

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 83 of 2012

Dated: 10th May, 2013

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

In the matter of:

Reliance Infrastructure Limited,
H Block, 1st Floor,
Dhirubhai Ambani Knowledge City,
Navi Mumbai- 400 710

... Appellant (s)

Versus

1. The Maharashtra Electricity Regulatory Commission,
World Trade Centre No. 1,
13th Floor, Cuffe Parade, Colaba,
Mumbai-400 001
2. Mumbai Grahak Panchayat,
Grahak Bhavan, Sant Dnyaneshwar Marg,
Vile Parle (W),
Mumbai-400 056.
3. Prayas,
C/o Amrita Clinic,
Athawale Corner,
Deccan Gymkhana,
Karve Road, Pune-411 004
4. Thane Belapur Industries Association,
Plot No. P-14, MIDC, Rabale Village
Post: Ghansoli, Navi Mumbai-400 071.
5. Vidarbha Industries Association,
1st Floor, Udyog Bhavan,
Civil Lines, Nagpur-400 041

6. Shri N. Ponrathnam,
25, Majithia Industrial Estate,
Waman Tukaram Patil Marg,
Deonar, Mumbai-400 088
7. Shri Sandeep N. Ohri,
A-74, Tirupati Tower,
Thakur Complex,
Kandivali (East)
Mumbai-400 101
8. Shri Rakshpal Abrol,
Bhartiya Udhami Avam Upbhokta Sangh,
Madhu Compound, 2nd Floor,
2nd Sonawala Cross Road,
Goregaon (East),
Mumbai-400 063

...Respondent(s)

Counsel for Appellant(s) :

Ms. Anjali Chandurkar
Mr. Saswat Pattnaik
Mr. Hasan Murtaza

Counsel for the Respondent(s):

Mr. Buddy A. Ranganadhan,
Mr. Arijit Mitra
Ms. Richa Bhardwaja for R-1

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by Reliance Infrastructure Limited against the order dated 27.2.2012 passed by the Maharashtra Electricity Regulatory Commission (“State Commission”) in the matter of Truing Up for FY 2009-10 and Provisional

Truing Up for FY 2010-11 of the transmission business of the Appellant.

2. The State Commission is the first Respondent. The Respondents 2 to 8 are the consumer's representatives.

3. Although the Appellant had raised a number of issues in the Appeal, only two issues are being pressed. They are as follows:

i) The entire normative Interest on Working Capital for the FY 2009-10 has been considered as efficiency gain for the purpose of sharing of gain/losses on the ground that it is a controllable parameter.

ii) The tax on incentive on higher system availability of transmission system for FY 2009-10 has not been considered.

4. The Appellant has made the following submissions on these two issues:

4.1 The issue regarding Interest on Working Capital is covered by the judgment of the Tribunal dated 13.9.2012 in Appeal nos. 202 & 203 of 2010 in the case of Reliance Infrastructure Ltd. vs. Maharashtra Electricity Regulatory Commission & Ors.

4.2 Transmission licensee is entitled to incentive on achieving annual availability beyond the target availability of 98% for AC system over and above the Return on Equity. However, the entitlement is only if the specified availability norm is bettered which is known at the end of the year. According to the Tariff Regulations, the Appellant is entitled to recover income tax on the incentive as a part of ARR. The Regulations clearly show income is to be allowed as a part of ARR,

i.e. while approving the ARR at the inception which is always subject to truing up. The State Commission has erred to link the allowance of tax on incentive to actual payment. The impugned order is silent on not considering the tax on incentive either for FY 2008-09 or for FY 2009-10 at the time of truing up of FY 2009-10 and APR of FY 2010-11, the same is now sought to be supported by reasons given in the Affidavit in Reply which have no legal basis.

5. The learned counsel for the State Commission has made the reply submission in line with the counter affidavit filed by them and in support of the findings in the impugned order.

6. On the above issues, we have heard Ms. Anjali Chandurkar, learned counsel for the Appellant and Shri Buddy Ranganadhan, learned counsel for the State Commission. Keeping in view the contentions of

the parties, the following questions would arise for our consideration:

i) Whether the State Commission has erred in considering entire Interest on Working Capital as efficiency gain?

ii) Whether the income tax on incentive for achieving higher system availability allowed in the True Up has to be considered in the True Up Order itself or to be considered after the income tax is actually paid?

7. The first issue is regarding Interest on Working Capital for FY 2009-10.

7.1 According to Ms. Anjali Chandurkar, learned counsel for the Appellant, this issue is covered by the judgment of the Tribunal in Appeal nos. 202 & 203 of 2010.

7.2 Shri Buddy Ranganadhan, learned counsel for the State Commission on the other hand argued that the Appellant should have clearly indicated the actual amount of funds tied up due to working capital. But instead of that, the Appellant has adopted the formula specified in the Tariff Regulations to arrive at the working capital. The very fact that the Regulations recognize that the working capital requirement is controllable parameter, it implies that the provisions of the Regulation regarding sharing of gains/losses on Interest on Working Capital can be applied.

7.3 Let us examine the findings of the State Commission in the impugned order.

“3.10.6. Further subsequent to Hon’ble ATE’s Judgment in Appeal No. 115 of 2008, the Commission, in Order dated September 3, 2010, viewed as below:-

“From the above responses of RInfra-T, it is observed that RInfra-T has not been able to satisfactorily address the Commission's queries in this matter for FY 2006-07 and FY 2007-08, and that there is no substantiation of the actual working capital interest on funds used for meeting working capital requirement, for FY 2008-09 as well. The Commission is of the view that by implication, RInfra has managed to meet its working capital requirements by its own operational efficiency, and has minimized the working capital requirement itself, and not actually relied on any funds to meet its working capital requirement. Hence, the Commission has allowed the entire working capital interest on normative basis in accordance with the MERC Tariff Regulations. Further, as per Regulation 17.6.2 (d) of the MERC (Terms and Conditions of Tariff) Regulations, 2005, variation in working capital requirement is a controllable factor, and hence, the Commission rules that the entire normative working capital interest

has to be considered as an efficiency gain, and the sharing of gains has to be computed in accordance with Regulation 19.1 of the MERC (Terms and Conditions of Tariff) Regulations, 2005”.

3.10.7. The Commission allowed the entire normative interest on working capital as efficiency gains as RInfra-T could not establish that it had relied on any funds to meet its working capital requirement. However, RInfra-T being aggrieved on the decision of the Commission approached the Hon'ble ATE in the Appeal No. 203 of 2010 claiming that the formula for working capital in the Regulations, if substituted for actual values of the parameters therein, itself results in a cash flow deficit that should be considered as actual working capital requirement. Consequently, interest on the same at SBI PLR needs to be permitted. RInfra-T in the present Petition has maintained the same position as the Hon'ble ATE has not yet pronounced in its judgment.

3.10.8. The Commission's decision in the present matter to treat the entire interest on working capital as efficiency gains is subject to the outcome of Appeal No. 203 of 2010 pending before the Hon'ble ATE. The details of sharing of gains and losses have been worked out in the respective sections in this Order".

7.4 Thus, the State Commission in the impugned order has held that its decision in the present matter to treat the entire interest on working capital as efficiency gain is subject to outcome of Appeal no. 203 of 2010.

7.5 The Tribunal in Appeal nos. 202 & 203 of 2010 has held as under:

"9. Let us first take up the first issue relating to efficiency gain on interest on working capital which is common to both the appeals.

9.1 This issue has already been decided by the Tribunal in its judgment dated 31.8.2012 in Appeal nos. 17, 18 & 19 of 2011 in the matter of Tata Power Company Limited Vs. MERC. The relevant extracts of the judgment are reproduced below:

“20 Issue no.3 On this issue the only point raised by the Commission is that the ratio of the decision in Appeal no.111 of 2008 is that the Commission must enquire into and consider the actual costs of the funds used by the utility as working capital in the regulated business. In that case the Commission had treated the entire difference between the normative interest on working capital and actual interest as efficiency gain on the ground that the entire working capital of the appellant had been made from the internal funds of the appellant. It must not be missed that in Appeal no.111 of 2008 it has not been held that unless internal fund is located and sourced out interest on working capital cannot be given so far as normative portion is concerned. Merely

because internal funds were spent as working capital it cannot follow that no cost was associated with it. This point has been made clear in number of decisions namely Appeal no.137 of 2008 decided on 15.07.2009 which refers to the judgment in Appeal no.111 of 2008 and Appeal no.173 of 2009. In Appeal no.137 of 2008 following observation was made:-

“20. In Appeal No.111/08, in the matter of Reliance Infrastructure v/s MERC and Ors., this Tribunal has dealt the same issue of full admissibility of the normative interest on Working Capital when the Working Capital has been deployed from the internal accruals. Our decision is set out in the following paras of our judgment dated May 28, 2008 in Appeal No. 111 of 2008.

“7) The Commission observed that in actual fact no amount has been paid towards interest. Therefore, the entire interest on

Working Capital granted as pass through in tariff has been treated as efficiency gain. It is true that internal funds also deserve interest in as much as the internal fund when employed as Working Capital loses the interest it could have earned by investment elsewhere. Further the licensee can never have any funds which has no cost. The internal accruals are not like some reserve which does not carry any cost. Internal accruals could have been inter corporate deposits, as suggested on behalf of the appellant. In that case the same would also carry the cost of interest. When the Commission observed that the REL had actually not incurred any expenditure towards interest on Working Capital it should have also considered if the internal accruals had to bear some costs themselves. The Commission could have looked into the source of such internal accruals or funds could be less or more than the normative interest. In arriving at whether there was a gain or loss the Commission was required to take the total picture into

consideration which the Commission has not done. It cannot be said that simply because internal accruals were used and there was no outflow of funds by way of interest on Working Capital and hence the entire interest on working capital was gain which could be shared as per Regulation No. 19. Accordingly, the claim of the appellant that it has wrongly been made to share the interest on Working Capital as per Regulation 19 has merit.

15. b): The interest on Working Capital, for the year in question, shall not be treated as efficiency gain.

21. In view of our earlier decision on the same issue we allow the appeal in this regard also.”

In Appeal no.173 of 2009 this Tribunal held as follows:

“23. The next issue is wrongful consideration of the difference between normative interest on

working capital and the actual interest of working capital. In respect of this issue, according to the Learned Counsel for the Appellant, the judgment rendered by this Tribunal in Appeal NO. 137/08, this point has been referred in favour of the Appellant. The relevant observation in the said judgment is as follows:

Analysis and decision

“20. In Appeal No. 111/08, in the matter of Reliance Infrastructure V/s MERC and Ors., this Tribunal has dealt the same issue of full admissibility of the normative interest on Working Capital where the Working Capital has been deployed from the internal accruals. Our decision is set out in the following paras of our judgment dated May 28, 2008 in Appeal No. 111 of 2008.

.....

21. In view of our earlier decision on the same issue we allow the appeal in this regard also.”

24. In view of the law laid down by his Tribunal in the aforesaid judgment which covers the issue in hand, the State Commission is directed to restore the actual amounts considered as part of the gains on account of saving in interest expenditure in working capital”.

This issue is decided in favour of the Appellant accordingly. However, the State Commission may frame regulations for evaluation of cost of internal accruals used as working capital for working out the actual interest on working capital and efficiency gain”.

9.2 This issue is decided in favour of the appellant accordingly”.

7.6 In view of the above finding, this issue is answered accordingly in favour of the Appellant.

8. The second issue is regarding income tax on incentive.

8.1 According to Mrs. Anjali Chandurkar the income tax on the incentive determined in the True Up order should have been considered in the order in accordance with the Regulations.

8.2 According to Shri Buddy Ranganadhan, learned counsel for the State Commission, the incentive will be liable to tax in the subsequent year say FY 2012-13 or 2013-14. The rates of income tax and other benefits may undergo a change which would have impact on the resultant tax figure. Further, incentive approved is not the only item which can have impact on income tax. The net result for all other items approved or disapproved as compared to the original approval will have impact on tenable income and thereby the tax.

The effect of the order of tax has to be considered in totality and not selectively only on select few items. The net impact of approvals and disapprovals of various incomes and expenditures in the impugned order is not a gap but a surplus of Rs. 3.58 crores. However, the State Commission has not passed order for recovery of tax on this surplus as this need to be considered only in the year in which this surplus is factually adjusted.

8.3 We have carefully considered the submissions made by the parties. There is no dispute in the fact that the Appellant is entitled to recovery of income tax on the incentive. What is disputed here is the time when such recovery of income tax has to be allowed. According to the Appellant, the income tax should have been allowed in the True Up/Annual Performance Review order itself. On the other hand, the State

Commission's contention is that it would be allowed on the net revenue gap/surplus in the year it is allowed to be recovered in tariff.

8.4 Let us first examine the Tariff Regulations of 2005 regarding income tax.

"50.2 Income-tax

50.2.1 Income-tax on the income of the Transmission Business of the Transmission Licensee shall be allowed for inclusion in the aggregate revenue requirement.

50.2.2 The Transmission Licensee shall include an estimate of the income-tax liability of his Transmission Business along with the application for determination of tariff, based on the provisions of the Income-Tax Act, 1961:

Provided that any change in such income-tax liability on account of assessment under the Income-tax Act, 1961 shall be dealt with as being on account of uncontrollable factors:

Provided further that any change in such income-tax liability on account of changes in the provisions of the Income-Tax Act, 1961 shall be dealt with as being on account of uncontrollable factors:

Provided further that any change in such income-tax liability on account of change in income of the Transmission Licensee from the approved forecast shall be attributed to the same controllable or uncontrollable factors as have resulted in the change in income and shall be dealt with accordingly.

50.2.3 The benefits of any income-tax holiday, credit for unabsorbed losses or unabsorbed depreciation on the intra-State transmission system or any part thereof shall be taken into account in calculation of the income-tax liability of the Transmission Business”.

8.5 The Tariff Regulations clearly indicate that the income tax on income of the Transmission Licensee

shall be allowed to be included in the Aggregate Revenue Requirement. The Transmission Licensee has to include the estimate of income tax liability alongwith the application for determination of tariff based on the provisions of the Income Tax Act, 1961. Any change in income tax liability due to change in income from the approved forecast attributable to uncontrollable or controllable factors shall be dealt with accordingly.

8.6 We notice that the impugned order dated 27.2.2012 is an order for Truing up of FY 2009-10 and Provisional Truing Up of FY 2010-11. In this order only revenue gap/surplus on account of true up of Accounts has been determined. There is no determination of tariff/ARR adjusting the revenue gap/surplus as a result of true up. The net revenue

gap/surplus is required to be adjusted in the tariff of the subsequent year.

8.7 If the State Commission had considered the true up petition for the FY 2009-10 along with the ARR/tariff determination for the subsequent year, the income tax liability on account of true up as permissible under the tariff regulation should have been included in the ARR/tariff for the subsequent year. However, in the impugned order, the State Commission has only determined the revenue gap/surplus on account of true up with the direction to carry forward the recovery in the subsequent year. Therefore, the income tax liability on additional revenue allowed to be recovered on account of true up of accounts as permissible under the Regulations has to be adjusted in the ARR of the subsequent financial year in which it is passed on in the tariff.

8.8 The total revenue gap for the FY 2009-10 including incentive determined in the impugned order is Rs. 2.81 crores which has been directed by the State Commission to be carried forward for recovery in the subsequent year. Thus, the incentive allowed in the true up for FY 2009-10 will also be recovered in tariff of the subsequent year and accordingly the income tax on the same will also be payable in that year only. The Appellant has to include the impact of income tax as a result of true up of FY 2009-10 in the estimate of income tax liability of the transmission business in terms of the Tariff Regulations in the application for determination of tariff for the subsequent year and the State Commission has to consider the same. Accordingly, directed.

9. Summary of our findings

9.1 The issue regarding interest on working capital is covered by this Tribunal's judgment dated 13.9.2012 in Appeal nos. 202 & 203 of 2010 in the matter of Reliance Infrastructure Ltd. vs. MERC & Ors. Accordingly, this issue is decided in favour of the Appellant.

9.2 The total revenue gap including incentive determined in the impugned order for FY 2009-10 has been directed to be carried forward for recovery in the subsequent year. Thus, the incentive allowed in the true up for FY 2009-10 will also be recovered in the tariff of the subsequent year and accordingly the income tax will also be payable in that year only. The Appellant has to include the impact of income tax as a result of true up of FY 2009-10 in the estimate of income tax liability of the transmission

business in terms of the Tariff Regulations in the application for determination of tariff for the subsequent year and the State Commission has to consider the same. Accordingly, directed.

10. The Appeal is allowed in part as indicated above.
No order as to costs.

11. Pronounced in the open court on this
10th day of May, 2013.

**(Rakesh Nath)
Technical Member**

**(Justice M. Karpaga Vinayagam)
Chairperson**

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REPORTABLE/~~NON-REPORTABLE~~

vs