide judgement dated 17.11.2016 in R.P. No. 13 of 2016. We have gone through the findings of the State Commission in this regard and note that the Commission has allowed the carrying cost on items which it had originally disallowed but have been subsequently allowed in compliance with the directive of this Tribunal. The relevant extract of the impugned order is reproguced as under:-

"On certain other claims, the Commission had allowed expenses or Revenue based on certain principles, for the assessment of which the ATE has now enunciated a different

methodology or principle. Since the revised claim towards such items have been worked out based on the methodology or principles enunciated by ATE subsequently and there had been no stay of the original Order, the Commission has not considered the carrying cost on such claims since the amounts were not disallowed earlier but were assessed on different principles. Most of these items now being allowed differently due to the change of methodology, i.e., Income Tax, impact of Truing Up for FY 2011-12 in accordance with the MYT Regulations rather than Tariff Regulations, etc., are normative expenses rather than actual expenses. The actual expenses have already been allowed. Hence, non-consideration of carrying cost on such items cannot be said to adversely affect TPC-D."

(emphasis supplied)

7.5 It is relevant to note that the main reason for the large cumulative Revenue Gap faced by TPC-D in FY 2015-16 is the reverse migration of subsidising consumers back to RInfra-D. However, TPC-D did not think it fit to petition the State Commission at that time itself to seek the tariff correction required, as the basic premise underlying TPC-D's MYT Order had undergone significant change. The findings of the State Commission on this aspect are as under:-

"The Commission is of the view that TPC-D ought to have approached the Commission with a request for specific relief in terms of tariff revision, within 3-4 months of RInfra-D's MYT Order dated 22 August, 2013 in Case No. 9 of 2013, when the reverse migration of the subsidising load, and its likely magnitude and impact, would have become apparent to TPC-D. This might have enabled TPC-D to recover its Revenue Gaps earlier, thereby minimising the avoidable future carrying cost. On the contrary, even in the present MTR Petition, TPC-D has proposed to further defer the recovery and to compound such deferment by back-ending it, while claiming carrying cost @14%.

The Commission concludes that the avoidable delay by TPC-D in seeking this relief has resulted in undue carrying cost and resultant tariff shock to consumers. Accordingly, the Commission is not allowing any carrying cost on the amount of Regulatory Assets that is deferred to future years."

(emphasis supplied)

As rightly pointed out by the learned counsel for the Respondent Commission that the Appellant has not countered the above justification given by the State Commission in the impugned order and hence the Appeal on this issue may not be maintainable. It is also noticed that the impact of the non-consideration of carrying cost on the revenue gap as contended by the Appellant is based on the revised presentation of all numbers by the Appellant which has not been admitted by the State Commission as per settled principles of law.

7.6 Regarding the Appellant's contention that the Respondent Commission has not allowed carrying cost in the year of origin and year of recovery, it is pertinent to note that the same is not justified from the available records. In view of these facts, we opine that the Respondent Commission has adequately addressed the issue of carrying cost in line with its regulations and the judgements of this Tribunal and any interference of this Tribunal on this issue is not called for.

Issue No.2:-

8. Learned counsel for the Appellant submitted that the property tax is levied by the Municipal Corporation of Greater Mumbai and the Appellant is statutorily bound to make such payments which is an

uncontrollable expense. He further submitted that in terms of Regulation 12.1(d) of the MYT Regulations 2011, change in law is also an uncontrollable factor. Learned counsel vehemently submitted that the State Commission has allowed Property Tax, being an uncontrollable factor, as a pass through but while doing so, it has considered it as a part of the O&M expenses while computing the Efficiency Gains & Losses. Learned counsel quick to point out that it is a settled principle of law that uncontrollable factors are not to be considered while computing Efficiency Gain/ (Loss) of the distribution licensee. To substantiate his submission, learned counsel relied upon the judgement of this Tribunal dated 15.02.211 in Appeal No. 173 of 2009 which has dealt about introduction of Fringe Benefit Tax ("**FBT**"). Learned counsel further contended that the principles laid down by this Tribunal in the above judgement is squarely applicable to increase in Property Tax, since change in Property Tax is a uncontrollable factor.

8.1 ***Per contra, l***earned counsel for the Respondent Commission submitted that in the impugned order, the State Commission had taken a view that under Regulation 12 of the MERC MYT Regulations, 2011, variation in O&M expenses was a controllable factor hence did not accept TPC-D submissions, the part of O&M expenses including Property Tax, should be considered as uncontrollable and deducted before sharing the Gains/losses. He further contended that normative O&M Expenses have an in-built escalation of 5.72% and increase in any type of taxation is also included as part of the composite escalation rate. To support his

contentions, learned counsel relied upon the judgment of this Tribunal dated 23-3-2011 in Appeal No. 139 of 2009 in the case of Maharashtra State Electricity Transmission Co Ltd Vs MERC which held and accepted that "..A&G and R&M expenses are controllable factors.

Our Findings:-

8.2 We have analysed the submissions of the learned counsel for both the parties and also took note of various judgements of this Tribunal and findings of the State Commission on the issue. What transpires therefrom that though TPC-D had submitted the property tax as an uncontrollable expenditure and requested for get deducted before sharing the gains/losses, however, in view of the inbuilt escalation of 5.72% in normative O&M expenses, the State Commission considered that increase in any type of taxation including property tax could be subsumed in the said escalation and accordingly did not allow the variation in property tax separately. In light of these facts, we consider the findings of the State Commission as just and right, having no necessity of any interference by this Tribunal.

Issue No.3:-

9. Learned counsel for the Appellant submitted that the Respondent Commission has incorrectly computed income tax as it has not allowed income tax on efficiency gains and incentive in terms of Regulation 34.2 and 34.3 of the MYT Regulations 2011. He further submitted that instead of calculating income tax on accrual basis, the Commission has wrongly computed the same on

revenue billed basis, contrary to the Income Tax Act, 1961. Learned counsel quick to submit that the State Commission in doing so has wrongly relied on the proviso to Regulation 34.1 which can be applied only at the time of tariff determination and not at the stage of truing up. Additionally, it is the Appellant's contention that since efficiency gain and incentive are part of tariff computation, the income tax on the same has to be allowed to be recovered through the ARR.

9.1 Learned counsel pointed out that as a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. In this regard, he relied on the judgment of the Hon'ble Supreme Court in *Haryana State Cooperative Land Development Bank Ltd.* v. *Haryana State Cooperative Land Development Banks Employees Union & Anr.* reported as (2004) 1 SCC 574. Regarding MERC's objection that the Appellant has been claiming Income Tax by grossing up RoE and not on the basis of PBT (Profit Before Tax), learned counsel clarified that both the options were submitted to MERC and no objections/ recordings has been made in the Impugned Order. Learned counsel submitted that as per _Section 145 of the Income Tax Act, 1961, Income chargeable under the head of "Profits and gains of business or profession" or "Income from other sources" shall be computed in accordance with the method of accounting regularly employed by the assessee. The Appellant has been consistently following the accrual basis of accounting and the resultant profit and the computed income is also on accrual basis. Accordingly,

the income tax should be allowed to the Appellant on the income of the regulated business accrued for that year.

9.2 Learned counsel for the Appellant alleged that the State Commission has deviated from its own methodology by considering billed revenue as income, which, in fact, is not the approved income of the Regulated Business once Truing up has been done for the relevant financial year. Learned counsel quick to point out that such change in methodology at the stage of truing up is impermissible in law, as held by this Tribunal in a catena of Judgments. In this regard reference may be made to the judgement of this Tribunal:-

(a) Judgment dated 10.08.2010 in Appeal No. 37 of 2010 titled as *Meghalaya State Electricity Board* v. *Meghalaya SERC* reported as 2010 ELR (APTEL) 940 [Para 34];

(b) Judgment dated 31.08.2012 in Appeal No. 17, 18 and 19 of 2011 titled as *Tata Power Company* v. *MERC*; and

(c) Judgment dated 09.10.2009 in Appeal No. 15 of 2008 titled as *Bangalore Electricity Supply Company Ltd.* v. *Karnataka Electricity Regulatory Commission* reported as 2009 ELR (APTEL) 1012 [Para 4-7].

In regard to the queries raised by the State Commission that the Appellant could not submit requisite responses to the queries raised by it, learned counsel submitted that the information was submitted, however, the authenticity of the same was never questioned by the State Commission. Moreover, there is no reasoning given in the impugned order regarding such contentions and due to lack of adequate grounds and reasoning, the impugned

order emerges to be a non-speaking order. In this regard. Learned counsel relied on the judgement of the apex court in *Mohinder Singh Gill* v. *Chief Election Commissioner, New Delhi & Ors.* which clearly held that when a statutory functionary makes an order based on certain grounds/ reasoning, its validity must be judged by the reasons so mentioned.

9.3 ***Per contra, l***earned counsel for the Respondent Commission submitted that the aforesaid issues raised by the Appellant are entirely covered against it by the judgment of this Tribunal dated 03.06.2016 in A.No.244 & 246 of 2015 against which a Review Petition filed by the Appellant was also dismissed by this Tribunal vide Judgment dated 17-11-2016 in RP No. 13 of 2016. He further submitted that interpretation of MERC MYT Regulations, 2011 by the Appellant is totally erroneous. In fact, there is no merit in the Appellant's contention as the amount of efficiency gain and incentives are crystalised at the time of truing up only and hence there is no question of such amounts even being known or pass through at the time of ARR and tariff determination. Further, the Appellant's contention that, since efficiency gain and incentive are part of tariff computation the Income Tax on the same has to be allowed to be recovered through the ARR. This is factually incorrect. Regulation 14.1 of the MERC MYT Regulations, 2011 is crystal clear in this regard.

9.4 The issue of allowing Income Tax raised by the Appellant is on the Licensee's share of the efficiency gain [under Regulation 14.1 (b), which is not considered in the tariff and is to be utilised at the

discretion of the Licensee. As these amounts are not considered in the ARR and tariff, Income tax on these amounts retained by the Licensee cannot be passed on to the consumers, and the Licensee has to bear the Income Tax on the same. Learned counsel also submitted that tariff petition of the Appellant did not contend any such claim as is being sought to be made before this Tribunal. Moreover, this Tribunal, in its Judgment in **Appeal No. 104-105-106 of 2012 (para 55)** dt 28-11-2013 titled TPC Vs MERC has held that:

> *"any notional or actual income even within regulated business that is not permissible to be considered as regulatory taxable income cannot be allowed as it would amount to allowance of more than warranted regulatory tax liability/profits."*

Learned counsel vehemently submitted that the law as laid down by this Tribunal is that the Commission cannot change the principles of tariff determination at the true up stage. The same submission has been contended by the Appellant itself inter alia, relying upon the Judgments of this Tribunal in Appeal No. 37 of 2010 dated 10th August 2010 in the case of Meghalaya State Electricity Board Vs MSERC. Learned counsel also placed reliance on this Tribunal's judgement in the case of PSTCL Vs PERC – Appeal No. 262 of 2014 dated 14-1-2016 .

9.5 Regarding the Appellant's contentions that, when truing up is done for any year, the Respondent Commission approves the actual ARR for that year, which is the income for that Business, learned counsel for the Commission submitted that such interpretation is totally incorrect as the ARR is not equal to income. He further

contended that the Respondent Commission has rightly considered the regulatory PBT as the difference between the income considered for truing up purpose and the expenses allowed at the time of truing up. Learned counsel further submitted that in an ongoing business like the Appellants, regulatory PBT for any year will include the regulatory asset that is allowed to be recovered in any year and hence the amount of income tax will get computed correctly. In view of these facts, there is no merit in the contentions of the Appellant in this regard and the same deserves to be rejected.

Our Findings:-

9.6 We have carefully considered the submissions of both the counsel and also took note of various judgements relied upon by the learned counsel on this issue. From the available records and material placed before us, it is relevant to note that while Appellant had claimed income tax by grossing up the ROE, the State Commission has computed the same on the basis of profit before tax (PBT) basis at the time of truing up. In a hosts of judgments, this Tribunal has held that the income tax should be computed on PBT basis and the State Commission has provided justification on the issue under Para 3.1.1 of the impugned order. Further, we are unable to accept the contentions of the learned counsel appearing for the Appellant that when truing up is done for any year, the Respondent Commission approves the actual ARR for that year i.e. income for that business. We do not notice any deviation in the principles adopted by the State Commission for computation of income tax from time to time and it has rightly considered the

regulatory PBT as the difference between the income considered for truing up purposes and the expenses allowed at the time of truing up.

9.7 The other contention of the learned counsel appearing for the Appellant that, the said approach adopted by the State Commission will result in zero income tax, stand negated by the impugned order itself wherein it has allowed income tax of over Rs.50 crores for the period FY 2008-09 to FY 2013-14. In light of foregoing facts, we do not feel any legal error in the impugned order on this issue. Accordingly, interference of this Tribunal does not call for.

Issue No.4:-

10. Learned counsel for the Appellant submitted that the Appellant had been claiming interest on FAC in terms of Regulation 82 of the Tariff Regulations, 2005. However, as of now, the State Commission has denied on the premise that the Commission had already allowed the normative interest on working capital which is *TPC-D's* legitimate claim and hence has not considered interest on FAC. He vehemently submitted that findings of the State Commission are factually incorrect as the interest on working capital considers two months equivalent of the expected revenue from sale of electricity at the prevailing tariff and not for working capital which is delayed to be billed as per the above formula of Regulation 82. As the recovery of such variable charges is made after a lapse of two months, the Appellant has been claiming interest on FAC as per the MERC Regulations. Learned counsel

further submitted that under the MYT Regulations, 2011, the corresponding provision is Regulation 13 which provides for the mechanism for pass through of gains or losses on account of uncontrollable factors such as variations in fuel charges.

10.1 Learned counsel quick to point out that the State Commission is erroneously considering the interest component of the FAC formula while deriving the revenue earned by the Appellant. But, at the same time, it has not considered the interest component while computing the Appellant's expenditure. Learned counsel emphasised that the State Commission ought not to deviate from the principles / methodology at the stage of truing up.

10.2 ***Per contra,*** **l**earned counsel for the Respondent Commission contended that the issue of interest on FAC has been duly clarified in the impugned order:-

> ***Commission's Analysis***
>
> *The FAC formula already provides for interest due to delayed recovery of FAC. The Commission has already allowed the normative IoWC, which is TPC-D's legitimate claim. Hence, it has disallowed interest of Rs. 19.70 Crore on FAC recovery claimed by TPC-D."*

Learned counsel further submitted that the interest on FAC is in-built in the FAC Formula, and is hence considered in the Revenue earned from FAC. On the cost side, the interest on working capital factors in this cost, hence there is no requirement for allowing further interest on FAC as an expense in the ARR. The Claim of

the Appellant would clearly lead to double counting of the Interest on the FAC.

Our Findings:-

10.3 After careful consideration of the submissions of the learned counsel appearing for the Appellant and Respondents, we find that the Appellant is relying on the previous Tariff Regulations, 2005 under which it was a regular practice to claim interest on FAC in terms of Regulation 82. However, MERC MYT Regulations, 2011 (Regulation 13) provides for the mechanism for pass through to gains or losses on account of uncontrollable factors such as variation in fuel charges. Besides, it is noticed that the interest on FAC is in-built in the FAC formula and any additional provision for the same will amount to double counting of the interest on the FAC. We do not find force in the submissions of the learned counsel for the Appellant's that, the earlier principles of 2005 Regulations should be followed under the MYT Regulation, 2011. It is relevant to note that the State Commission has duly analysed the issue and has passed the reasoned order relating to the issue of interest on FAC. Hence, the interference of this Tribunal on this issue does not call for.

Issue No.5:-

11. Learned counsel for the Appellant submitted that the State Commission has wrongly disallowed the excess purchase of Non-Solar RECs purchased by the Appellant, beyond the Renewable Purchase Obligation ("***RPO***") requirement for the FY 2013 and 2014. He vehemently submitted that in fact, the State Commission

has failed to consider that the exact energy requirement for RPO gets ascertained after expiry of two to four months in a financial year because of the reconciliation of changeover consumers and meter reading etc.. For Financial Yer 2013-14, there has been a large amount of deviation in comparison with the approved figures, which is because large number of changeover consumers have reverse migrated from the Appellant to R-Infra. Learned counsel further submitted that in such cases it is very difficult to estimate as what would be the RPO requirement of the Appellant when the consumers are reverse migrating. He emphasised that the energy procured/ REC's purchased towards compliance of RPO by the Appellant in FY 2012-13 and in FY 2013-14 was in a minor deviation from its actual RPO requirement. Learned counsel vehemently submitted that the Appellant has prudently procured its non-Solar REC's, especially given a situation that the Appellant is not aware of its actual RPO requirement, even at the end of the financial year.

11.1 He contended that such minor deviations which are beyond the Appellant's control ought not be disallowed to the detriment of the Appellant. Learned counsel quick to point out that in the subsequent RPO Regulations 2016, MERC has acknowledged the difficulties faced by a licensee in estimating the actual RPO requirement and accordingly provided for variation to the extent +/- 5% of the applicable RPO.

11.2 ***Per contra,*** learned counsel for the Respondent Commission submitted that the issue in respect of purchase of solar energy in excess of the RPO target has been disallowed by this Tribunal in

Judgment dated 8-4-2015 in Appeal No. 160 of 2012 and batch. He further submitted that If purchase of solar energy (physical form) in excess of the RPO target has been disallowed, the purchase of REC's in excess of the RPO target stands on a much weaker footing . Learned counsel contended that the Appellant in its Mid-term review Petition, did not ask for any specific relief in this regard which has been sought in the present Appeal. Learned counsel emphasised that the State Commission has given full rationale in the Impugned Order in full justification of its findings especially that consumers ought not to be burdened with such cost and accordingly the Commission has disallowed the cost of the excess RECs since their purchase were unnecessary.

<u>Our Findings:-</u>

11.3 Having regard to the rival contentions of the learned counsel appearing for the Appellant and Respondents, it is relevant to note that after prudence check and analysis, the State Commission specifies the RPO target for solar as well as non-solar and the licensees are required to closely adhere to such stipulations of the State Commission in meeting the RPOs. In fact, the issue in respect of purchase of solar energy in excess of the RPO has already been settled by this Tribunal by its judgement dated 8.4.2015 in Appeal No.160 of 2012 & batch at Para 97 and the present issue is squarely covered under the aforesaid judgement. We are unable to accept the submissions of the learned counsel for the Appellant that, in subsequent MYT Regulation, the State Commission has allowed such purchase with a deviation of +-5% as the said Regulation cannot be applied retrospectively. In view of these facts, we do not find any infirmity or ambiguity in the

impugned order passed by the State Commission and our interference is uncalled for.

Issue No.6:-

12. Learned counsel for the Appellant submitted that the State Commission has wrongly disallowed exchange/trading fees of Rs. 0.02/kWh per unit for FY 2012-13 & FY 2013-14 for procurement of non-solar RECs. He further submitted that RECs were purchased from two exchanges namely (a) Indian Energy Exchange; and (b) Power Exchange of India Limited for the aforesaid period and for any purchase, Exchange Fees and Service tax is payable regardless of whether the transaction is undertaken through a trader or directly with the Exchange. Accordingly, MERC has erroneously disallowed trading margin for the ultimate loss to the Appellant.

12.1 ***Per contra,*** learned counsel for the Respondent Commission submitted that the details of the charges paid to Exchange and Traders in FY 2012-13 and FY 2013-14 for procurement of RECs were not submitted to the Commission in the Tariff Petition or in the reply submitted by the Appellant to the specific query raised by it in this regard. He further pointed out that the findings and rationale contained in the impugned order for such disallowance has not been challenged by the Appellant, much less answered.

Our Findings:-

12.2 After thoughtful consideration of the submissions of learned counsel for the Appellant and the Respondent, it is pertinent to the note that the Appellant before the State Commission had

submitted amount of Rs.0.02/kwh higher than the floor price of Rs. 1.50 /kwh of RECs which was on the account of exchange/trading fees and service tax thereon. In response to the said submissions of the Appellant, the State Commission has clearly enunciated in the impugned order as under:-

> *"However, the Commission is of the view that TPC-D should have procured RECs directly from the Exchange not from traders, as the Exchange platform provides double-sided undisclosed bidding. In such a case, there is no additional benefit from procurement of RECs through traders. In this transaction, TPC-D has unnecessarily increased the burden on the consumers to the extent of trading fees and Service Tax. Hence, the Commission has disallowed the additional Rs. 0.02 per kWh incurred on account of exchange/trading fees and Service Tax thereon."*

In view of the above, we find that the State Commission has adequately responded the Appellant's contention on this issue and has rendered cogent reasoning in the impugned order on this issue. As such, interference of this Tribunal is not called for.

Issue No.7:-

13. Learned counsel for the Appellant submitted that the State Commission has erroneously allowed O&M expenses on the normative basis for the Appellant instead of actual basis. MERC ought to have relaxed the norms to approve actual expenses under Regulation 100 of the MYT Regulations, 2011. He quick to submit that O&M expenses include the expenditure on manpower, repairs, spares, consumables, insurance and overheads and since the Appellant's consumer base was very small, while deciding the O&M expenditure norms in the MYT Regulations, 2011 for the

Appellant, only one parameter of Rs. / kWh was used as compared to a combination of Rs. / kWh and Rs. Lakhs / '000 Consumers, which is used for all other distribution licensees in Maharashtra.

13.1 Learned counsel further contended that, the Appellant in its MTR petition has pointed out that the O&M expenses had increased also due to several exceptional activities undertaken by the Appellant. Learned counsel contended that the State Commission in R-Infra's MYT Order dated 22.08.2013 in Case No. 09 of 2011 has recognised the same and approved the actual expenses. He, accordingly contended that the State Commission being the sector Regulator cannot discriminate between two distribution licensees and ought to have allowed actual O&M expenditures for the Appellant too.

13.2 ***Per contra,*** learned counsel for the Respondent Commission submitted that the Appellant's contention on actual O&M expenses rather than the normative expenses have been clearly elucidated by the Commission in the impugned order as reproduced below:-

> *"TPC-D has requested the Commission to consider the actual O&M Expenses rather than the normative expenses as specified in the MYT Regulations.* ***The Commission is of the view that, once the norms have been specified, these have to be considered, or else the whole purpose of linking the O&M Expenses to identified output parameters would be defeated****. Hence, the Commission has considered the normative O&M Expenses for FY 2012-13. Further, the Commission has undertaken sharing on account of Efficiency Losses/Gains between actual O&M Expenses and the normative expenses, considering the O&M Expenses as controllable, in accordance with the MYT Regulations".* ..."(***emphasis supplied***)

Learned counsel further submitted that the O&M expenses are clearly measurable output and controllable parameters and after this consideration if the O&M expenses are allowed on actual basis, then the whole purpose of specifying norms will be defeated. Learned counsel to fortify his submissions placed reliance on this Tribunal Judgments (i) dated 28-11-2013 in Appeal Nos. 158, 182 and 183 of 2012 and in Appeal Nos. 104, 105 and 106 of 2012 and (ii) dated 27-10-2014 in Appeal No. 212 of 2013.

Our Findings:-

13.3 We have carefully considered the rival contentions on this issue and note that the State Commission has to follow its Regulations on all aspects including the O&M expenses. While taking note of the main premise of the Appellant's contention that in case the actual expenses are lower than the norms, then norms should be considered and in cases where the actual expenses are higher than the norms then the actual expenses should be considered. We do not find any force in the above contentions of the Appellant which results into the situation that only the efficiency gains should be considered whereas the efficiency losses should not be considered but under the regulated regime such pick & choose approach cannot be allowed. Additionally, the aforesaid judgments of this Tribunal have duly interpreted on similar issues. Accordingly, we opine that findings of the State Commission on the O&M issue is just and right in accordance with law and the Commission's Regulations. Therefore, interference of this Tribunal is uncalled for.

Summary of Findings:-

14. In view of our consideration and findings in the preceding paragraphs, we find that the issues raised in the Appeal by the Appellant have been analysed by the State Commission appropriately and it has passed the impugned order in judicious consideration of its Regulation and the judgements of this Tribunal on various relevant issues passed from time to time. The State Commission has rendered cogent reasoning for its findings in the order and we do not find any legal infirmity or ambiguity in the impugned order. Hence, we are of the considered opinion that the instant appeal is liable to be dismissed and the impugned order deserves to be upheld.

ORDER

For the forgoing reasons, as stated supra, we are of the considered view that the issues raised in the present appeal being Appeal No. 245 of 2015 are devoid of merits. Hence the Appeal filed by the Appellant is dismissed.

The impugned order passed by the Respondent / Maharashtra Electricity Regulatory Commission dated 22.06.2015 in Case No. 18 of 2015 is hereby upheld.

In view of the disposal of the Appeal, the relief sought in the IA No. 398 of 2015 does not survive for consideration and accordingly stands disposed of.

No order as to costs.

Pronounced in the Open Court on this **05th day of April, 2019.**

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~

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